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HAND BOOK ON THE LAW OF EVIDENCE

A CONCISE STATEMENT OF THE RULES
IN CIVIL AND CRIMINAL TRIALS

BASED UPON
THE MODERN LAW OF EVIDENCE

5 VOLUMES

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BOOK OF THE

ADVENTURE IN THE WEST

THE ADVENTURE OF THE WEST

THE ADVENTURE OF THE WEST

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PREFACE

This Handbook on the Law of Evidence is designed to present to the Bench and the Bar in compact form the important rules and principles of evidence as applied in both civil and criminal trials and proceedings, with a treatment in clear and succinct style of all the leading questions involved in a consideration of the subject.

The work is based on Mr. Chamberlayne's exhaustive and comprehensive work, "The Modern Law of Evidence," which has been published in five large volumes.

The editors have attempted to include all topics and propositions covered by that great work.

Mr. Chamberlayne's text, like that of all comprehensive treatises of law subjects, contains much that is technical, historical and explanatory, with a great number of pertinent illustrations showing the application of the principles discussed. Much of this material has been eliminated in preparing this handbook, to the end that the principles that control the disposition of a concrete question may be readily available.

It is obvious that the active practitioner is required very frequently to refer quickly, without loss of time, to definite, clearly expressed rules of evidence. For this purpose he needs the rules themselves with citation of leading authorities, but without elaborate discussion or extended illustrative matter. Multiplication of cited precedents is not always essential. It is confidently expected that this handbook will prove of great value to the profession as a practical manual for constant use in trials of litigated cases and in the preparation for such trials.

In carrying out the intention of basing this handbook upon Chamberlayne's elaborate work, references are made under each section to the corresponding sections of such work. By referring to the sections of Chamberlayne's work thus cited, a discussion and full treatment of all the principles laid down in the handbook will be found.

Many important cases which have been decided by the courts since the publication of Chamberlayne's Modern Law of Evidence have been inserted in their proper places in this handbook, and much new matter covering questions which are now of present importance, but which were not of so much importance when Chamberlayne's work was published, has been added.

The editorial work was partially done by the late DeWitt C. Moore of the New York Bar. Upon his death the work was revised and completed by Arthur W. Blakemore, Esq., of the Boston Bar.

February, 1919.

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LAW OF EVIDENCE.

CHAPTER I.

LAW OF EVIDENCE.

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§ 1. **Definitions in General.**¹— Whatever may be true of the ancient maxim, "*Omnis definitio in jure periculosa est*," in other connections. one who, like Mr. Justice Stephen, is seeking to render the law of evidence intelligible, cannot well refrain from incurring the danger of violating it. The constant necessity of adapting familiar technical terms to the apprehension of a popular, ever-changing, tribunal like the jury, and the careless, inexact — sufficiently accurate for immediate purposes — action of the courts in their use of terms have a constant tendency to break down any remnants of scientific precision in the use of terminology, and to develop numerous connotations for each term or phrase commonly employed in connection with the subject. That any

1. 1 Chamberlayne, Evidence, § 1.

treatise on evidence should be understandable, this confusion must, so far as practicable, be eliminated by a careful definition of the terms about to be employed. It has, however, been deemed advisable not to attempt incumbering the subject with the additional complication of a new terminology. The only course, therefore, would seem to be the selection of one among several connotations of the multifold-meaning terms. This has, wherever possible, been done.

§ 2. **Law of Evidence.**²—The “rules of evidence” are such precepts in the general subject of judicial administration as determine the manner in which a designated fact submitted to judicial decision may be proved;³ whether such a fact may be proved at all; if so, who are competent to prove it and under what conditions. In the aggregate, these rules constitute the “law of evidence.”

§ 3. **Scope of the Law of Evidence.**⁴—“The law of evidence has to do with the furnishing to a court of matter of fact, for use in a judicial investigation. (1) It prescribes the manner of presenting evidence; as by requiring that it shall be given in open court, by one who personally knows the thing, appearing in person, subject to cross-examination, or by allowing it to be given by deposition, taken in such and such a way; and the like. (2) It fixes the qualifications and the privilege of witnesses, and the mode of examining them. (3) And chiefly, it determines, as among probative matters, matters in their nature evidential,—what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence.”⁵

§ 4. **Evidence Defined.**⁶—In its original sense, the term “evidence” is that which causes the state of being evident or plain. As at present employed, the term “evidence,” in general, covers all facts from which an inference may logically be drawn as to the existence of a fact under investigation. For judicial purposes, evidence may be conveniently divided, in the order in which a fact may present itself to observation, into *extrajudicial* and *judicial*. “Judicial evidence is that which is produced to the court; it comprises all evidential facts that are actually brought to the personal knowledge and observation of the tribunals. Extrajudicial evidence is that which does not come directly under judicial cognizance but nevertheless constitutes an intermediate link between judicial evidence and the fact requiring proof.”⁷

2. 1 Chamberlayne. Evidence, § 2.

Mr. Chamberlayne's treatise concerns itself primarily with evidence, neither as denoting the science of proof nor the art of proof, but “as covering the physical means by which the art of producing belief in the truth of a given proposition or of verifying a fact by the use of reason, is carried on.” This aspect of the term “evidence” is the special subject of his treatise.

3. Lapham v. Marshall, 51 Hun (N. Y.) 361, 3 N. Y. Supp. 601 (1889).

4. 1 Chamberlayne. Evidence, § 3.

5. Thayer, Prelim. Treat., 264.

6. 1 Chamberlayne, Evidence, § 4.

7. Salmond. Jurisp. (2nd ed.), 447. For other definitions of evidence, see Chamb., Ev., §§ 4 and 5, and notes thereto.

§ 5. **Extrajudicial evidence.**⁸—"Extrajudicial evidence includes all evidential facts which are known to the court only by way of inference from some form of judicial evidence."⁹ Extrajudicial evidence is part of the order of nature—as distinguished from the art of investigating reports of the natural occurrences. It is the field of objective relevancy.

§ 6. **Judicial evidence.**—Judicial evidence includes all testimony given by witnesses in court, all documents produced to and read by the court, and all things personally examined by the court for the purposes of proof.¹⁰ Judicial evidence is the domain of subjective relevancy;¹¹ of the use of deliberative facts;¹² of the balancing in mental scales, of the *weight*—the true probative force—of the statements of witnesses or of the declarations of documents.¹³

§ 7. **"Proof" and "Evidence."**—The terms "evidence" and "proof" have been used as synonyms—that is, as indicating the means by which mental certainty on the part of a tribunal is created.¹⁴ But when properly employed, "proof" sustains to "evidence" the relation of an end to the means used in attaining it. Proof is the state of mind which it is the object of evidence to produce.¹⁵ The most pernicious effect of using the word "proof" as meaning either (1) the end of mental certitude, or (2) the means by which a party seeks to attain that end lies in connection with the phrase "burden of proof," where the two senses of the term proof are interchangeably employed in a bewildering way.¹⁶

§ 8. **"Testimony" and "Evidence."**—"Evidence" and "testimony" have been used frequently by the courts as conveying the same meaning. More properly, "testimony" is that part of judicial evidence which comes to the tribunal through the medium of witnesses—i.e., by means of their verbal statements.¹⁷

§ 9. **Subdivisions of Evidence.**—No general system of classification has been adopted by those who have sought to create classifications in the generic term

8. 1 Chamberlayne, Evidence, §§ 6, 55.

9. Salmond, Jurisp. (2nd ed.), 417

10. 1 Chamberlayne, Evidence, § 7; Salmond, Jurisp. (2nd ed.), 417.

11. 1 Chamberlayne, Evidence, §§ 7, 56.

12. 1 Chamberlayne, Evidence, §§ 7, 47, 52.

13. 1 Chamberlayne, Evidence, § 7.

14. 1 Chamberlayne, Evidence, § 8; O'Reilly v. Guardian, etc., Life Ins. Co., 6 N. Y. 169, 172; 19 Am. Rep. 151 (1875); Hill v. Watson, 10 S. C. 268, 273 (1878).

Reverse confusion.—Under a New York statute a certain certificate was declared to be "evidence without further proof." These words were construed to mean that the certificate was proof without further evidence.

Albany County Savings Bk. v. McCarty, 149 N. Y. 71, 83, 43 N. E. 427 (1896).

15. 1 Chamberlayne, Evidence, § 8; Schloss v. Creditors, 31 Cal. 201 (1866); Powell v. State, 101 Ga. 9, 21, 29 S. E. 309, 65 Am. St. Rep. 277 (1897); Perry v. Dubuque, etc., R. Co., 36 Iowa, 102 (1872); Miles v. Edelen, 1 Duv. (Ky.) 270 (1864); Jastrzembaki v. Marxhausen, 120 Mich. 677, 683, 79 N. W. 935 (1899); Buffalo, etc., R. Co. v. Reynolds, 6 How. Pr. (N. Y.) 96-98 (1851); Hill v. Watson, 10 S. C. 268, 273 (1878). "Evidence is the medium of proof; proof is the effect of evidence." People v. Beckwith, 108 N. Y. 67, 73 (1888).

16. 1 Chamberlayne, Evidence, §§ 8, 936.

17. 1 Chamberlayne, Evidence, § 9.

"evidence." In most cases the classification is, as it were, *modal*, i.e., the classes are differentiated according to the *mode* or method by which the evidence operates in creating belief in the existence of a given fact, e.g., direct and circumstantial evidence; or *probative*, i.e., as indicating the evidentiary force — belief-generating effect — of the facts in question as related to the facts involved in the inquiry — as material evidence, competent evidence and the like.¹⁸

§ 10. [Subdivisions of Evidence]; Admissible Evidence.— Evidence which the court receives in the course of a trial, or might properly receive, is admissible evidence. Admissible evidence relates to proof of three classes or species of facts: (1) Constituent, or *res gestae* facts; (2) probative or evidentiary facts; (3) deliberative facts.¹⁹

§ 11. [Subdivisions of Evidence]; Best and Secondary Evidence.— The important subject of "best and secondary" evidence indicates no absolute division between facts of one class and facts of another. The classification, in any particular case, is conditioned upon a number of variables, e.g., the evidence which it is fairly within the power of a proponent to produce, the nature of the case or investigation, the stage of the trial, the state of the evidence, and the like. It, therefore, indicates a *relative* rather than an absolute line of demarkation. Such division of relation is obviously not a rule of law or even a rule of procedure. It is rather a guide to the discretion of the court in admitting testimony, i.e., a canon of judicial administration.²⁰

§ 12. [Subdivisions of Evidence]; Competent Evidence.— Facts which, under these rules of procedure or the canons of administration, will be considered by a judicial tribunal, have been designated as "competent,"²¹ though the term has been used as equivalent to sufficient to warrant action by the tribunal.²²

§ 13. [Subdivisions of Evidence]; Conclusive Evidence.²³— Where the evidence of a probative fact or set of facts amounts to a demonstration of the *factum probandum* to which it is directed, where the evidence is uncontrovertible, it is said to be conclusive.²⁴ This conclusive evidence has been spoken of as "either a presumption of law, or else evidence so strong as to overbear all other in the case to the contrary."²⁵ Such a statement would be appropriate, in reality, only of a mathematical demonstration, the ultimate basis of which is

18. 1 Chamberlayne, Evidence, § 10.

19. 1 Chamberlayne, Evidence, § 11.

20. 1 Chamberlayne, Evidence, §§ 12, 339.

21. 1 Chamberlayne, Evidence, § 13; Ryan v. Bristol, 63 Conn. 26, 36, 27 Atl. 360 (1893); State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241 (1867); Porter v. Valentine, 18 Misc. (N. Y.) 213-215, 41 N. Y. Supp. 507 and cases cited (1896).

22. 1 Chamberlayne, Evidence, § 13; Niles v. Sprague, 13 Iowa, 198, 204 (1862)

23. 1 Chamberlayne, Evidence, § 14

24. Wood v. Chapin, 13 N. Y. 509, 515, 67 Am. Dec. 62, per Denio, C.J. (1856)

25. Haupt v. Pohlmann, 1 Rob. (N. Y.) 121, 127, per Robertson, J. (1863).

where the existence of the thing observed as distinguished from the inferences to be drawn from it — being a state of consciousness, cannot admit of doubt.²⁶

§ 14. [Subdivisions of Evidence]; Direct and Circumstantial Evidence.²⁷— As commonly used, direct evidence is the immediate perception of the tribunal or the statement of a witness as to the existence of a constituent fact. Circumstantial evidence is the statement of a witness as to the existence of a fact in some degree probative as to the existence of a constituent fact. The distinction is generally regarded as important. Where a witness testifies to the existence of a *res gestae* fact his testimony is direct. Where, on the contrary, he testifies to a probative fact, i.e., to a fact which, either alone or in connection with other facts, renders probable the existence of a *res gestae* fact, the evidence is circumstantial. "Evidence is of two kinds: That which, if true, directly proves the fact in issue; and that which proves another fact from which the fact in issue may be inferred."²⁸ *The distinction seems confusing and misleading rather than helpful.* It is an attempt to turn a difference in degree of immediateness in proving a *res gestae* fact into a difference in kind or nature of evidence itself.²⁹ The value of the distinction does not apparently compensate for the danger involved in emphasizing it, and it might readily be abandoned without injury to any interests of judicial administration.³⁰

26. 1 Chamberlayne, Evidence, § 14. The phrase, conclusive evidence, may be used to state a proposition as to which the law of evidence has nothing whatever to do, though couched in the appropriate phraseology of the subject; — the equivalence between two things prescribed by the substantive law. Thus, the rule of substantive law that prescriptive user of a non-corporeal hereditament for a period of twenty years bars the right of action, may be announced by saying that proof of such a user is *conclusive evidence* of a lost grant, or by the equivalent expression that a lost grant is conclusively presumed from the fact of such user. See *Wallace v. Fletcher*, 30 N. H. 434 (1855).

27. 1 Chamberlayne, Evidence, § 15.

28. *Hart v. Newland*, 10 N. C. 122, 123 (1824); *West v. State*, 76 Ala. 98 (1884); *Terr. v. Fagan*, 3 Dak. 119, 13 N. W. 568 (1882); *Reed's Case*, 1 Cen. L. J. (Me.) 219 (1874); *Com. v. Webster*, 5 Cush. (Mass.) 295, 310, 52 Am. Dec. 711 (1850); *McCann v. State*, 13 Smedes & M. (Miss.) 471 (1850); *State v. Avery*, 113 Mo. 475, 21 N. W. 193 (1892); *Curran v. Percival*, 21 Neb. 434, 32 N. W. 213 (1887); *State v. Slingerland*, 19 Nev. 135, 7 Pac. 280 (1885); *Pease v. Smith*, 61 N. Y. 477 (1875); *Bash v. Bash*, 9 Pa. St. 260 (1848); *Lancaster v.*

State, 91 Tenn. 267, 18 S. W. 777 (1891); *U. S. v. Cole*, 5 McLean (U. S.) 513, Fed. Cas. No. 14,832 (1853); *U. S. v. Gilbert*, 2 Sumn. (U. S.) 19, Fed. Cas. No. 15,204 (1834).

"Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial." *Com. v. Webster*, *supra*, per Shaw, C.J.

Circumstantial not cumulative as regards direct evidence.— Evidence tending, circumstantially, to establish a fact in issue is not cumulative as regards direct evidence as to the same fact. *Vardeman v. Byrne*, 7 How. (Miss.) 865 (1843).

29. 1 Chamb., Ev., § 15. A fact proved by a legitimate inference is proved no less than when it is directly sworn to. *Doyle v. Boston, etc., Ry. Co.*, 145 Mass. 386 (1888).

30. See discussion in 1 Chamb., Ev., § 15. This has been done by Stephen. See Dig. Law of Ev., art. 1.

Circumstantial evidence is not of secondary importance to direct or positive evidence. All evidence is largely circumstantial and even when most direct it depends upon circumstances for its credibility, weight and effect. No human testimony is superior to doubt even in cases of the most direct

§ 15. [Subdivisions of Evidence]; **Material Evidence.**³¹—Where a fact offered in evidence is not merely relevant, in the logical sense, but presents the cogency of probative force required for affirmative action on the part of the tribunal,³² it is "material evidence."³³

§ 16. [Subdivisions of Evidence]; **Oral and Documentary Evidence; Document Defined.**³⁴—By "document" is denoted the union of a material substance and the written language carried by it. A document is a physical thing—a piece of paper, parchment, any material substance, and this physical, material thing is a vehicle, instrument or means by which thought is presented to the mind. Both of these ideas are essential to the conception of the term "document." A blank sheet of paper would not be a document. The oral testimony of a witness—though it convey thought, is not a document. The stenographic notes by which the testimony of the witness has been placed upon paper would probably constitute the paper containing them a document. When these notes are transcribed into the ordinary written, typewritten or printed characters of language, the material substance carrying the thoughts so represented is clearly one. It is this combination of a material substance and its conveyance of thought which constitutes the essential feature of a document. In other words, the term "document" will be limited to *writings* in the present treatise.³⁵ *No restriction exists as to the material substance which may thus convey thought.*³⁶

§ 17. [Subdivisions of Evidence]; **Difficulty of Removal.**³⁷—Practical conproof. It is always possible that witnesses may err unintentionally or may corruptly falsify their testimony for reasons which are at the time not apparent and not known. If the law required mathematical certainty either as to matters of fact or as to the conclusions drawn by the courts and juries the enforcement of law would be impossible. *Ex parte Jeffries*, 7 Okla. Crim. Rep. 544, 124 Pac. 924, 41 L. R. A. N. S. 749 (1912).

31. 1 Chamberlayne, Evidence, § 16.

32. 2 Chamberlayne, Evidence, § 993.

33. 1 Chamberlayne, Evidence, § 16; *Porter v. Valentine*, 18 Misc. (N. Y.) 213, 41 N. Y. Supp. 507 (1896).

While "material" implies an additional logical persuasiveness to that necessarily carried by the term relevant, "immaterial" and "irrelevant," as generally used, are practically synonymous. What facts are material to any inquiry will be found to be determined by the nature of the right or liability asserted, i.e., so far as this is expressed in terms of fact, by the component facts of the case. The existence of these component facts differentiates the *res gestae*

facts into those which are the material, i.e., constituent, and those which are not. 1 Chamb., Ev., § 16.

34. 1 Chamberlayne, Evidence, § 17.

35. 1 Chamberlayne, Evidence, § 17. Such a limitation of the characters on a document to language—which conveys thought, rather than to marks or symbols which merely suggest it, from the existence of which it may reasonably be inferred—seems to be in the direction of clearness and precision in terminology. Unless this limitation be adopted, the whole definition of document at once becomes involved in a fog—as is abundantly shown by the interesting speculations of Bentham and Mr. Gulson's commentaries upon them. (See 1 Chamb., Ev., §§ 23, 27.) The limitation to language is also in the interest of symmetry and harmony in the subject itself. 1 Chamb., Ev., § 17.

36. 1 Chamberlayne, Evidence, § 17; *Rowland v. Burton*, 2 Harr. (Del.) 289 (1837), wood; *Kendall v. Field*, 14 Me. 30 (1836), wood.

37. 1 Chamberlayne, Evidence, § 19.

siderations of convenience may, as a matter of administration, excuse the physical production of a document where its size, weight or immobility are such as to render it difficult, if not impossible, to afford the court and jury actual personal inspection of it. In such cases, as is more fully stated elsewhere,³⁸ the court may take a view or permit the jury to take one if this seems the more satisfactory course; or, witnesses may be permitted to testify as to the contents,³⁹ or a copy,⁴⁰ by photographic or other means, may, upon proper identification, be introduced in evidence. But this inconvenience of production in no way affects the fact that, whatever may be the material substance, it is, so long as it conveys thought, a document. Up to this point, harmony exists among the authorities.

§ 18. [Subdivisions of Evidence]; Symbolical Representation of Thought.—

For practical purposes the sole method by which thought may properly be said to be *conveyed* with a reasonable approximation to clearness and accuracy from one mind to another, is by the use of *language*. It would seem appropriate therefore that the use of written language should be the sole means of conveying thought which, when joined with a material substance, shall be deemed to constitute a document.⁴¹

§ 19. [Subdivisions of Evidence]; Proper Scope of Documentary Evidence.—

To sum up the results of examination into the proper scope of "documentary evidence,"⁴² and state the conclusions reached, it may be taken (1) that as a species of evidence, a classification into oral evidence and documentary evidence would be of little or no value. (2) That as a medium of proof, documents have a recognized and valuable place, sharing with the oral testimony of witnesses and with perception the class of media of proof. (3) That the oral testimony of witnesses is properly confined to the psychological facts, such as thought, and the like, which are conveyed to the tribunal by means of oral testimony, i.e., the verbal statements of witnesses. (4) That "documentary evidence" is confined to such psychological facts, including thought and the like, as are conveyed to the consciousness of the tribunal by the medium of written language carried by any material substance. (5) That the third medium of proof, perception,⁴³ may properly be used to denote all physical facts, including the

38. See Evidence by Perception, *post* Ch. LX.

39. Tracy Peerage Case, 10 Cl. & Fin. 154, 180 (1843). But the difficulty of removal must affirmatively appear; otherwise the evidence will be rejected. *Jones v. Tarleton*, 9 M. & W. 675, 677, per Parke, B. (1842).

40. *Slaney v. Wade*, 1 Myl. & C. 338 (1835).

41. 1 Chamberlayne, Evidence, § 20. The baggage check attached to a trunk and ear-

ring a number suggests the thought of a corresponding number which may serve to identify the proper claimant. Yet neither this, nor any similar suggestions apparently suffice to make the check such a conveyor of thought as to constitute it a document. "The tag referred to was not a document, but an object to be identified." *Com. v. Morrell*, 99 Mass. 542 (1868).

42. 1 Chamberlayne, Evidence, §§ 21-24.

43. See Evidence by Perception, *post* Chapter LX.

expression or manifestation of psychological facts, whether the immediate source of these facts is a person or thing, which the court perceives by the use of its own senses. It may be added that in connection with the treatment of documents as a medium of proof, it has seemed appropriate to treat the requirements of substantive law or various branches of procedure especially affecting the use of documents and their distinctive effect in evidence, under this heading of documentary evidence.⁴⁴

§ 20. [Subdivisions of Evidence]; Positive and Negative Evidence.⁴⁵—The term "positive evidence" has been used as synonymous with "direct."⁴⁶ A more accurate use of the term "positive" is that by which it is employed as opposed to "negative"—positive evidence being defined as direct evidence as to the existence of an alleged fact, negative evidence being used to indicate the case where a tribunal is asked to infer the nonexistence of the fact in question from the circumstance that the witness did not perceive it.⁴⁷ Certainly the distinction is of little if any practical importance.

§ 21. [Subdivisions of Evidence]; Real and Personal Evidence.⁴⁸—The distinction between real and personal evidence has proved one fertile in confusion. The fundamental difficulty does not lie in the main line of cleavage—real evidence, on the one hand, being the evidence furnished by things—Latin, *res*; *personal* on the other, being evidence furnished by persons, as this distinction was originally formulated by Bentham. The distinction between real and personal evidence is thus stated by Bentham: "*Personal* evidence, that which is afforded by some human being—by a being belonging to the class of persons; *real* evidence, that which is afforded by a being belonging, not to the class of persons, but to the class of things."

This distinction has been confused by Mr. Best by attempting to make the distinction depend on whether the evidence is furnished by the testimony of a witness or by perception of the tribunal; and by making a distinction between evidence which is voluntary and that which is involuntary.

It seems the better rule to follow to hold that that which the tribunal per-

44. 1 Chamberlayne, Evidence, § 25.

45. 1 Chamberlayne Evidence, § 26.

46. Davis v. Curry, 2 Bibb (Ky.) 238 (1810); Cooper v. Holmes, 71 Md 20, 281, 17 Atl. 711 (1889); Com. v. Webster, 5 Cush. (Mass.) 295, 310 (1850); Niles v. Rhodes, 7 Mich. 374 (1850); Pease v. Smith, 61 N. Y. 477, 484 (1875); Bash v. Bash, 9 Pa. St. 260, 262 (1848), "positive" and "clear and satisfactory." See also Schrack v. McKnight, 84 Pa. St. 26, 30 (1877), "positive" and "satisfactory"

47. Falkner v. Behr, 75 Ga. 2671, 674 (1885). *Illustration*.—The distinction between positive and negative testimony may

be illustrated thus: It is positive to say that a thing did or did not happen; it is negative to say that a witness did not see or know of an event's having transpired. McConnell v. State, 67 Ga. 633 (1881).

Although positive testimony will outweigh negative testimony still testimony by men that no warning was given when the witnesses were in a position to hear one if it had been given is not purely negative but is sufficient to justify a verdict which the appellate court will not set aside on appeal. P. B. & W. S. R. v. Gatta, 4 Boyce (Del.) 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932 (1913).

48. 1 Chamberlayne, Evidence, §§ 27-31.

ceives of an evidentiary nature furnished by a thing, a physical object, is real evidence; that which it perceives of an evidentiary nature furnished by a person, is personal evidence. In other words, that evidence is personal which is furnished to the tribunal by persons, and *real* evidence, that which is furnished to the tribunal by *things*. If this mental concept of the viewpoint of the tribunal be abandoned, the distinction has no value, and only confusion results from its use. Thus the physical aspect of persons who appear before the tribunal is personal and not real as it emanates from persons and so of evidence of involuntary acts.

§ 22. *Secondary Meanings of the Term "Evidence."* ⁴⁹—It seems appropriate that the subsidiary or secondary meaning of the term "evidence," that is evidence treated as a *science*, or regarded as an *art* should receive brief attention at this point. This subordination must be understood as merely relative to the purposes of a particular treatise. Jurisprudence stands sorely in need of a science of evidence. Judicial administration, both in the work of trial and appellate courts would be greatly facilitated and expedited were the art of evidence more clearly formulated and better understood by the vast majority of practitioners. The rules and practical administration of evidence—the law of evidence—may fairly be defined as being that part of the doing of judicial justice which concerns itself with the ascertainment of truth. That justice should be done in any case it is first essential that the truth of the matter be ascertained. It is as to this preliminary requisite to the just action of any tribunal with which the law of evidence, whether regarded as a science or as an art, exclusively concerns itself. The object of the law of evidence is, therefore, that of all scientific inquiry—the establishment of truth by the use of the perceptive and reasoning faculties.

Substantive law is in the nature of things comparatively distinct but substantive law has much direct influence on the law of evidence introducing its considerations of public policy and the rights of the parties. Substantive law has further much concealed influence on evidence and the instances in which this is done, are most frequently introduced by the phrase "evidence is admissible to prove" or "evidence is not admissible to prove" a given fact. The peculiarity is that in many such cases, the evidentiary fact, the *factum probans*, is well calculated to prove the fact to the proof of which it is directed, i. e., the *fuctum probandum*. The real cause for rejecting the former fact is that the latter fact is not provable under the rules of substantive law, or that the ultimate *factum probandum*—the constituent fact at the end of the chain of probative facts would be excluded by these rules. The real difficulty lies in a failure to distinguish accurately between the function of a probative fact and that of a constituent one.

⁴⁹. 1 Chamberlayne, *Evidence*, §§ 32-37.

CHAPTER II.

FACTS.

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states and events, 35.

Relevancy, 36.

Constitutionality of statute declaring effect of certain facts, 37.

§ 23. "**Fact**" Defined.—Scientifically speaking, a fact is that which exists—either in the world of matter or in that of mind. "We may define a fact as a reality of nature, existing or perceptible in the present or the past, and having its seat either in matter or in mind."¹

§ 24. "**Matter of Fact.**"—For judicial purposes, "fact" as a genus. is divided into three species (1) matter of law, (2) matter of opinion, and (3) matter of fact. No very clear differentiae indicate these several species. It may be said that whatever falls within the genus "fact" which is not clearly "matter of law" or "matter of opinion" is properly classed as "matter of fact."²

§ 25. **Matter of Law.**—The existence of a rule of foreign law is, by the great weight of authority,³ a question of fact. But it is otherwise as to rules of municipal or domestic law. Knowledge and enforcement of these laws is, so far as the judge is concerned, part of the judicial office. It has seemed wise, partly as conducive to the proper demarcation of the respective provinces of the court and jury,⁴ to segregate such matters of fact from facts of a different relation to the administration of justice under the general term "matter of law."⁵

1. 1 Chamberlayne, Evidence, §§ 38, 39.

2. 1 Chamberlayne, Evidence, § 40.

3. 1 Chamberlayne, Evidence, § 154 et seq.

4. 1 Chamberlayne, Evidence, § 67 et seq.

5. 1 Chamberlayne, Evidence, § 41.

§ 26. **Matter of Opinion.**—"Matter of opinion, not being disputed questions of fact, are general propositions or theorems relating to laws of nature or mind, principles and rules of human conduct, future probabilities, deductions from hypotheses and the like, about which a doubt may reasonably exist. All doubtful questions, whether of speculation or practice, are matter of opinion. With regard to these, the ultimate source of our belief is always a process of reasoning."⁶

§ 27. **Classification of Facts; Physical or Psychological.**—Classifying facts in general, according to whether they are within or without the body of the observer, they may be divided into (1) physical, of which the knowledge of the observer comes through the *perception* of the senses; and (2) psychological, comprising feelings, emotions and other phases of the mind of which the latter is intuitively aware. It may well be that the mind is aware only of changes in its states of consciousness.⁷

§ 28. **[Classification of Facts]; Simple and Compound.**—Facts of a comparatively simple nature may unite to form compound facts of a greater degree of complexity, these in turn joining with others to form a fact still more involved, and so on to an indefinite extent. An absolutely simple, uncompounded, indivisible fact apparently does not exist in nature as commonly presented to perception. Even the simplest act to which a single name is attached in language as of a unit is in reality upon closer inspection found to be a series of collection of simpler acts.⁸ "In theory we can conceive a fact absolutely simple; for example, the existence of an atom in a state of rest, an instantaneous perception of the mind, etc. In practice, there is nothing of this kind; a fact, though it may be spoken of as a single fact, is still in reality an aggregate of facts."

While *this is essentially true*, it has been deemed practically expedient to treat as a simple fact any existing state of matter or mind which may be ascertained or verified by a single act of perception or intuitive consciousness.⁹

§ 29. **[Classification of Facts]; Component Facts.**—In any investigation, judicial or other, in which the existence of a right is claimed or a liability asserted, the truth of certain special facts which, when united, make up or compose such right or liability, is necessarily involved. It seems proper to designate these facts as *component*. Proof of these facts is absolutely essential to proof of

6. 1 Chamberlayne, Evidence, § 42.

Lewis, Authority on Matters of Opinion, c. 1, § 1.

7. **Physiological Facts.**—It has seemed best to classify physiological with physical facts, 1 Chamberlayne, Evidence, § 43.

Proof of condition of mind.—Where "the condition or state of mind of a party is in

issue the circumstances attending his acts are competent evidence of it and also his own testimony as to his motive, purpose and intent is also competent. Eckerd v. Weve, 85 Kan. 752, 118 Pac. 870, 38 L. R. A. (N. S.) 516 (1911).

8. 1 Chamberlayne, Evidence, § 44.

9. 1 Chamberlayne, Evidence, § 45.

the proposition submitted to investigation. They, or more properly, their existence is essential to the truth of the proposition in issue.¹⁰

§ 30. [Classification of Facts]; Component and Probative.—The relation between a compound fact and its component facts is essentially different from that between an evidentiary and a principal one, between a *factum probans* and a *factum probandum* whatever be the degree of approximation to the *res gestae* and through these and the component facts to the proposition in issue. First, a component fact is comprised in, and part of, its compound fact. The latter, at least in its present form, does not exist unless the component fact also exists. If the compound fact exists, its component facts, of necessity, also exist.

On the contrary, a probative or evidentiary fact (*factum probans*) is something extrinsic to and entirely outside of the principal fact (*factum probandum*), it is externalized as part of objective nature. The evidentiary or probative fact may exist and the principal fact not exist; or, on the contrary, the probative fact may not be true and the *factum probandum* still exist.¹¹

§ 31. [Classification of Facts]; Res Gestae and Constituent.—The *res gestae* of a judicial inquiry are that portion of the natural occurrences, a portion, as it were, of the world's aggregate of happenings or existences, out of which the right claimed or liability asserted comes into being. Constituent facts are those among the *res gestae* facts which are material to the existence of this right or liability.¹²

§ 32. [Classification of Facts]; Compound, Component and Constituent.—The relation of the component facts to the compound proposition — of the facts in issue to the issue itself — is a matter of law. The existence of these component facts is part of the definition, in point of law, of the main proposition, i.e., of the issue. These component facts are the requirements of substantive law expressed in terms of fact, they establish the legal standard up to which the facts proved in the case are to come in order to establish the truth of the main proposition asserted.

The constituent facts constitute the final or primary facts, to which, when established to their satisfaction, the court or jury, as the case may be, will apply the rule of law involved in the main proposition — the issue. In other words, component facts are part of the rule, furnished by the court, and applied by it or by the jury. The constituent facts are those to which the rule is applied.¹³

10. 1 Chamberlayne, Evidence, § 45.

11. 1 Chamberlayne, Evidence, § 46.

12. 1 Chamberlayne, Evidence, §§ 47, 48.

For example.—An accomplice may testify as to the plans of the conspirators before the crime and what they intended to do with the money they expected to steal from the victim. So his testimony may be corroborated by evidence of other witnesses that men were seen in the places where the accomplice said they were who looked like the accused. *Grant v. State*, Tex. Crim. Rep. 148 S. W. 760, 42 L. R. A. (N. S.) 428 (1912) citing text.

13. 1 Chamberlayne, Evidence, §§ 45, 49.

§ 33. [Classification of Facts]; Positive and Negative.¹⁴— It has been said by high authority¹⁵ that all facts may be classified as positive or negative. This statement is true rather of propositions than of facts. In the nature of things, all facts must be positive. For, as Bentham more accurately says,¹⁶ “the only really existing facts are positive facts. A negative fact is the non-existence of a positive one, and nothing more. But it is otherwise of propositions of fact. We may, and frequently do, predicate, both in judicial or other inquiries, the nonexistence of a fact.” A proposition, negative in form, may well be positive in substance; a statement in form positive, may in reality be negative. Indeed, the same proposition may be made positive or negative at will—it being obvious that it is not material to the meaning whether the existence of a fact be affirmed or its nonexistence be denied; or whether its nonexistence be affirmed or its existence be denied. The proposition, in either form, is positive in the first case and negative in the second. It is for this reason that one who testifies to a positive fact, e.g., that he noticed a certain detail of an accident, is deemed, as a rule, more credible than he who affirms the negative fact that it did not occur.

The most that can be done in the way of proof of the negative fact—or, if the expression be preferred, the disproof of the correlative positive—is the proof of some positive fact, the existence of which is inconsistent with the existence of the correlative positive fact, and then *infer* the nonexistence of the latter from the existence of the former. In other words, while a negative fact presents peculiar difficulties in the way of direct proof, it may be established inferentially or, by the more customary phrase, circumstantially.

§ 34. [Classification of Facts]; Principal and Probative.¹⁷— According to the classification adopted by Bentham the distinction between a principal and an evidentiary fact is that between a *factum probandum* and a *factum probans*. The relation is not as to the proposition in issue but as to the two facts—the fact to be proved and the fact offered as proving or assisting to prove it. In other words the principal fact is not a principal fact as related to the issue but as related to the evidentiary or probative fact. “In every case, therefore, of *circumstantial evidence*, there are always at least two facts to be considered—1. The *factum probandum*, or say, the principal fact—the fact, the existence of which is supposed or proposed to be proved—the fact evidenced to, the fact which is the subject of proof. 2. The *factum probans*—the evidentiary fact—the fact from the evidence of which that of the *factum probandum* is inferred.

An anomaly of code pleading may make such a statement inaccurate. As contrasted with common law pleading and statutory pleading which adopts common law pleading as its basis, code pleading, distinctively so called, states

14. 1 Chamberlayne, Evidence, § 50.

15. Best, Ev., § 13.

16. Rationale of Jud. Ev., bk. I, § 50.

17. 1 Chamberlayne, Evidence, §§ 51, 52.

Bentham, Rationale of Jud. Ev., bk. V, c. 1.

the *constituent* rather than the component facts. This circumstance must be kept constantly in mind while dealing with the rulings of certain courts.¹⁸ The ultimate *facta probanda* are these constituent facts. Here the line of proof — the proper subject of evidence — ceases.¹⁹ *Deliberative facts*, in the original significance of the term, comprise that species of judicial evidence which assists the tribunal in weighing the truth of a party's contention or the credibility of the witnesses or other proof by which it is established. Deliberative facts enable the court or jury to exercise adequately and accurately the function of judging. They explain, elucidate or qualify the probative or *res gestæ* facts in such a way as to determine the evidentiary weight that shall be accorded them. They are placed, as it were, in the mental scales, together with the probative or *res gestæ* facts to assist in striking the proper balance. Such facts are probative; but possess that slight degree of probative relevancy which may properly be spoken of as deliberative.

§ 35. [Classification of Facts]; States and Events.²⁰ — Bentham distinguishes, as a classification of facts, between events and states of things.²¹ Best adopts the same distinction and assigns Bentham's reasons for making it.²² "By an event," says Best, "is meant some motion or change considered as having come about either in the course of nature or through the agency of the human will, in which latter case it is called an act or action. The fall of a tree," he goes on, "is an event, the existence of a tree is a state of things, but both are alike facts." The essential point of difference here indicated is that between motion and rest. Whatever embodies motion is an event; that which is attended by a condition of rest is a state of things. Such a distinction one may venture to observe, with deference to these two eminent authorities who have placed the students of the law of evidence under such heavy obligations, is, in reality, superficial and inaccurate.

From the standpoint of the law of evidence, however, the distinction will continue to be of importance. It need not be pointed out that only facts, however numerous or complicated, which constitute to the observer, whether a witness or the tribunal itself, present existences or states of things, can be the subject of perception and, consequently, of personal knowledge. Completed events can be learned only by information derived from others — results of their past perception of what were to them, at that time, continuing states of things.

§ 36. Relevancy.²³ — The relation between a *factum probans* and a *factum probandum* by virtue of which of which the former tends to establish the exist-

18. An "ultimate or issuable fact" is one essential to the claim or defense, and which cannot be stricken from the pleading without leaving it insufficient. *Meyer v. School Dist.* No. 31, 4 S. D. 420, 57 N. W. 68, 69 (1893).

19. *Caywood v. Farrell*, 175 Ill. 480, 51 N. E. 775, 776 (1898).

20. 1 Chamberlayne, Evidence, § 53.

21. *Rationale*, Jud. Ev., bk I, 47.

22. Best, Ev., § 13.

23. 1 Chamberlayne, Evidence, §§ 54-64.

ence of the latter is logical relevancy. *Objective relevancy* is a relation arising in the world of matter, as distinguished from the realm of mind. Subjective relevancy deals with the realm of mind. It is chiefly confined, in its operation, to judicial evidence,²⁴ i. e., to the oral statements, the testimony of witnesses, given in court, or the written declarations of the author of a document. Relevancy is a state of relation. Unless and until conditioned, it may well be regarded as a link connecting any given fact in point of time, with varying degrees of remoteness, with all other facts, prior or subsequent, and in all directions of space. The proponent may start his proof of a material *res gestæ* fact as far back over the links of the chain of causation as the court, under all the circumstances of the case, shall deem not too remote to be helpful to him or the jury. He may then prove the existence of the several links in the chain until the ultimate *factum probandum*, the *res gestæ* fact is reached. This is the direct line of proof, the direct lineal relevancy. Any *res gestæ* fact may be proved in this way. Establishing the direct line of proof, in and of itself, makes other potentially direct relevancy indirect or collateral. It is as natural and inevitable as that laying out and constructing a road should create sides for it. Other relevant relations persist but in a subordinate, collateral and incidental capacity. As Frederick Pollock says: "Facts may be relevant to one another not only when they are links in the same chain, but when they are links in two chains having a common link in some other part of their length; that is, when they are effects of the same cause or causes of the same effect. Relevancy is a question of logic, with which law, either in its substantive or adjective form has nothing to do. The only test is that of experience; and to follow it, presents in practice, little, if any, difficulty except the question of what degree of probative force may be deemed by a presiding judge helpful to himself and to the jury. The probative relation of a deliberative fact to the existence of one in the *res gestæ* may well be spoken of as deliberative relevancy. It is a relation of logical relevancy where the connection between the evidentiary and principal fact is a slight one. All relevancy is not, however, that of logic.

Two inquiries at once arise: (1) What is the nature of the relevancy existing between the constituent and the component facts? (2) What is the nature of the relevancy which exists between the component facts or expressions of fact and the right or liability asserted or denied? In answering them, it will at once occur to the mind; that an entirely distinct element has been added to the logical relevancy, based on experience, which has been hitherto dominant in establishing the *res gestæ* — from which the constituent facts have been selected or inferred; and that this new element furnishes the selective principle in determining which of the *res gestæ* facts are *material* to the component facts and so are constituent of the right or liability. It so becomes clear that this new element is the substantive or positive law of the subject which confers

²⁴ *Summerour v. Felker*, 102 Ga. 254, 29 S. E. 448, 450 (1897).

the right or imposes the liability. Such a rule is entirely outside the logic of experience, is arbitrary, of legal rather than mental allegiance and relations. The establishment of the proposition in issue by the correspondences between the constituent and the component facts is determined, in part at least, by legal reasoning, with which logic has no exclusive function. This is, so far as possible, within the inviolable province of the jury — the judging of their evidence. To this form of relevancy, no designation seems more appropriate than that of legal or constituent relevancy. Legal relevancy imports the possibility of legal reasoning. The relation between the constituent and the component facts and the further step from the component facts to the truth of the *main* proposition in issue is determined by this legal reasoning. Reasoning from probative to constituent facts is thus seen to be a conclusion of fact, while any reasoned result from the constituent or *res gestæ* facts is a matter of legal reasoning.²⁵ This class of reasoning is merely reasoning in general motivated and conditioned by a rule of substantive law.

§ 37. **Constitutionality of Statute declaring Effect of certain Facts.**— It is not competent for the Legislature to declare that affidavits of the shipper as to the amount of grain carried is conclusive on the carrier. The Legislature may declare rules of evidence, change the burden of proof, or declare that a fact from which an inference as to the existence of another fact may reasonably be drawn should be regarded as evidence of the latter fact but it is not competent for the Legislature to declare that the existence of the first fact shall conclusively establish the existence of the latter.²⁶

25. *Nolan v. New York, N. H., etc., R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305 (1898).

26. *Shelabarger Elevator Co. v. Illinois Central R. Co.*, 278 Ill. 333, 116 N. E. 170, L. R. A. 1917 E 1011 (1917).

CHAPTER III.

LAW AND FACT.

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§ 38. **Law Defined.**— Law may, for municipal or domestic judicial purposes, be defined as a rule of conduct prescribed by the sovereign of the forum upon its subjects and enforced by a sanction.¹

§ 39. **A Divided Tribunal.**— In considering the relation between the respective provinces of judge and jury, at common law, in an English or American court, in respect to the distinction between "matter of law" and "matter of fact," it may be said, in general, that it is error to instruct the jury that they are to judge the law² or of its constitutionality.³ While the contrary has been

1. 1 Chamberlayne, Evidence, § 66.

2. Sweeney v. State, 35 Ark. 586, 601 (1880); Hamilton v. People, 29 Mich. 173, 189-193 (1874); Montgomery v. State, 11

Ohio 424 (1842); 1 Chamb., Ev., § 67, n. 2 and cases cited.

3. Com. v. Anthes, 5 Gray (Mass.) 186 (1855); Pierce v. State, 13 N. H. 537 (1843).

at times held,⁴ the view that even in criminal cases the jury are to receive and apply the rule of law as announced by the court is supported by the great weight of authority.⁵ With the policy of the law the jury are not concerned.⁶

§ 40. **Who Should Apply the Law.**—Before it can be ascertained by the tribunal as to whether the right or liability asserted or denied in the ordinary judicial action can be regarded as established or shown not to exist, three steps, one of law, one of logic and one partly of law and partly of logic, i.e., of legal reasoning, must be taken by the tribunal, or one of its component parts. That is to say, (1) a rule of law must be formulated and announced; (2) the ultimate facts must be ascertained; (3) the rule of law must be applied to these ultimate constituent facts and determine in this way whether the right or liability has been established.⁷

§ 41. **[Who should apply the Law]; Judge Authoritatively Announces Rule of Law.**—It is the universally recognized duty of the jury,⁸ even in criminal cases,⁹ to follow the rulings of the judge as to matter of law.¹⁰ These instructions as to rules of law the judge will give so far as required by the state of the evidence, either *sua sponte*, of his own motion,¹¹ or at the request of the parties,¹² even in criminal cases.¹³ This, for the purposes of the trial, is authoritative; revision or correction, so far as needed, is the work of other judges, nothing of the kind being allotted to the jury.¹⁴

Civil Cases.—As *quasi* matter of fact, the jury have been considered, in a few cases, as entitled to find the law to be different from that announced to them by the court, should the law be one of *local* nature.¹⁵ This may be regarded as untenable.¹⁶

Criminal Cases.—Juries are not judges of the law in criminal cases.¹⁷

Connecticut permits this. *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98 (1880).

4. *Infra*, §§ 41, 45; 1 Chamb., Ev., §§ 71, 86.

5. *Washington v. State*, 63 Ala. 135, 35 Am. Rep. 8 (1879); *Com. v. Rock*, 10 Gray (Mass.) 4 (1857); *Hamilton v. People*, 29 Mich. 173, 189 (1874); *Duffy v. People*, 26 N. Y. 588 (1863); 1 Chamb., Ev., § 67, n. 6 and cases cited.

6. *State v. Buckley*, 40 Conn. 247 (1873); *State v. Miller*, 53 Iowa 154, 4 N. W. 900 (1880).

7. 1 Chamberlayne, Evidence, § 68.

8. *Higginbotham v. Campbell*, 85 Ga. 638, 11 S. E. 1027 (1890).

9. *Infra*, § 140; 1 Chamb., Ev., § 71.

10. *Council v. Teal*, 122 Ga. 61, 49 S. E. 806 (1876); *Com. v. Rock*, *supra*.

11. *State v. Stonum*, 62 Mo. 596 (1876).

12. *Com. v. Porter*, 10 Metc. (Mass.) 263

(1845); *Montgomery v. State*, *supra*; *Nels v. State*, 2 Tex. 280 (1847).

13. *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 132 (1830); 1 Chamb., Ev., § 69.

14. *Hamilton v. People*, *supra*; No independent examination into the law is permissible in the jury-room. *Newkirk v. State*, 27 Ind. 1 (1866); *Merrill v. Nary*, 10 Allen (Mass.) 416 (1865); *Harrison v. Hance*, 37 Mo. 185 (1866); *State v. Smith*, 6 R. L. 33 (1859). Improper conduct in using law books in the jury-room does not require that the verdict should be set aside. *State v. Hopper*, 71 Mo. 425 (1880); *People v. Gaffney*, 14 Abb. Prac. (N. Y.) 37 (1872).

15. *Sparf v. U. S.*, 156 U. S. 51, 110, 15 S. Ct. 273 (1895).

16. *State v. Gannon*, 75 Conn. 206, 52 Atl. 727 (1902); *Com. v. Porter*, *supra*; *State v. Hodge*, 50 N. H. 510 (1869); 1 Chamb., Ev., § 70, n. 3 and cases cited.

17. *Townsend v. State*, 2 Black (Ind.) 151

Double Jeopardy.—In criminal cases, the court may direct a verdict for the defendant but not against him.¹⁸ The entire power of the jury to deal with the rules of law in any case is incidental to their right to render a general verdict.¹⁹ The peculiarity in criminal cases is this: that where such a general verdict is one of acquittal, the judge cannot set it aside.²⁰ Under an almost universal constitutional provision, one accused of crime cannot twice be placed in jeopardy for the same offence. Changed social conditions seem greatly to have impaired the basis of public policy upon which the rule originally rested.²¹ The fact of the provision against double jeopardy has given rise to the conception that as the work of the jury in acquitting contrary to the rule of law formulated by the court could neither be prevented, revised, nor punished,²² therefore, they had a *right* to disregard the instructions of the court. "This power, instead of being called a power to judge of the law, should rather be regarded as a power to *set aside the law* in a given instance."²³ Such is the general view of American courts who very properly distinguish sharply between a *right* and an uncorrectible abuse of *power*.²⁴

Public Policy.—The rule of law laid down by the court may be the sole protection of innocence. A lawless jury may be as dangerous to a person accused of crime though innocent as a lawless mob.²⁵ "If the court had no right to decide the law, error, confusion, uncertainty and licentiousness would characterize the criminal trials, and the safety of the accused might be as much endangered as the stability of justice certainly would be."²⁶

Confusion of Law.—To permit casual bodies of twelve untrained men, selected by lot from the community, to construe the law, would introduce such an element of confusion as to what that law is as would amount to an intolerable abuse and degradation of the administration of justice.²⁷ More than this, under such circumstances, "Jurors would become not only judges but legislators as well."²⁸ Nor is this all. "If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be

(1828); *Com. v. Anthes, supra*; *Hardy v. State*, 7 Mo. 607 (1842); *State v. Hodge, supra*; *Duffy v. People, supra*; *Com. v. McManus*, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761 (1891); *Sparf v. U. S., supra*.

CONTRA: *Montee v. Com., supra*; *State v. Jurche*, 17 La. Ann. 71 (1865); *State v. Snow*, 18 Me. 346 (1841); *Drake v. State*, 30 N. J. L. 422 (1863); *Nelson v. State*, 2 Swan (Tenn.) 482 (1852); *State v. Croteau*, 23 Vt. 14 (1849). Generally, see 1 Chamb., Ev., § 71 and cases cited.

18. *Infra*, n. 20.

19. *Devizes v. Clark*, 3 A. & E. 506 (1835); 1 Chamb., Ev., § 72, n. 2 and cases cited.

20. *King v. Jones*, 8 Mod. 201, 208 (1724).

21. *Duffy v. People*, 26 N. Y. 588, 591 (1863).

22. *Attaint.*—The earlier practice pro-

vided a punishment of the jury for false verdicts by way of attain. Co. Litt., 155b, 228a.

23. 2 *Thomp. on Tr.*, 2133.

24. *State v. Ford*, 37 La. Ann. 443 (1865); *U. S. v. Greathouse*, 4 Sawy. (U. S.) 457, 464, 2 Abb. 364 (1863); 1 Chamb., Ev., § 72, n. 7 and cases cited. CONTRA: *Kane v. Com.*, 89 Pa. 522 (1879).

25. *Pennsylvania v. Bell, Add. (Pa.)* 156, 160 (1793); *U. S. v. Battiste*, 2 Summ. (U. S.) 240 (1835); *Hamilton v. People*, 29 Mich. 173 (1874).

26. *Montee v. Com., supra*; 1 Chamb., Ev., § 73.

27. *Hamilton v. People, supra*; *Duffy v. People, supra*; *Pennsylvania v. Bell, supra*.

28. *Duffy v. People, supra*.

most uncertain, from the different views which juries might take of it, but, in case of error, there would be no remedy or redress of the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was."²⁹

Differing Views.—In several jurisdictions more powers in dealing with the rule of law than are generally adjudged to be in the public interest have, by statute or constitution, been conferred upon the jury.³⁰ The same results authorizing the jury to invent or improvise a rule of law for themselves, in criminal cases, have been occasionally effected by judicial decision.³¹ Among these jurisdictions are Illinois,³² Indiana,³³ Louisiana,³⁴ Maine,³⁵ Massachusetts,³⁶ Pennsylvania,³⁷ Tennessee³⁸ and Vermont.³⁹ A growing tendency is, however, observable among such courts to bring their rulings more nearly into correspondence with the general weight of authority.⁴⁰

§ 42. [Who should apply the Law]; (2) Jury Ascertain Constituent Facts.—Speaking generally, the second step—that of ascertaining the constituent facts—is admittedly for the jury.⁴¹

§ 43. [Who should apply the Law]; (3) Application of Law to Constituent Facts.—Upon a natural scientific division of matter of law and matter of fact, the jury should find simply the constituent facts. To the judge should fall the duty of announcing the rule of law and applying it to the constituent facts found by the jury. In other words, both the rules of law and their application—judicial knowledge⁴² and legal reasoning⁴³—are “matter of law.”

§ 44. Coke's Maxim Considered.⁴⁴—It may be accepted as settled that what-

29. *State v. Ford*, *supra*; *Nicholson v. Com.*, 96 Pa. 503 (1880); *U. S. v. Battiste*, *supra*; 1 Chamb., Ev., § 74, n. 3 and cases cited.

30. *Hudelson v. State*, 94 Ind. 426 (1883); *State v. Ford*, *supra*; *State v. Miller*, 75 N. C. 74 (1876); *R. S. Ind.* 1881, § 64, 1823. In Georgia a code provision is as follows:—“The jury in all criminal cases shall be the judges of the law and the facts.” *Const. Ga.*, art. I, § 2, par. 1 (1877); *Ga. Code* 1882, § 5019. See 1 Chamb., Ev., § 75, n. 1 and cases cited.

31. An erroneous instruction by the court will, even in states where the jury are judges of the law, beg round for a new trial. *Clem v. State*, 42 Ind. 422, 447 (1873); *State v. Rice*, 56 Iowa 431, 9 N. W. 343 (1881).

32. *Adams v. People*, 47 Ill. 376 (1868).

33. *Stout v. State*, 96 Ind. 407 (1884).

34. *State v. Vinson*, 37 La. Ann. 792 (1885).

35. *State v. Snow*, 18 Me. 346 (1841).

36. *Com. v. Porter*, 10 Metc. (Mass.) 263 (1845).

37. *Kane v. Com.*, 89 Pa. 522 (1879).

38. *Hannah v. State*, 75 Tenn. (11 Lea) 201 (1883).

39. *State v. Croteau*, 23 Vt. 15 (1849). For full list of cases, see 1 Chamb., Ev., § 75 and notes.

40. *State v. Ford*, *supra*.

41. *Fowler v. State*, 85 Ind. 538 (1882); *Robbins v. State*, 8 Ohio St. 131, 145, 166 (1857); *U. S. v. Greathouse*, *supra*; 1 Chamb., Ev., § 76. This is the rule even in states which by constitutional provision make the jury judges of both law and fact in criminal causes. *State v. Tisdale*, 41 La. Ann. 338, 6 So. 579 (1889).

42. *Infra*, § 315 *et seq.*; 1 Chamb., Ev., § 570 *et seq.*

43. *Supra*, § 36; 1 Chamb., Ev., §§ 59, 63.

44. 1 Chamberlayne, Evidence, §§ 78-84.

ever be the proper relation between law and fact on a jury trial, no such simple division exists as that all matters of law are for the judge; all matters of fact are for the jury, which has had a wide vogue in England⁴⁵ and America.⁴⁶ The so-called maxim — *ad quaestionem facti non respondent iudices, ad quaestionem juris non respondent juratores* — was a favorite with Lord Coke and was by him⁴⁷ attributed to Bracton. It was, however, never more than partially true.

"Ad Quaestionem Facti Non Respondent Iudices."— So far as regards the first branch of the statement — that judges do not decide questions of fact — the announcement is so transparently false as not to be essentially misleading.⁴⁸ The only facts with which the jury is concerned are constituted facts, i.e., material facts in the *res gestae* relevant to the issue raised by the pleadings; ⁴⁹ or, where there are no pleadings, to the existence of the right or liability involved in the inquiry. Other questions of fact are normally for the court.

Incidental Findings.— On any trial "carried on at once before court and jury"⁵⁰ questions of fact are incessantly arising. Whether an expert is sufficiently qualified to make his "opinion" of value to the jury; a document has been "attested"; a confession offered in evidence is "voluntary"; whether the nonproduction of a document has been sufficiently explained — these and other subsidiary or preliminary questions of fact⁵¹ can, under the rules of common law procedure, be decided only by the judge.⁵²

Preliminary Facts Conditioning Admissibility.— It may happen that the admissibility of particular testimony is dependent upon or conditioned by the existence of a preliminary fact.⁵³ Where a serious conflict arises upon the evidence as to the existence of a conditioning or qualifying fact, the judge may adopt one of several expedients: (1) He may hear the evidence and adjudicate as to the existence of the qualifying fact,⁵⁴ hearing the evidence as offered by both sides, and not in the presence of the jury.⁵⁵ When he has decided whether the evidence in support of admissibility is such that the jury might rationally act on it, he will proceed as in a case where the evidence is uncon-

45. *Welstead v. Levy*, 1 Mood. & Rob. 138 (1831).

46. *Scott v. People*, 141 Ill. 195, 30 N. E. 329 (1892); *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452 (1888); *Strauss v. Kansas, etc., R. Co.*, 86 Mo. 421 (1885); *New Jersey Steamboat Co. v. New York City*, 109 N. Y. 621, 15 N. E. 877 (1888); 1 Chamb., Ev., § 78, n. 2 and cases cited.

47. *Isaak v. Clark, Rolle*, 59; 2 Bulstr. 314 (1614).

48. *Thayer, Prelim. Treat.* 185; 1 Chamb., Ev., § 79.

49. *State v. Hodge*, 50 N. H. 510, 522 (1869): § 31, *supra*; 1 Chamb., Ev., § 47.

50. *Com. v. Porter*, 10 Metc. (Mass.) 263, 284 (1845).

51. *Zipperlen v. Southern Pac. Co.*, 7 Cal. App. 206, 93 Pac. 1049.

52. *Fairbank v. Hughson*, 58 Cal. 314 (1881); *Com. v. Robinson, supra*; *Semple v. Callery*, 184 Pa. 95, 39 Atl. 6 (1898); 1 Chamb., Ev., § 80, n. 3 and cases cited.

53. As, for example, whether a witness is disqualified by interest, *Bartlett v. Hoyt*, 33 N. H. 151, 165 (1856): whether one to whom a communication was made was, at the time, a legal adviser. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502 (1877); or the like.

54. *Cleve v. Jones*, 7 Exch. 421 (1852).

55. *State v. Shaffer*, 23 Or. 555, 32 Pac. 545 (1893).

troverted.⁵⁶ (2) He may ask the jury to find, specifically, as to the existence of the qualifying fact; and, upon receiving their report, proceed as where the evidence is uncontroverted. Or, (3) he may leave the entire matter to the jury, to whom it must ultimately go on the question of weight, under suitable instructions directing them as to their proper course in the event that they find, or fail to find, the existence of the qualifying fact.⁵⁷

Function of the Jury.—Common practice permits a presiding judge to submit the evidence in its entirety to the jury, instructing them to regard or disregard it according as they shall find as to the existence of the preliminary fact upon which its admissibility is dependent.⁵⁸ But making such preliminary findings is not a recognized and essential part of the jury's duty.

"Ad Quaestionem Juris Non Respondent Juratores."—The second division of the rule—that the jury are not to answer questions of law—is more nearly accurate than is its associated branch of the rule. Their power of applying the rule of law announced by the judge to the constituent facts found by them and of returning a general verdict⁵⁹ seems, however, to approximate closely to dealing with a question of law. As is more fully stated elsewhere,⁶⁰ it is the substantive right of a party to have the judge exercise his allotted functions. He will not, therefore, as a rule, submit questions of law to the jury.⁶¹

Collateral Rulings.—Where the ruling as to the law concerns a collateral matter, as in connection with the admissibility of evidence, statements as to the issue raised by the pleadings,⁶² whether the evidence is sufficient in law to support a verdict⁶³ or the like, the power and duty of the court to make an authoritative ruling for the purposes of the case are unchallenged in any quarter.⁶⁴ The jury may refuse to follow evidence admitted by the judge, but they cannot disregard it.⁶⁵ For the court to instruct the jury that they may so act is error.⁶⁶

56. *Infra*, §§ 179 *et seq.*; 1 Chamb., Ev., §§ 385 *et seq.* It has been held that the propriety of the judges finding in this connection will not be reviewed in an appellate court. *Com. v. Robinson, supra*. It has been suggested that in a criminal case, the court, to find a fact against a prisoner, must be satisfied of the truth of the matter beyond a reasonable doubt. *Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (1898). The better view is that no such limitation on the court's action exists. *Com. v. Robinson, supra*.

57. 1 Chamb., Ev., § 81. The reason assigned for this course is that it "does not properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict." *Hartford F. Ins. Co. v. Reynolds, supra*.

58. *Central of Ga. Ry. Co. v. Harper*, 124 Ga. 836, 53 S. E. 391 (1906); *Com. v. Culver*, 126 Mass. 464 (1879). See *American Nat. Bank v. First Nat. Bank (Tex. Civ.*

App.) 92 S. W. 439 (1906); 1 Chamb., Ev., § 82.

59. *Infra*, § 45; 1 Chamb., Ev., § 86.

60. *Infra*, § 203; 1 Chamb., Ev., § 409.

61. *Thomas v. Thomas*, 15 B. Mon. (Ky.) 178 (1854); *Hickey v. Ryan*, 15 Mo. 63 (1851); 1 Chamb., Ev., § 84, n. 3 and cases cited.

62. *Missouri Coal & Oil Co. v. Hannibal, etc., R. Co.*, 35 Mo. 84 (1864).

63. *Harris v. Woody*, 9 Mo. 113 (1845); *Cole v. Hebb*, 7 Gill & J. (Md.) 20 (1835).

64. *Carter v. Bennett*, 6 Fla. 214 (1855); *Gorton v. Hadsell*, 9 Cush. (Mass.) 508 (1852); 1 Chamb., Ev., § 85, n. 4 and cases cited.

65. *Com. v. Knapp*, 10 Pick. (Mass.) 477, 496 (1830).

66. *Thomason v. Odum*, 31 Ala. 108 (1857); *Robinson v. Ferry*, 11 Conn. 460 (1836); *Ratliff v. Huntley*, 5 Ired. (N. C.) 545 (1845).

§ 45. *General Verdicts.*⁶⁷—The result announced in a general verdict is a composite one, blending a decision as to certain constituent facts with the application of a rule of law to them.⁶⁸ That it is the duty of the jury in thus blending the fact and the law into a composite result to take the rule of law to be as stated by the presiding judge is entirely settled.⁶⁹ The right of the jury, by returning a general verdict, to make for themselves the application of the rule of law as stated by the courts to the constituent facts ascertained by them is equally settled.⁷⁰ They may, in all cases, civil⁷¹ or criminal,⁷² return a general verdict. In the absence of regulation by statute,⁷³ the jury may decline to return any other verdict than a general one,⁷⁴ although the court may have required special findings. It follows from this power and practice of the jury to return a general verdict that the whole matter of law as well as of fact must be stated and explained to the jury so that they may fully understand and apply it to the facts.⁷⁵ Fox's Libel Act⁷⁶ set this matter as to the right of a jury to return a general verdict at rest, so far as England itself was concerned, by expressly providing that on such prosecutions it should be the right of the jury to return a general verdict, passing not only upon the facts but applying the rule of law to them. The rule essentially of administration or, at most of procedure, upon this point has been inscribed into most of the constitutions of the American States, it being provided, for example, in Pennsylvania, that "in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases."⁷⁷ Other jurisdictions, with great uniformity, have enacted similar provisions, statutory⁷⁸ or constitutional. *Very strong arguments* in favor of the contrary view, in point of administrative principle, may be found, among the American courts.⁷⁹

Matter of Law for the Jury an Incidental Power.—Only when the jury are themselves required to find the constituent facts and in connection with the discharge of such a duty may the jury apply the law to the facts. No practice exists under which the jury are to apply the rule of law, announced by the court, to constituent facts found by others, or to such facts when admitted, not

67. 1 Chamberlayne. Evidence, §§ 86–88.

68. Gibson v. Hunter, 2 H. Bl. 187 (1793).

69. *Supra*, § 41; 1 Chamb., Ev., § 69.

70. Kane v. Com., 89 Pa. 522 (1879); 1 Chamb., Ev., § 86, n. 5 and cases cited.

71. Com. v. Porter, 10 Metc. (Mass.) 263 (1845).

72. King v. Jones, 8 Mod. 201 (1723). See also, Erving v. Cradock, Quincy (Mass.) 553 (1761); Georgia v. Brailsford, 3 Dall. (U. S.) 1 (1794).

73. *Infra*, § 49 *et seq.*; 1 Chamb., Ev., §§ 96, 98 *et seq.*

74. Devizes v. Clark, 3 A. & E. 506 (1833)

75. Higginbotham v. Campbell, 85 Ga. 638 (1890); Cain v. Porter, 10 Metc. (Mass.)

263 (1845); Com. v. McManus, 143 Pa. 64 (1891); 1 Chamb., Ev., § 86.

76. Stat. 32 Geo. III, c. 60.

77. Const. Pa., Art. I, § 7.

78. People v. Croswell, 3 Johns. Cas. (N. Y.) 337 (1804).

79. Prominent among these is the opinion of Chief Justice Lewis, in which Chief Justice Livingston concurred (People v. Croswell, *supra*), where, after an elaborate review of the authorities, the conclusion is reached that Lord Mansfield was right in holding that judges had power to determine, after the fact of publication has been found, as to whether a given publication was or was not libellous.

disputed, or established beyond the point of successful contradiction.⁸⁰ The rule is well-nigh universal that, where the constituent facts are found and all which remains to determine the action of the court is the application of the measuring rule of law, the application of this rule is a question of law and within the function of the judge.⁸¹

§ 46. **More Rational Expedients.**⁸²—The *common law* judge is not compelled, in all cases, to work out the substantial rights of the parties through the expensive and dilatory method of granting new trials. In certain cases the more normal relations of the judge and jury are maintained—the jury finding some or all of the constituent facts and the judge applying the rule of law.⁸³

Inferences of Fact.—A main difficulty encountered by a court in applying the rule of law to facts found by a jury, or agreed upon by the parties, is that certain inferences of fact, so called, still remain to be found. The rule of law can properly, as has elsewhere been said,⁸⁴ be applied only to the constituent facts,⁸⁵ the ultimate facts so called. But it frequently happens that the jury in finding the facts or the parties in agreeing on them rest content with finding the *probative* facts⁸⁶ without proceeding to ascertain the constituent facts to be proved by these probative ones. Clearly these inferences from the existence of the probative to that of the constituent facts which they tend to establish is for the jury to draw, or, in case of a statement of agreed facts, for the agreement to cover.⁸⁷

§ 47. **[More Rational Expedients]; Agreed Statements of Fact.**⁸⁸—Questions of fact may be submitted to the court in the form of an agreed statement. The function of applying the law to the facts is thus transferred to the judge. Where only the probative facts are agreed upon, unless there is a provision that the court may draw the inferences from the probative to the constituent facts, the task is to apply the rule of law to the probative facts.⁸⁹

Power to Draw Inferences; Express Authority Needed.—It has been deemed by certain courts advisable⁹⁰ and even necessary⁹¹ that power to draw infer-

80. 1 Chamb., Ev., § 88. See discussion of the question of Matter of Law for the Jury, 1 Chamb., Ev., §§ 87, 88.

81. **Illustrative Instances.**—It is not material whether the right of the jury to apply the law is excluded because the constituent facts are agreed by the parties, as in agreed statements (*Infra*, § 47; 1 Chamb., Ev., § 91) demurrers to evidence (*Infra*, § 59; 1 Chamb., Ev., § 139) or the like; or because the facts are uncontroverted, as where the court orders a verdict where only one outcome is rationally possible, (*Infra*, § 184; 1 Chamb., Ev., § 390) or, as in the case of the construction of documents (*Infra*, § 57 *et seq.*; 1 Chamb., Ev., § 128 *et seq.*), or where con-

tempt takes place in the presence of the court (*Infra*, § 112; 1 Chamb., § 255), the judge is the percipient witness of all the constituent facts. In all such cases, it is not questioned that it is for the judge to apply the law.

82. 1 Chamberlayne, Evidence, §§ 89, 90.

83. 1 Chamb., Ev., § 89.

84. *Supra*, § 36; 1 Chamb., Ev., § 61.

85. *Supra*, § 31; 1 Chamb., Ev., § 47.

86. *Supra*, § 34; 1 Chamb., Ev., § 51.

87. 1 Chamb., Ev., § 90.

88. 1 Chamberlayne, Evidence, §§ 91-94.

89. 1 Chamb., Ev., § 91.

90. *Cole v. Northwestern Bank*, L. R. 10, C. P. 354 (1875).

ences other than those necessary, as matter of law,⁹² should be conferred *totidem verbis* if the court is to exercise it. *Otherwise* the province of the judge is limited in the original instance, to finding the effect of the facts thus stated on the record as matter of law⁹³ and that of an appellate court to saying whether the ruling was right, or, if erroneous, what it should be; not, as in case of a finding of fact, as where the court is permitted to draw inferences of fact,⁹⁴ whether there was any evidence warranting a finding.⁹⁵

A Different View.—The action of the parties may reasonably be regarded as implying liberty to use a certain discretion in drawing inferences from the facts stated. Even, therefore, in the case of stipulations where no express power of drawing inferences of fact has been conferred, certain judges have asserted and exercised the right of drawing these inferences,⁹⁶ while declining to exercise the same power in dealing with the facts found by a jury in the form of a special verdict.⁹⁷

Effect of Agreement.—But where a case is tried on an agreed statement of facts, it is not necessary that the courts should make separate findings of fact and law.⁹⁸ Where the facts are agreed on they are equivalent to facts found by the court.⁹⁹ Though findings of fact are not necessary to the validity of a judgment, the court is not thereby precluded from making such findings.¹

§ 48. [More Rational Expedients]; Advantages to Be Expected.—That the jury should, in all cases, find the existence of all constituent facts about which a dispute exists between the parties, leaving the court, in all cases, to apply the rule of law, has certain attractive features as a satisfactory rule of administration.²

§ 49. [More Rational Expedients]; Special Verdicts; Statutory.³—The practice of rendering special verdicts is one of considerable antiquity.⁴ The difference between a special verdict and the answers to special interrogations, con-

91. *Schwartz v. Boston*, 151 Mass. 226 (1890); *Kinsley v. Coyle*, 58 Pa. 461 (1868); *Byam v. Bullard*, 1 Curt. C. C. (U. S.) 100 (1852); 1 Chamb. Ev., § 92 and cases cited.

92. *Later v. Haywood*, 14 Ida. 45, 93 Pac. 374 (1908); *Mayhew v. Durfee*, 138 Mass. 584 (1885).

93. *Coffin v. Artesian Water Co.*, 193 Mass. 274, 79 N. E. 262 (1906); *Schwartz v. Boston*, *supra*.

94. *Charlton v. Donnell*, 100 Mass. 229 (1908).

95. *Schwartz v. Boston*, *supra*.

96. *Jackson v. Whitbeck*, 8 Cow. (N. Y.) 632 (1827); *Whitney v. Sterling*, 14 Johns. (N. Y.) 215 (1817). But see, *contra*, under the Code, *Clark v. Wise*, 46 N. Y. 612 (1871). It is the duty of the court to find an ulti-

mate fact in issue if it may be inferred from the stipulated facts. *Crisman v. Lanterman*, 149 Cal. 647, 87 Pac. 89 (1906).

97. *Tancred v. Christy*, 12 M. & W. 316 (1843).

98. *Cincinnati, etc., Ry. Co. v. Hansford & Son*, 30 Ky. L. Rep. 1105, 100 S. W. 251 (1907).

99. *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094 (1906).

1. *Towle v. Sweeney*, 2 Cal. App. 29, 83 Pac. 74 (1905).

2. See discussion of the question in 1 Chamb. Ev., § 95 and notes thereto, wherein the author advances six important advantages to be expected from the rule.

3. 1 Chamberlayne, Evidence, § 96.

4. *First Nat. Bank v. Peck*, 8 Kan. 660 (1871); *Ross's Case*, 12 Ct. Cl. 565 (1876).

sidered elsewhere,⁵ is obvious and fundamental. The interrogations inquire as to the existence of one or more constituent facts.⁶ The special verdict finds them all.⁷ No special interrogatories can be propounded, as of right, by a party when a special verdict is asked.⁸ Should the jury have the option to return either a special or a general verdict, they need return special answers only in case they decide to return a verdict in general form.⁹

§ 50. [More Rational Expedients]; Special Interrogatories; Common Law.—The old practice of requesting special findings of fact has increased in popularity with judges,¹⁰ frequently acting under legislative sanction.¹¹ The right to interrogate the jury, on returning a general verdict, as to the method in which they reached their conclusion in certain particulars has been denied in England,¹² and by courts in this country, in the absence of agreement by the parties.¹³ The practice, however, has obtained in certain sections of America.¹⁴ If the ground assigned by the jury for their action could not support it, the verdict is set aside.¹⁵ Other courts have been bolder and have directly submitted interrogations to the jury for them to answer.¹⁶

§ 51. [More Rational Expedients]; Special Interrogatories; Statutory.¹⁷—Many states of the American Union have re-enacted, with some variation in detail, the common law practice of submitting special interrogatories to the jury. A typical statute is that of Indiana.¹⁸

5. *Infra*, §§ 51 *et seq.*; 1 Chamb., Ev., §§ 98 *et seq.*

6. Hazard Powder Co. v. Viergutz, 6 Kan. 471, 486 (1870); Smith v. Warren, 60 Tex. 462 (1883).

7. Housworth v. Bloomhuff, 54 Ind. 487 (1876); Pittsburg, etc., R. Co. v. Spencer, 98 Ind. 186 (1884); 1 Chamb., Ev., § 96.

8. Chapin v. Clapp, 29 Ind. 614 (1868).

9. Hendrickson v. Walker, 32 Mich. 68 (1875).

10. Atchison, etc., Ry. Co. v. Morgan, 43 Kan. 1 22 Pac. 995 (1890); Maceman v. Equitable L. Assur. Soc., 69 Minn. 285, 72 N. W. 111 (1897).

11. 1 Chamb. Ev., § 97.

12. Mayor of Devizes v. Clark, 3 A. & E. 506 (1836).

13. Allen, etc., Co. v. Aldrich, 9 Fost. (N. H.) 63 (1854). Such consent has also been held not to be necessary. Walker v. Sawyer, 13 N. H. 191 (1842); See Barston v. Sprague, 40 N. H. 27 (1859).

14. For example, the presiding judge may ask the jury whether they read certain papers improperly taken by them to their consultation-room. Hix v. Drury, 5 Pick. (Mass.) 296 (1827). "Where the judge is surprised

by the verdict, it is not unusual to ask the jury upon what principle it was found." Pierce v. Woodward, 6 Pick. (Mass.) 206 (1828). See also, Roche v. Ladd, 1 Allen (Mass.) 436 (1861).

15. Parrott v. Thatcher, 9 Pick (Mass.) 426 (1830). See Spurr v. Shelburne, 131 Mass. 429 (1881). The answers to such interrogatories may also be used as part of a bill of exceptions or on motion for a new trial based on the insufficiency of the evidence. Monies v. City of Lynn, 119 Mass. 273 (1876).

16. McMasters v. West Chester County, etc., Co., 25 Wend. (N. Y.) 379 (1841).

17. Chamberlayne, Evidence., §§ 98-116.

18. "In all actions, the jury, unless otherwise directed by the court, may, in their discretion, render general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. This special finding is to be recorded with the verdict. . . . When the special finding of facts is inconsistent with the general verdict,

Criminal Cases Excluded.—The enabling statutes do not, in the absence of express language, apply to criminal cases.¹⁹ *In equity causes* where the jury is brought in to assist the judge no binding effect attaches to the findings.²⁰

Object of Special Findings.—It has been said that the object of answers to special interrogatories is to obtain an explanation of a general verdict,²¹ and to place upon record the details of this explanation.²² If the jury finds simply a general verdict, and it should happen later that the judge should be convinced that he had given the wrong rule of law to the jury, the obvious available course is to order a new trial. If the separate findings are before the judge on the record, he may, however, order such a verdict as would have been rendered, had the correct rule been given.²³ A special verdict or set of findings must set forth the existence of all constituent facts necessary to the actor's case.²⁴ *Thus is the emotionalism of the jury* in part controlled.²⁵ Error may be rectified by checking, by the knowledge furnished by separate findings, erroneous inferences from the facts found;²⁶ a consideration of no small consequence where any verdict is allowed to stand for which any logical basis can be assigned from the evidence.²⁷

§ 52. [More Rational Expedients]; Administration by the Court.²⁸—The court may, with great propriety, exert its administrative powers so to formulate the interrogations to the jury as to raise material questions, so framed as not to confuse or mislead them²⁹—the object being to enable the judge to apply the law to the constituent facts.³⁰ Where, therefore, the question asked is as to the existence of a probative as distinguished from a constituent fact, it may properly be rejected.³¹ The question should be specific, something more than a mere application of a rule of law to a particular branch of the case.³² In other

the former shall control the latter, and the court shall give judgment accordingly." *Indiana Rev. St.*, 1881, §§ 546, 547. 1 *Chamb., Ev.*, § 98.

19. *State v. Ridley*, 48 *Iowa* 370 (1878); *People v. Marion*, 29 *Mich.* 32 (1874).

20. *Jennings v. Durham*, 101 *Ind.* 301 (1884); *Learned v. Tillotson*, 97 *N. Y.* 1 (1884); 1 *Chamb., Ev.*, § 99.

21. *Hendrickson v. Walker*, 32 *Mich.* 68 (1875).

22. *Durfee v. Abbott*, 50 *Mich.* 479 (1883).

23. *Moss v. Priest*, 19 *Abb. Prac. (N. Y.)* 341, 1 *Rob.* 632 (1863). See *Dempsey v. Mayor, etc.*, 10 *Daly (N. Y.)* 417 (1882); *Partridge v. Gilbert*, 3 *Duer (N. Y.)* 184 (1854).

24. *Elwood State Bank v. Mock*, 40 *Ind. App.* 685, 82 *N. E.* 1003 (1907).

25. *Morrow v. Commrs. Saline Co.*, 21 *Kan.* 484 (1879).

26. *Morse v. Morse*, 25 *Ind.* 156 (1865); *Cole v. Boyd*, 47 *Mich.* 98 (1881).

27. *Buntin v. Rose*, 16 *Ind.* 209 (1861).

28. *Chamberlayne*, *Evidence*, §§ 101-116.

29. *Manning v. Gasharie*, 27 *Ind.* 399, 409 (1866).

30. *Plyler v. Pacific Portland Cement Co.*, (*Cal.* 1907) 92 *Pac.* 56.

Inferences of fact.—If the constituent facts found by the jury are ambiguous, they may be asked for a definite inference of fact from them. *Ft. Wayne Cooperage Co. v. Page*, (*Ind. App.* 1907) 82 *N. E.* 83. But they cannot be asked to draw a conclusion of law.

31. *Springfield Coal Min. Co. v. Gedutis*, 227 *Ill.* 9, 81 *N. E.* 9 (1907) [affirming judgment, 127 *Ill. App.* 327 (1906)].

32. *Trentman v. Wiley*, 85 *Ind.* 33 (1882).

words, questions of mingled law and fact, as it is said, should not be permitted.³³ Of such a nature is the scope of a partnership.³⁴

On the other hand where the jury, in reply to a proper question state a mere conclusion as to the law the answer may be disregarded.

That a fact is compound or complex is no ground for rejecting a finding as to it³⁵ but the question must be sufficiently specific to be helpful and must admit of a direct answer.³⁶ Such questions should be few in number,³⁷ in a form approved by the court³⁸ and so drawn as to present a single material proposition for the jury³⁹ and should be asked for before the arguments.⁴⁰

The answers should be full and unequivocal⁴¹ and not in the alternative.⁴² Qualifying expressions as "in our judgment" may be disregarded.⁴³

General verdicts cannot take the place of the special answers⁴⁴ which the judge may require.⁴⁵ Special answers are without effect unless the questions were regularly submitted to them.⁴⁶ Usually the special answers will prevail over general verdicts when they are inconsistent⁴⁷ if irreconcilably so.⁴⁸ Granting a new trial sets aside a special answer⁴⁹ but the special answers may be used by the judge in deciding whether a new trial should be ordered.⁵⁰

§ 53. **Matters of Argument, Opinion or Judgment.**⁵¹—Not all matters of fact involved in the province of the jury are the subject of evidence. Within limitations imposed by the rule of law which requires the exercise of reason, the judging of the issue, the exercise of the reasoning faculty on the facts involved in the case as to the truth of the proposition in issue or as to the existence of any constituent fact is a function of the jury. A witness, therefore, is not at liberty (1) to testify to the existence and nature of the rules of reasoning

33. *Town of Albion v. Hetrick*, 30 Ind. 545 (1883).

The construction of an unambiguous writing is of this nature. *Comer v. Himes*, 49 Ind. 482 (1875); *Symmes v. Brown*, 13 Ind. 318 (1859).

34. *Bonner Tobacco Co. v. Jennison*, 48 Mich. 450 (1882); *Dubois v. Compan*, 28 Mich. 304 (1873).

35. *Howard v. Beldenville Lumber Co.*, (Wis. 1908) 114 N. W. 1114.

36. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56.

37. *City of Indianapolis v. Lawyer*, 38 Ind. 348 (1871); *Atchison, etc., R. Co. v. Plunket*, 25 Kan. 188 (1881).

38. *Ormond v. Connecticut Mut. Life Ins. Co.*, 145 N. C. 140, 58 S. E. 997 (1907).

39. *Rosser v. Barnes*, 16 Ind. 502 (1861); *City of Wyandotte v. Gibson*, 25 Kan. 236 (1881).

40. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56.

41. *Summers v. Greathouse*, 87 Ind. 205 (1882).

42. *Peters v. Lane*, 55 Ind. 391 (1876).

43. *Peters v. Lane*, 55 Ind. 391 (1876).

44. *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426 (1872).

45. *Urbanek v. Chicago, etc., Ry. Co.*, 47 Wis. 59 (1879).

46. *Hamilton v. Shoaff*, 99 Ind. 63 (1884).

47. *Plyler v. Pacific Portland Cement Co.*, (Cal. 1907) 92 Pac. 56; *New York, etc., R. Co. v. Hamlin*, (Ind. 1908) 83 N. E. 343 [judgment modified, 79 N. E. 1040 (1907)].

48. *Woollen v. Wishmier*, 70 Ind. 108 (1880).

49. *Hollenbeck v. Marshalltown*, 62 Iowa 21 (1883).

50. *Atchison, etc., R. Co. v. Brown*, 33 Kan. 757 (1885).

51. 1 Chamberlayne, Evidence, §§ 117, 118.

applicable to the case; (2) to argue a proposition in issue or the inferences from any fact in evidence, or (3) to state the effect which the evidence as to the existence of any probative or constituent facts has produced in his mind. What constitute the rules of sound reasoning, or as to what inferences should properly and logically be drawn from the evidence as to the truth of propositions in issue, is within certain limits also a matter for the jury and is also imposed by the substantive law on the judge.

§ 54. **Matter of Law.**⁵²— Consideration has thus been given to “matter of fact” as rather loosely used in the phraseology of judicial proceedings; and as to the manner and extent to which, under the generally prevailing system of English jurisprudence, issues involving matters of fact are decided by a jury. It remains to turn attention to the many and important issues, or questions of fact which are decided by the *judge*. While these matters of fact, grouped under the heading of “matter of law,” present the common feature that they embody the use of legal reasoning, i.e., involve the application of the rule of law to a set of facts, they yet present among themselves certain points of difference. Among them, for example, are the meaning of words and the general requirement of the use of reason in extrajudicial as well as in judicial conduct, especially in relation to certain branches of the substantive law. In addition to these more general matters, it is the practice of the courts when certain sets of constituent facts have been found by the jury, or where these are admitted or not controverted, to apply to them the rule of law for themselves. A familiar instance of this is in connection with the construction of documents.

§ 55. **Meaning of Words.**⁵³— The meaning of words is equally a question of fact, whether the meaning is of words taken separately of themselves, as definitions or when the inquiry is as to the meaning in which they have been used in a given context or under a certain set of circumstances. In other words, definition as well as interpretation presents a question of fact. The function of defining words used in connection with rules of law necessarily, however, fell to the court as part of its duty of administration as presiding officer of a mixed tribunal charged by the sovereign with the work of administering justice. These definitions may well be so drawn as to exclude from the consideration of the jury many inferences of fact otherwise permissible, and in this way to take over into the custody of the judge the decision of numerous matters of fact.

§ 56. **The Use of Reason.**⁵⁴— The power of the jury to deal with the facts as measured by the rule of law given to them by the court for that purpose is not, however, unlimited. Among matters of law, i.e., rules of legal requirement, which still remain in the handling of the judge, is the requirement that the

52. 1 Chamberlayne, Evidence, § 119.

54. 1 Chamberlayne, Evidence, §§ 120a-127.

53. 1 Chamberlayne, Evidence, § 120.

jury must proceed according to reason, whether the reasoning is logical or legal. The law in general requires that all should act reasonably and this issue of reasonableness is frequently left to the jury.⁵⁵

Where the facts as to what is a reasonable time are established the question is one of law.⁵⁶ In cases of negligence the same principle is applied that where the facts are undisputed their effect is a question of law,⁵⁷ but where the evidence is disputed the issue must be left to the jury. So in an action for malicious prosecution where the facts are conceded the existence of reasonable cause is a question for the court as a question of law,⁵⁸ but where the facts are in dispute the case may be submitted to the jury with alternative rulings adapted to their action in determining the question of fact.⁵⁹

§ 57. Construction of Documents.⁶⁰—The discovery of the intention of the writer of a written document is largely a question of fact,⁶¹ but where the facts are not in dispute and the intention is to be gathered from the document itself its discovery presents merely a question of law to be ascertained by the judge.⁶² The modern method of construction is to introduce all the surrounding circumstances in an effort to ascertain this intention.⁶³ The court has also to construe documents other than probative⁶⁴ and all public documents,⁶⁵ including statutes,⁶⁶ but it is beyond the province of the court to decide whether a writing was intended to have a certain effect as between the parties to it⁶⁷ or as to what inferences are to be drawn from its existence.⁶⁸

Where the terms of a document are vague, technical, in a foreign language or the like where the facts are not all found any conflict of testimony is to be settled by the jury.⁶⁹ The jury also must decide where the effect of the instru-

55. *Chesterfield v. Ratliff*, (S. C. 1898) 30 S. E. 593 (unreasonable shooting).

56. *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, (Ind. App. 1906) 76 N. E. 1006.

57. *Boyle v. Mahanoy City*, 187 Pa. 1, 40 Atl. 1093 (1898).

58. *Besson v. Southard*, 10 N. Y. 236 (1851).

59. *Schattgen v. Holnback*, 149 Ill. 646, 652, 36 N. E. 969 (1894).

The question what facts are sufficient to constitute probable cause is an unmixed question of law. Where the facts are disputed it must be left to the jury to determine what the facts are; but the court should instruct what facts amount to probable cause and what do not. *Matson v. Michael*, 81 Kan. 360, 105 Pac. 537, L. R. A. 1915 D 1 (1909).

In an action for malicious prosecution evidence of a conviction is conclusive evidence of probable cause although the conviction was reversed on appeal unless the conviction was

obtained by fraud. The theory of the courts is that the result of a full hearing before the trial court should foreclose the question. *Haddad v. Chesapeake & O. R. Co.*, W. Va. 88 S. E. 1038, L. R. A. 1916 F 192 (1916).

60. 1 *Chamberlayne*. Evidence, §§ 128-132.

61. *Edes v. Boardman*, 58 N. H., 580 (1879).

62. *Hamilton v. Ins. Co.*, 136 U. S. 242, 255, 10 Sup. 945 (1889).

63. *Shaw v. Pope*, 80 Conn. 206, 67 Atl. 495 (1907).

64. *Ellis v. Littlefield*, (Tex. Civ. App. 1906) 93 S. W. 171.

65. *Bedenbaugh v. Southern R'y Co.*, 3 C. 1, 48 S. E. 53 (1904).

66. *Winchell v. Town of Camillus*, 95 N. Y. Sup. 688, 109 App. Div. 341 (1905).

67. *Holm v. Coleman*, 89 Wis. 233 (1895).

68. *Teesdale v. Bennett*, (Wis. 1904) 101 N. W. 688.

69. *Rochester & P. Coal & Iron Co. v. Flint, Eddy & Co.*, 84 N. Y. Supp. 269 (1903).

ment depends on collateral facts⁷⁰ or where the language is ambiguous⁷¹ or uncertain in any way.

§ 58. **Construction of Oral Contracts.**⁷²—By a parity of reasoning when the terms of an oral contract are undisputed its construction and effect are to be determined by the court as a matter of law.⁷³ But where its interpretation depends on collateral facts which are disputed the court will leave the construction to the jury conditioned on their findings as to the collateral facts.⁷⁴

§ 59. **Demurrers to Evidence.**⁷⁵—A demurrer to evidence is an effort to ascertain the rule of law applicable to the facts, admitting the facts proved,⁷⁶ and has been practically rendered obsolete by the more convenient expedient of moving to direct a verdict. The latter course has the advantage of permitting the party who makes the motion to introduce further evidence if his motion is overruled while the party who demurs is precluded from putting in new evidence.⁷⁷ The party against whom such a motion is made is entitled to the most favorable inferences deducible in his favor from the evidence and the pleadings.⁷⁸

The English rule required the demurring party to state exactly what he admitted,⁷⁹ while in this country this rule has not been generally enforced,⁸⁰ but the party against whom the demurrer is taken has a right to have every inference taken in his favor.⁸¹ A demurrer to evidence may be taken before a judge sitting without a jury.⁸²

§ 60. **Certainty of Law; Rulings on Facts.**⁸³—In assuming the right of applying the rule of law to the facts when nothing remains as to them but to find their legal effect, judges have realized that only in this way can certainty in the rules of law be acquired and maintained. Where a given state of constituent facts is measured by a rule of law and the result is announced in the reports, it amounts *pro tanto* to a construction of the law, in terms of fact. If this process were left to the variant action of successive juries nothing but a very undesirable uncertainty, vagueness and confusion could result. Where this is necessary by reason of the circumstance that some disputed proposition of

70. *West v. Smith*, 101 U. S. 263, 270 (1879).

71. *Rankin v. Fidelity Ins., etc., Co.* 189 U. S. 242, 23 Sup. 553 (1903).

72. 1 *Chamberlayne*, Evidence, §§ 136-138.

73. *Spragins v. White*, 108 N. C. 449 (1891).

74. *Nash v. Classen*, 163 Ill. 409, 45 N. E. 277 (1896).

75. 1 *Chamberlayne*, Evidence, §§ 139-145.

76. *Golden v. Knowles*, 120 Mass. 336 (1876); *Colegrove v. New York, etc., R'y Co.*, 20 N. Y. 492 (1859).

77. *Woldert Grocery Co. v. Veltman*, (Tex. Civ. App. 1904) 83 S. W. 224.

78. *Konigsberg v. Davis*, 108 N. Y. S. 595, 57 Misc. Rep. 630 (1908).

79. *Gibson v. Hunter*, 2 H. Bl. 187 (1793).

80. See *Skinner Mfg. Co. v. Wright*, (Fla. 1906) 41 So. 28.

81. On a demurrer to evidence the evidence is to be given full belief and should be submitted to the jury where the allegations of the plaintiff's pleadings are supported by competent evidence. *Maryland Casualty Co. v. Cherryville Gas, etc., Co.*, 99 Kan. 563, 162 Pac. 313, L. R. A. 1917 N. C. 487 (1917).

82. *Gerock v. Western Union Telegraph Co.*, (N. C. 1906) 54 S. E. 782.

83. 1 *Chamberlayne*, Evidence, §§ 145-150.

fact is to be determined, the mischief must, possibly, be endured. But where all the facts are before the court, it realizes the great social advantages of deciding for itself as to what is correct legal reasoning.

This is often done by announcing where the juries have decided for a series of verdicts that certain acts do or do not constitute negligence that there is a presumption of fact as to it which binds subsequent juries. The court may also exercise its powers by ruling after hearing the evidence or the statement of counsel as to what he expects to prove that there is no evidence for the jury of the negligence or other liability claimed.⁸⁴

§ 61. *Trial by Inspection.*⁸⁵—The determination of a plea of *nul tiel record* is one of a class of issues of fact, determined by the presiding judge by his own perception in much the same way that he needs no evidence to decide on an issue of direct contempt. At common law, these were grouped under the general title of trial by inspection. Under this form of trial the nonage of an infant, whether a party alleged to be dead was in fact alive, issues of idiocy, mayhem, or the like were decided by the judge. Early law points to the conclusion that trial by inspection antedates the more modern form of trial by jury.⁸⁶ So far as it applies to determination of a constituent fact, e.g., whether certain pieces of wood submitted to inspection were "chips" or "shingles" it is probably no longer permissible. A close approximation to the finding of a fact by the court upon inspection is furnished where the judge decides from the examination of a document as to whether it is sealed or not sealed.

So an issue as to whether a certain record exists "*nul tiel record*" is determined by the judge looking at it.⁸⁷ However, a judgment of a sister State in this country may be proved otherwise than by inspection.⁸⁸ The existence of a foreign law is a question of fact⁸⁹ and it is still an open question whether evidence as to it should be presented to the judge or to the jury.⁹⁰ It may be proved through skilled witnesses.⁹¹ Where the foreign law is in written form the province of the judge is somewhat broader than when it is not.

The court will as far as possible require that the document itself be produced when the law is in written form⁹² and may presume certain things as that the rate of interest in a foreign country is statutory although the better practice is to make no assumption in regard to it.

84. "It frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which the line must run." Per Hammond, J., in *Martell v. White*, 185 Mass. 255, 258 (1904).

85. 1 Chamberlayne, Evidence, §§ 151-162.

86. Thayer, Preliminary Treatise, 19-24.

87. *Adams v. Betz*, 1 Watts 425, 427 (1833).

88. *Mills v. Bartlett*, 179 Mass. 76, 61 N. E. (1833).

89. *Cook v. Bartlett*, 179 Mass. 76, 61 N. E. 266 (1901).

90. *Ottawa v. Perkins*, 94 U. S. 260 (1875); by judge. *Hancock v. Western Union Tel. Co.*, (N. C. 1905) 49 S. E. 852; by jury.

91. *Mexican N. R. Co. v. Slater*, 115 Fed. 593, 606, 53 C. C. A. 239 (1902).

92. *McDeed v. McDeed*, 67 Ill. 545 (1873).

CHAPTER IV.

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§ 62. **Court and Jury; Court.**¹— Before proceeding to consider in some detail the respective functions of the court and jury, it may be of advantage to take a brief survey of the general constitution and relations of the two branches of the mixed tribunal so familiar to the English law. The central figure of the courtroom is unquestionably the judge. The office, and, much more frequently than not, the individual, are hedged about with a dignity based upon varied and highly important considerations. This is due not alone to the great antiquity of the office of judge and to the universal social respect in which, wherever worthily exercised, the office has uniformly been held. The title of judge is, indeed, venerable with age and revered for the wisdom with which the age-enduring traditions of the past have enriched it. Compared with the institution of judge, that of the jury is extremely recent.

§ 63. **Functions of the Judicial Office.**²— In the machinery of judicial procedure, to which reference will be more fully made, the law of evidence has an especial place—intervening in operation between the establishment of issues of fact by means of the rules of procedure as to pleading, and the exercise of the reasoning faculty in the act of judging or rendering a verdict upon the facts which it is the province of evidence to supply. But beside having an appropriate field in the procedure of a trial, the admissions and rejections of

1. 1 Chamberlayne, Evidence, § 163.

2. 1 Chamberlayne, Evidence, § 164.

evidence, the form which it is compelled to assume, the limitations upon its use or effect, are being constantly modified and, in the course of a trial, controlled by rules imported from other branches of procedure.

This blending of the rules of evidence with those of substantive law or other branches of procedure is rendered easy of occurrence and difficult of disassociation by reason of the fact that knowledge and enforcement of all rules of substantive law, as well as those of procedure, are, together with the task of administration, centered in the same person — the presiding judge.

A Necessary Arrangement.— This multiplicity of function on the part of the presiding judge could at no time well be avoided.

A Palpable Confusion.— It has proved easy for a presiding judge, under the confusing conditions of a *nisi prius* trial to fail to distinguish or, indeed, greatly to concern himself as to what was the particular branch of procedure under which he was exercising a power which he clearly was entitled to use; or whether, indeed, he was dealing with procedure at all, rather than, in reality, announcing or applying a rule of substantive law, or exercising his power of administration.

But the common statement that evidence is not admissible for a given purpose does not specify whether the exclusion is made because the fact which the evidence tends to prove (a) is not material to the claim or defense relied on, (b) is not relevant under the pleadings, (c) is not a probative or constituent fact, (d) is calculated to mislead or confuse the jury, or unduly protract the trial.

For convenience, the functions of the court may be divided into those which are (1) *judicial*, i.e., involve the use of judgment; (2) *administrative*, i.e., imply the use of discretion; (3) those which are *executive*, i.e., require the exercise of what may be called the "police powers" of the court.

§ 64. [Functions of the Judicial Office]; Judicial.³— The presiding judge has not only the duty of announcing the substantive law of which he is said to have judicial knowledge, and which will be more fully considered later, in connection with that subject; he also is charged with the duty of applying the rules of procedure.

§ 65. [Functions of the Judicial Office]; Procedure Defined.⁴— Properly considered, procedure relates, not to the remedy, but to the process by which the remedy is made available. The law of procedure governs the process of litigation.⁵

§ 66. [Functions of the Judicial Office]; (1) Rights Relating to Matters of Procedure.⁶— The substantive rights of the parties may well extend to the observance of certain methods of procedure. Indeed, the rights to the observance of

3. 1 Chamberlayne, Evidence, § 166.

4. 1 Chamberlayne, Evidence, §§ 166, 167.

5. The Supreme Court of the United States defines procedure to include "Whatever is em-

braced by the three technical terms, pleading, evidence and practice." *Kring v. Missouri*, 107 U. S. 221, 231.

6. 1 Chamberlayne, Evidence, § 168.

an established procedure are the most ancient of which we know anything in Teutonic law. Historically, procedure antedated substantive law. In the more formal jurisprudence of early days, procedure was, in itself, the test of truth. Facts were "proved," not by any appeal to reason, but by carrying through without variation certain established *formulae*, known to the judges — noticing the result and acting accordingly.

§ 67. [Functions of the Judicial Office]; (2) **Substantive Law May Prescribe the Remedy.**⁷—As the right to the observance of a rule of procedure may be a matter of substantive right, so the remedy itself may be, and frequently is, prescribed by the substantive law. Thus, the punishment for crimes, the damages awarded upon the violation of a right or the infraction of a duty are all clearly part of the remedy. It is equally plain that such remedies are prescribed by the substantive law.

§ 68. [Functions of the Judicial Office]; **Verbal Metabolism.**⁸—This verbal metabolism between the phraseology of the substantive law and that of procedure by which the rules of positive law are made to appear as if they were part of the separate and distinct branch of law denominated procedure, takes place, most frequently, in practical judicial administration in three ways:

1. *Exclusive Mode of Proof.*—The first instance of this verbal interchangeability of a rule of substantive law with one of procedural law is furnished where an exclusive mode of proof is, in reality, a component element of the right or liability prescribed by substantive law. Thus, if contracts of a certain nature can, under the rule of substantive law, be proved only by a writing, the evidentiary requirement practically adds an additional condition, under which alone a right to enforce such a contract will arise.

2. *Conclusive Presumptions.*—A second paraphrasing or interchangeability of substantive for procedural rules is furnished where a conclusive effect is given to a particular fact in a given connection, irrespective of probative force; e.g., where a certain evidentiary fact is the equivalent of and may be substituted for another. A conclusive presumption, as it is called, states in substance, the equivalence in legal effect between two facts. The form of expression is that of procedural law; the reality is a proposition in substantive law. For example a child under seven is said to be conclusively presumed to be incapable of forming a criminal intent. Of this the only rational meaning can be that the law of persons provides that infants under this age shall not be criminally punished for offenses of which intent is an essential element.

3. *Statute of Limitations.*—The limitation on the right to bring an action — a specimen of procedural law — is practically equivalent to the loss of prescription of the right itself by lapse of time.

§ 69. [Functions of the Judicial Office]; **Distinction Not Important.**⁹—It

7. 1 Chamberlayne, Evidence, § 169.

8. 1 Chamberlayne, Evidence, § 171.

9. 1 Chamberlayne, Evidence, § 170.

would thus appear that the distinction between substantive and procedural law is one not only of but little consequence; it is one which is principally based, as, perhaps, the historical evolution of substantive law from forms of rigid procedure might in itself suffice to show, on a mere difference in form of statement. The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself.

In reality, the true distinction for the purpose of the law of evidence, the correct line of radical cleavage, is not between *rules* as announced in substantive law and similar and often interchangeable rules formulated as part of the law of procedure; but is, on the contrary, between rules of law, substantive or procedural, on the one hand, and the principles of rational judicial administration on the other.

§ 70. [Functions of the Judicial Office]; Promote Justice.¹⁰—Equally within the judicial function of the court with the enforcement of law, and far transcending it in social importance is the promotion and furtherance of justice. This is the field of judicial administration. The primary mandate to the judge is to promote justice. But society is not only interested in the doing of abstract individual justice. It is also essential to the objects which it has in view that rights and duties should be certain, that things once done in a given way should continue to be done in that way. The taking of judicial action in a particular way creates, to a certain extent, a right on the part of the litigant and a corresponding obligation on the judge to do the same thing in a similar case. Thus arises a rule, a law.

For this uniformity, created by its legal rules, society, however, is forced to pay a heavy price in terms of justice. This is inevitable; but it should be recognized. As the objective and subjective conditions of no two cases are, it may be anticipated, precisely similar, applying a rule from a case to which it was perhaps ideally accurate to another case can only be done by the disregard of certain of the attendant features of the actual situation in the latter case. The more general the rule, the more rigidly it is enforced, the greater must be the number, variety and importance of the elements present in the situation before him which the judge is forced to disregard.

A further price is paid in terms of popular respect. Truth is usually in advance of public opinion; public opinion is, as a rule, in advance of the law. The standards of what is just and even of what is socially expedient are not only in a state of constant flux but in one of incessant sublimation. Those held by any particular epoch are, as a rule, mentally and morally in advance of those used by that which has preceded it. The law, in proportion as it presents the advantage of fixity and uniformity, tends *pari passu* to exhibit the

10. 1 Chamberlayne, Evidence, § 172.

evils of undue conservatism. Law almost necessarily lingers behind the ethical standards of the age in which it is being applied. It proclaims the views of a previous age.

A *more disguised* but still very substantial price is paid by society in the prevalence, in the body of law, of the trivial, the false and the formal, the untrue estimate of real values which is not only in practice detrimental to the cause of justice, but powerfully operates to impair the instinct for justice itself which is the very crown of the judicial office. Formalism dies hard; it is kept alive by technicality of which the essential element is the rigidity of legal requirement.

§ 71. [Functions of the Judicial Office]; Apply Practice.¹¹—The presiding justice is charged not only with the function of enforcing the rules of law and promoting justice; he has also the duty and function of announcing and applying to matters before him the judicial practice, local or general, which prevails in the jurisdiction of his forum. In connection with the field of "Evidence," "Practice" may be defined as that portion of the field of administration which is covered by a custom or usage.

The *right* of a party, for example, to cross-examine his opponent's witnesses, is a matter of procedural law. The *scope* of such an examination at any particular stage of the trial is largely a matter of administration, controlled and conditioned by the fact that reason must be exercised. The order in which the examination of the adversary's witnesses shall be conducted is controlled, unless the judge actively intervenes, by a custom.

A *rule of court* is improperly spoken of as a rule of *practice*. When passed under authority of law a rule of court is one of procedural law.

§ 72. [Functions of the Judicial Office]; Administrative.¹²—"The judicial office is really one of administration." So far as it ceases to be administrative, it ceases to be judicial. Undoubtedly the supreme function of the judicial office is precisely that of administration. The function of enforcing law is governed by rules; the function of administration is guided and governed by the fundamental nature of the judicial office itself. In other words, administration is that portion of procedure which is not governed by a rule of law.

§ 73. [Functions of the Judicial Office]; Field of Administration.¹³—The general field of administration and the force and effect which shall be wisely accorded it, as contrasted with law, procedural or substantive, is determined in any particular connected by the inherent nature of administration itself. An infinite series of minute details, a nice adjustment of a principle to a number of conflicting phenomena requiring the constant exercise of judgment, the choice and selection of means to an end, cannot well be made the subject of a rule of law. This is the distinctive field of administration.

11. 1 Chamberlayne, Evidence, § 173.

13. 1 Chamberlayne, Evidence, § 175.

12. 1 Chamberlayne, Evidence, § 174.

§ 74. [Functions of the Judicial Office]; Reason Characteristic of Administration.¹⁴—The characteristic feature of that portion of procedure which we shall term administration, is its constant employment of reason and judgment rather than the imposition of a command to do things in a particular way. The test and guide of sound administration is the exercise of the reasoning faculty.

§ 75. [Functions of the Judicial Office]; "Discretion."¹⁵—It is commonly said that matters of procedure in which there is no definite rule are those of "judicial discretion." No especial objection exists to the use of the phrase other than that it appears misleading by a suggestion of arbitrary and irresponsible action on the part of the presiding judge. This by no means, in fact, exists. As Lord Mansfield says:¹⁶ "Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular."

Of discretion in the sense of purely arbitrary power to deal with the rights of litigants it may be truly said that no such right exists in the English law of evidence.¹⁷

Action of appellate courts as to matters of discretion.—It may fairly be observed that the action of many appellate courts in this respect is such as not only to add enormously to their own labors, but also to create a serious congestion of judicial business through repeated new trials and a consequent practical denial of justice. In matters properly of administration or discretion reversal should properly occur only where error in law has been committed.

Abuse of discretion, it would thus appear, is its unreasonable¹⁸ or otherwise illegal,¹⁹ use. This is commonly spoken of as "abuse" of discretion, it being said that the action of the trial judge on a matter within his discretion will not be reversed except in the event of its abuse,²⁰—a phrase which does

14. 1 Chamberlayne, Evidence, § 176.

16. R. v. Wilkes, 4 Burr, 2527, 2539 (1770).

15. 1 Chamberlayne, Evidence, §§ 177, 178.

17. *New Jersey*.—Sea Isle City Imp. Co. v. Assessors of Taxes of Borough of Sea Isle City, 61 N. J. Law 476, 39 Atl. 1063, 1064 (1898).

Discretion in equity is, normally, quite a different matter from the exercise of administrative powers at common law. The jurisdiction of equity was a prerogative one; many of its remedies were not obtainable as of right. Much, in most cases, depended on the extent to which certain facts affected the mind and conscience of a particular judge. The substantive law relating to equity procedure made the discretionary action of a trial judge reviewable in an appellate chancery tribunal. Absence of the jury, enabling the appellate court in equity to enter the final

order which the trial judge should have made, removes the hardship and delay of justice which attend the attempt, undertaken in several jurisdictions, to establish the same rule at law. It follows that judicial discretion, in equity cases, is not arbitrary or capricious dependent upon the mere pleasure of the judge but is a "sound and reasonable discretion which governs itself, as far as it may, by general rules and principles." *Patten v. Stewart*, 24 Ind. 332 (1865) (rescission).

18. *McBride v. McBride*, (Iowa 1909) 120 N. W. 709; *Freasier v. Harrison*, (Mo. App. 1909) 118 S. W. 108.

19. *Connecticut*.—*McKone v. Schott*, 82 Conn. 70, 72 Atl. 570 (1909).

Florida.—*Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28 (1908).

20. *Kansas*.—*Hackett v. Turner*, 19 Kan.

not seem essentially modified in meaning by the addition of adjectives such as "gross,"²¹ "wanton" or the like.²²

"All reasonable intendments must be made in favor of the acts of officials who are under obligations to perform their duties correctly, so long as they appear to be acting in good faith."²³ It has even been suggested that where the police powers have alone been exercised, by the court, the propriety of the trial judge's action will not be revised.²⁴

§ 76. [Functions of the Judicial Office]; Absence of Judge from Courtroom.²⁵—The presiding judge may, in his administrative discretion, leave the bench when so disposed.

A purely temporary absence of the judge from the courtroom will not be deemed error.²⁶

On the other hand, as much prejudice may be caused to a party by the uncontrolled action of his adversary during a prolonged absence of the judge, reversible error may be committed in leaving the courtroom.²⁷

§ 77. [Functions of the Judicial Office]; Adjournments.²⁸—The court may grant adjournments if justice apparently requires it, but he is not required to defer justice to other suitors because, in a case on trial, a party has failed to present such a case as with due diligence he might and should have done.²⁹

Where, however, surprise on a material point³⁰ has been caused to a party as by the taking of a sound technical objection which was not fairly to have been anticipated,³¹ or an unexpected demand for available proof arises,³² an adjournment, upon suitable terms,³³ may reasonably be conceded.

527 (1878) (amendments; continuances; costs).

21. *Murphy v. Southern Pac. Co.*, (Nev. 1909) 101 Pac. 322.

22. *Maryland*.—*Consol. Gas, etc., Co. v. State*, 100 Md. 186, 72 Atl. 651 (1909) (arbitrary).

Massachusetts.—*Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955 (1909) (manifestly unfounded).

23. *Rio Grande County Com'rs v. Lewis*, 28 Colo. 378, 65 Pac. 51 (1900) [citing *Smith v. Board*, 10 Colo. 17 (1887)].

The fact of abuse must be affirmatively established by the objecting party. *Waldron v. First Nat. Bank*, 60 Neb. 245, 82 N. W. 856 (1900); *Brenzinger v. American Exch. Bank*, 19 Ohio Cir. Ct. R. 536, 10 O. C. D. 775 (1900).

24. *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797 (1896).

25. 1 Chamberlayne. Evidence, § 179

26. *Chicago City Ry. Co. v. Creech*, 207 Ill. 400, 69 N. E. 919 (1904).

27. *Wells v. O'Hare*, 209 Ill. 627, 70 N. E. 1056 (1904). [Judgment reversed, 110 Ill. App. 7 (1903).]

28. 1 Chamberlayne, Evidence, § 180.

29. The court is not bound to suspend to enable a party to procure additional evidence. *Zipperer v. City of Savannah*, 128 Ga. 135, 57 S. E. 311 (1907); *Black v. Sherry*, 87 N. Y. Supp. 166, 43 Misc. Rep. 342 (1904); *Sheedy v. City of Chicago*, 221 Ill. 111, 77 N. E. 539 (1906) (Measure sewer); or to get a witness whom he has neglected to summon. *Kozlowski v. City of Chicago*, 113 Ill. App. 515 (1904); *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209 (1905).

30. *Nieberg v. Greenberg*, 91 N. Y. Supp. 83 (1904).

31. *Reiss v. Pfeiffer*, 117 N. Y. App. Div. 880, 103 N. Y. Suppl. 478 (1907)

32. *Heyman v. Singer*, 99 N. Y. Supp. 942, 51 Misc. Rep. 18 (1906).

33. *Poland v. Minshall*, 96 N. Y. Supp. 500 (1905) (judgment of costs).

An unreasonable refusal to adjourn may be treated as prejudicial error.³⁴ On the other hand, the court may proceed to trial *ex parte* where a case is reached in its order,³⁵ and no request for adjournment is made or such a motion has been overruled. He may even proceed *ex parte* where the attorneys of the moving party upon the refusal of their motion to adjourn, immediately withdraw from the case.³⁶

§ 78. [Functions of the Judicial Office]; Compelling Consistency in Parties.— Parties to a suit ought to be consistent and not play fast and loose with the court. Where a defendant objects to a rule of damages laid down by the court, and later accepts the court's theory and asks for rulings upon that very theory and the court does instruct upon that theory the party must be held to have abandoned his first theory and accepted the theory of the court.³⁷

§ 79. [Functions of Judicial Office]; Exclusion of Persons from the Courtroom.³⁸ — The presiding justice may exclude from the courtroom any persons not directly concerned in the particular trial which is in progress, except where the constitution guarantees a public trial.³⁹

§ 80. [Functions of Judicial Office]; Grounds for Admitting Public.⁴⁰ — As a rule, a portion of the public, suited to the capacity of the courtroom, will be admitted by the special or standing order of the judge.

A valuable educational influence tending toward interest in and respect for public justice is thereby created. The correction of judicial abuses, loyalty to good administration and general respect for law and its enforcement, are made personal to the citizen, and greatly promoted by examination and discussion.

The power for good in this connection, is perhaps most dramatically revealed in the abuses which have, as an almost invariable rule, attended the exercise of judicial administration through tribunals whose proceedings have been held in secret. Not only is publicity in judicial proceedings helpful in making the influence of legal administration powerful and personal through the community; it is an important guarantee for truth, as it is elicited from witnesses, in civil or criminal cases.

§ 81. [Functions of Judicial Office]; Persistence of Conditions.⁴¹ — The existence and nature of the subtle, intangible and yet powerful emotional disturbances which may be called the psychic atmosphere of a trial, are carefully to be considered and dealt with by the wise practitioner, and it is no small advantage of the public trial of causes that a practitioner may thus gauge the

34. *Heyman v. Singer*, 99 N. Y. S. 942, 51 Misc. Rep. 18 (1906).

35. *Linderman v. Nolan*, 16 Okl. 352, 83 Pac. 796 (1905).

36. *McInnes v. Sutton*, 35 Wash. 384, 77 Pac. 736 (1904).

37. *Ottumwa v. Nicholson*, 161 Iowa 473,

143 N. W. 439, L. R. A. 1916 E. 983 (1913).

38. 1 Chamberlayne, Evidence, § 182.

39. *State v. Keeler*, Mont. 156 Pac. 1080, L. R. A. 1916 472 (1916).

40. 1 Chamberlayne, Evidence, § 183.

41. 1 Chamberlayne, Evidence, § 184.

mental attitude of the tribunal in approaching the consideration of his case and be able to judge as to the precise nature of the task before him.⁴²

§ 82. [Functions of Judicial Office]; **Furnish Proof or Contradiction.**⁴³— The presence of the public in the courtroom and, to a still wider and more impressive extent, the publication in the newspaper press of judicial proceedings, is a powerful agency in bringing to the attention of persons having facts in their possession relating to a matter on trial the knowledge that they may be helpful to the cause of justice.⁴⁴

§ 83. [Functions of Judicial Office]; **Grounds for Exclusion.**⁴⁵— In discharging his administrative power in relation to the admission of the public to the courtroom, very different considerations may well be felt to apply to those who are attending on *business* in the courtroom as compared with those whose position is that of mere *spectators*.

In the case of persons having no direct connection with the business before the court, it may frequently seem to a presiding judge that his administrative control of the courtroom will be more rationally exercised by excluding their personal presence from it— all legitimate social interests being amply conserved by fair reports of the newspapers of daily judicial proceedings and temperate editorial comments upon finished cases, the interests of justice being secured in this connection by a correction by the judge of any abuses.

Fear of Violence.— Where the judge apprehends danger of disorderly proceedings by the spectators, or, the exercise of undue and improper influence on the jury, he may properly exclude from the courtroom all persons who have no direct connection with the proceedings.⁴⁶

Protect Public Morals.— Unmoral or immoral cases, especially those relating to sexual offenses or perversions, are constantly arising for trial and obviously tend to excite and gratify the morbid sensationalism of the lovers of moral filth at the expense, in all cases, of public morals and social sanity; and, in many cases, of great mental anguish to sensitive witnesses or parties. The judge, as *custos morum*, may reasonably consider that the assemblage over which he directly presides should be rather held for the dispatch of public business

42. *State v. Brooks*, 92 Mo. 542, 573 (1887); *Garnett v. Ferrand*, 6 B. & C. 611, 626 (1827). "The public had a right to be present, as in other courts." *Collier v. Hicks*, 2 B. & Ad. 663, 668 (1831), per Tenterder, C. J. "We are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed, have a right to be present for the

purpose of hearing what is going on." *Daubney v. Cooper*, 10 B. & C. 237, 240 (1829).

43. 1 Chamberlayne, Evidence, § 185.

44. A jeweler, reading in the papers of a perjured testimony as to when he did certain engraving on jewelry, attended and rendered valuable assistance in exposing the deceit. *Smyth v. Smyth*, Woodley's Celebrated Trials, 1, 115, 140, 144 (1853).

45. 1 Chamberlayne, Evidence, § 186.

46. *Stone v. People*, 3 Ill. 326, 338 (1840). *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849 (1887).

than composed of persons met for diversion — innocent or prurient. This power may however be controlled by a constitutional provision guaranteeing a public trial.⁴⁷

Declaratory statutes have been passed in many states making it the duty of the judge to exclude the public from cases of a lascivious nature⁴⁸ which may however be void when the state constitution contains a guarantee of a public trial.⁴⁹

§ 84. [Functions of Judicial Office]; *Adjournments to Avoid Unwise Publicity*, etc.⁵⁰—An alternative administrative expedient for the purpose of avoiding unwise publicity is to keep the courtroom open for the general dispatch of public business, while withdrawing a particular case, presenting exceptional circumstances, from idle or morbid curiosity or the other evils to which reference has been made, and hearing it privately in some other place.⁵¹

Other causes for Adjournments.—Adjournments may be made to places other than the courtroom, for causes entirely apart from protection of the public morals. The adjournment may, for example, be to the house of a sick witness⁵² or party.⁵³

§ 85. [Functions of Judicial Office]; *Separation of Witnesses*.⁵⁴—It is within the administrative function of the presiding justice to order that certain witnesses be excluded from the courtroom until they or other witnesses, whether called by the party proposing the order or by his opponent,⁵⁵ shall give their testimony.⁵⁶

Such an order may go further and direct that one witness be kept apart from the others; or that each witness shall have been kept by himself until after he has testified. When falsehood or bad faith is to be prevented or detected the expedient is of obvious value in that it permits effective inquiry as to subsidiary matters difficult to cover by a previous agreement between the witnesses. It is not, however, essential, in order that a separation should be or-

47. Where the constitution guarantees an accused a public trial it is error to exclude from the court room all persons except those then in it even in a rape case where the order is made in the interest of decency. The defendant must protect his rights by objecting to the order at the time. *State v. Keeler*, Mont. 156 Pac. 1080, L. R. A. 1916 E 472 (1916).

48. Colo. C. C. P. 1891, § 427; Ga. Code, 1895, § 5296; Mich. Comp. L. 1897, § 11873; Mich. Comp. L. 1897, § 11852; Utah Rev. St. 1898, § 696; Wis. Stats. 1898, § 4789.

49. *People v. Murray*, 89 Mich. 276, 50 N. W. 95 (1891); *People v. Yeager*, 113 Mich. 228, 71 N. W. 491 (1897).

51. *Reed v. State*, 147 Ind. 41, 46 N. E. 135 (1897); *Le Grange v. Ward*, 11 Ohio 257 (1842); *Mohon v. Harkreader*, 18 Kan. 383

(1877) at lawyer's office; *Bates v. Sabin*, 64 Vt. 511, 514, 24 Atl. 1013 (1892) at his own home.

50. 1 Chamberlayne, Evidence, § 187.

52. *Sutton v. Snohormish*, 11 Wash. 24, 39 Pac. 293 (1895).

53. *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975 (1898).

54. 1 Chamberlayne, Evidence, § 188, 189.

55. *State v. Zellers*, 7 N. J. L. 220, 224 (1824) (defendant's witnesses).

56. *Alabama*.—*McClellan v. State*, 117 Ala. 140, 23 So. 653 (1897); *McLean v. State*, 16 Ala. (N. S.) 672 (1849).

Massachusetts.—*Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491 (1830).

New York.—*People v. Green*, 1 Park Cr. R. (N. Y.) 11 (1845).

dered, that fraudulent collusion should be charged. Separation is further useful at times in preventing a certain unintentional and even unconscious collusion between interested persons who hear each other's story when testifying.⁵⁷

Persons testifying to the same transaction almost invariably, and without active bad faith, seek to harmonize their story. It apparently seems to them to strengthen it and give to each the moral support of all.

§ 86. [Functions of Judicial Office]; Order Not Matter of right.⁵⁸—It follows, for obvious reasons, that the request is usually granted, as a matter of course. This, however, is quite different from saying that the judge, whatever his view of the actual situation, is required to make the order, as has been at times decided,⁵⁹ or intimated.⁶⁰

*The Right to Demand a Separation May be Conferred by Statute.*⁶¹—In trials before Houses of Parliament the practice of granting an order seems to have been invariable.⁶²

Unless the judge's discretion has been abused, the propriety of the exercise of this power to order a separation of witnesses will not be reversed in an appellate court.⁶³

§ 87. [Functions of Judicial Office]; What Constitutes Violation of the Order.⁶⁴—A reasonable construction should be applied to such an order. As the object is to prevent giving of information to the witnesses, a hypothetical question which gives no information is not objectionable.⁶⁵ A counsel is at liberty, unless otherwise ordered, to consult with one of his own witnesses, and tell him while the latter is under the rule, what one of those called by his opponent has stated in the course of his testimony,⁶⁶ though it has been required that the consultation take place in the presence of the court⁶⁷ or one of its officers,⁶⁸ or

57. *Louisville, etc., Ry. Co. v. York*, 128 Ala. 305, 30 So. 676 (1900); *State v. Zellers*, 7 N. J. L. 220, 226 (1824); *Rainwater v. Elmore*, 1 Heisk. (Tenn.) 363, 365 (1870); *Fortesque, De Landibus Legum Angliæ*, c. 26 (1470). "The rule is provided merely to prevent the testimony of one witness from influencing the testimony of another." *Cook v. State*, 30 Tex. App. 607 (1892).

58. 1 Chamberlayne, Evidence, § 190.

59. *Georgia*.—*Shaw v. State*, 102 Ga. 660, 29 S. E. 477 (1897).

West Virginia.—*Gregg v. State*, 3 W. Va. 705 (1869).

60. *Wilson v. State*, 52 Ala. 299, 303 (1875) ("rarely if ever" withheld); *Cook v. State*, 11 Ga. 55, 62 (1852) (the prosecution may claim as of right); *Walker v. Com.*, 8 Bush (Ky.) 86, 89, 96 (1871); *R. v. Murphy*, 8 C. & P. 307 (1837) (almost a right).

61. *Nelson v. State*, 2 Swan (Tenn.) 237, 257 (1852).

62. *Taylor v. Lawson*, 3 C. & P. 543 (1828); *Berkeley Peerage Trial*, *Sherwood's Abstract*, 151 (1811).

63. *May v. State*, 94 Ga. 76 (1894); *Nelson v. State*, 2 Swan (Tenn.) 237 (1852); *Powell v. State*, 13 Tex. App. 244 (1882); *Haines v. Terr.*, 3 Wyo. 168 (1887) ("gross abuse").

64. 1 Chamberlayne, Evidence, § 191.

65. *State v. Taylor*, 56 S. C. 360, 34 S. E. 939 (1899) ("if your husband says so" is it true?).

66. *Horne v. Williams*, 12 Ind. 324 (1859); *Allen v. State*, 61 Miss. 627, 629 (1884); *White v. State*, 52 Miss. 216, 224 (1876); *Williams v. State*, 35 Tex. 355 (1872) ("in a proper manner").

67. *Jones v. State*, 3 Tex. Cr. App. 150, 153 (1877).

be expressly permitted in the court's discretion.⁶⁹ The rule is the same as to a party;⁷⁰ whether this privilege applies to other agents assisting in the trial of the cause is more doubtful.⁷¹ Information as to the trial conveyed by the daily journals does not violate such an order.⁷²

§ 88. [Functions of Judicial Office]; Time of Motion for Order.⁷³—The order may properly be requested at any time⁷⁴ after the reading of the pleadings⁷⁵ and the opening address of the counsel,⁷⁶ and before the close of all the evidence; though it has been held inappropriate to make a motion for a separation while affidavits are being read.⁷⁷

§ 89. [Functions of Judicial Office]; By Whom Motion is Made.⁷⁸—The motion may be made by either⁷⁹ or both⁸⁰ parties; the jury may request it;⁸¹ or the judge may make the order, *sua sponte*.⁸²

§ 90. [Functions of Judicial Office]; To Whom the Order Applies.⁸³—The administrative power of the court extends not only to the making of the order, and the details of its enforcement, but as to whom it shall cover.⁸⁴ Not only do attorneys (in the American sense)⁸⁵ and counsel,⁸⁶ form, as a rule, an ex-

68. Brown v. State, 3 Tex. Cr. App. 294, 310 (1877).

69. Kennedy v. State, 19 Tex. Cr. App. 618, 631 (1885).

70. Shaw v. State, 79 Miss. 21, 30 So. 42 (1901); Holt v. State, 9 Tex. Cr. App. 571, 580 (1880) (discretionary with court).

71. Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 814, 12 S. E. 18 (1890).

72. Com. v. Hersey, 2 Allen (Mass.) 173 (1861).

73. 1 Chamberlayne, Evidence, § 192.

74. Southey v. Nash, 7 C. & P. 632 (1837).

The separation may be ordered at the request of a party whose own witnesses have been already examined. Southey v. Nash, 7 C. & P. 632 (1837).

75. Wilson v. State, 52 Ala. 299 (1875); Roberts v. Com., 94 Ky. 499 (1893).

76. Benaway v. Conyne, 3 Chand. (Wis.) 214, 219 (1851).

Little doubt exists that in most jurisdictions, if reasonably requested, separation would be ordered before the opening. Rex v. Murphy, 8 Car. & P. 297 (1837). It may, under certain circumstances, be highly important that the witnesses be not influenced by suggestions conveyed to them by counsel at this stage. It has been held, however, that it is beyond the court's power to separate the witnesses during the opening address. Benaway v. Conyne, 3 Chand. (Wis.) 214 (1851).

77. Penniman v. Hill, 24 Wkly. Rep. 245 (1876) (Hall, V. C.).

78. 1 Chamberlayne, Evidence, § 193.

79. Holder v. U. S., 150 U. S. 91 (1893).

80. State v. Sparrow, 3 Murph. (N. C.) 487 (1819).

81. Earl of Shaftesbury's Trial, 8 How. St. Tr. 759, 778 (1681).

82. Ryan v. Couch, 66 Ala. 244, 248 (1880); Wilson v. State, 52 Ala. 299 (1875).

83. 1 Chamberlayne, Evidence, § 194.

84. Alabama.—Webb v. State, 100 Ala. 47, 52 (1893). See also Strickland v. State, (Ala. 1907) 44 So. 90.

85. State v. Brookshire, 2 Ala. 303 (1841); Wisener v. Manpin, 2 Ba. & (Tenn.) 342, 357 (1872); Powell v. State, 13 Tex. App. 244 (1882); State v. Ward, 61 Vt. 153, 179, 17 Atl. 483 (1888) (not employed on case). This has been said to be a matter of discretion and not as of right. Powell v. State, 13 Tex. App. 244, 252 (1882). An attorney appearing simply as a witness may be granted a similar privilege of remaining, although the other witnesses have been placed under the rule. Mitchell v. State, (Tex. Cr. App. 1908) 114 S. W. 830.

No express exception need be made in the case of an attorney or counsel. It will be implied. Powell v. State, 13 Tex. App. 244 (1882); Gregg v. State, 3 W. Va. 705 (1869). See also to the same effect, Bischoff v. Com., 29 Ky. Law Rep. 770, 96 S. W. 538 (1906).

86. Boatmeyer v. State, 31 Tex. Cr. 473, 20 S. W. 1102 (1893); Powell v. State, 13 Tex. App. 244 (1882); Pomeroy v. Baddeley, R. &

ception to the operation of the order, but the party⁸⁷ and other persons necessary to protect his interest in the management of the trial,⁸⁸ also are permitted to remain in the court room.⁸⁹

Corporations as parties come under the same administrative indulgence. Its officers, e.g., a president,⁹⁰ so far as, in the opinion of the judge,⁹¹ their presence shall be reasonably necessary to protect the interest of the company, will be allowed to remain.

*Court officers,*⁹² *jurors,*⁹³ *and parties,*⁹⁴ are equally privileged to remain.

In criminal cases, the exemption from the order of separation applies also to prosecutors⁹⁵ and defendants.⁹⁶ Public officers,⁹⁷ medical⁹⁸ or other experts, and, indeed, any witness⁹⁹ or class of witnesses may be excepted from the order by express action of the court or agreement of parties.¹ If persons

M. 430 (1826); *Everett v. Lowdham*, 5 Carr & P. 91 (1831).

87. *Seaboard Air-Line Ry. v. Scarborough*, (Fla. 1906) 42 So. 706.

88. *Ryan v. Couch*, 66 Ala. 244, 248 (1880) (father of absent plaintiff).

89. Thus the judge may properly permit a brother of a person accused of crime to remain in the court room and assist in the defense. *May v. State*, 94 Ga. 76 (1894). So also of the wife and daughter of one accused of crime. *State v. Pell*, (Iowa 1909) 119 N. W. 154.

90. *Warden v. Madisonville, H. & E. R. Co.*, 101 S. W. 914, 31 Ky. L. Rep. 234 (1907).

91. *Trotter v. Town of Stayton*, (Ore. 1904) 77 Pac. 395. As between its president and vice-president the corporation may properly be called upon to elect whom it would prefer. *Atlanta Terra Cotta Co. v. Georgia, Ry. & Electric Co.*, 132 Ga. 537, 64 S. E. 563 (1909). A municipal corporation occupies a similar position. Thus, a city recorder may be excluded although it is asked that he be permitted to remain to assist counsel. *Trotter v. Town of Stayton*, (Or. 1904) 77 Pac. 395.

92. *Johnican v. State*, (Tex. Cr.) 48 S. W. 181 (1898) (clerk of court); *State v. Lockwood*, 58 Vt. 378, 3 Atl. 539 (1886) (deputy sheriff).

93. *State v. Vari*, 35 S. C. 175, 14 S. E. 892 (1891).

94. *McIntosh v. McIntosh*, 79 Mich. 198, 203, 44 N. W. 592 (1890).

The marked degree to which parties are exposed to the temptations to perjury and general falsity in testimony which separation seeks to minimize, has not, however, escaped attention. *Salisbury v. Com.*, 79 Ky. 425, 432 (1881); *Wisener v. Maupin*, 2 Baxt.

(Tenn.) 342, 357 (1872). In pursuance of this line of thought it has been held that parties stand on the same position as other witnesses and should be equally subject to exclusion.

Arkansas.—*Randolph v. McCain*, 34 Ark. 696 (1879).

Georgia.—*Tift v. Joens*, 52 Ga. 538, 540, 542 (1874).

Kentucky.—*Salisbury v. Com.*, 79 Ky. 425, 432 (1881).

Tennessee.—*Wisener v. Maupin*, 2 Baxt. 342, 356 (1872).

England.—*Penniman v. Hill*, 24 W. R. 245 (1876).

95. *Coolman v. State*, (Ind. 1904) 72 N. E. 568; *State v. Whitworth*, 196 Mo. 573, 29 S. W. 595 (1894) (father of prosecutrix in rape). But see to the contrary, *Salisbury v. Com.*, 79 Ky. 425, 432 (1881).

96. Of two persons jointly charged with crime, each proposing to testify for himself, neither can be excluded during the examination of the other. *Richards v. State*, 91 Tenn. 723, 30 Am. St. 907 (1892).

97. *Webb v. State*, 100 Ala. 47, 52, 14 So. 865 (1893) (sheriff); *People v. Garnett*, 29 Cal. 622 (1866) (chief of police).

98. *Vance v. State*, 56 Ark. 402, 19 S. W. 1066 (1892) (insanity).

99. *May v. State*, 94 Ga. 76 (1894); *Hinkle v. State*, 94 Ga. 595 (1894); *State v. Whitworth*, (Mo. 1895) 29 S. W. 595; *Cook v. State*, 30 Tex. App. 607 (1892).

1. *Alabama*.—*Hall v. State*, 137 Ala. 44, 34 So. 681 (1902).

California.—*People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673 (1886).

Vermont.—*State v. Hopkins*, 50 Vt. 316, 322, 332 (1877).

reasonably necessary to the orderly conduct of the case are ² not expressly excluded from the scope of the order, but nevertheless remain in court contrary to its terms, the presiding judge may ratify and sanction their action, in this respect, thus placing them in a position equivalent for administrative purposes to a previous exemption.

Such exemption is matter of administration. A party has no right to insist that his expert ³ or other special witnesses, or even the members of his immediate family, ⁴ be allowed to remain.

§ 91. [Functions of Judicial Office]; Enforcement of the Order.⁵—A witness “under the rule” is not, unless specially permitted, at liberty to remain in the courtroom after giving his testimony.⁶ It may be necessary to require his evidence again as a witness at a later stage of the trial; to permit him to hear the testimony of others whom he may be asked to refute is, therefore, within the mischief which separation seeks to prevent. The judge’s order is at times, especially in cases of magnitude, enforced by the sheriff.⁷ The parties may furnish the latter with a list of the witnesses to enable him to see that they withdraw from the courtroom.⁸ But a party is not under obligation to do so.⁹ Where the list is not furnished, or in case of witnesses who for any reason have not been placed on it, it is the duty of each party to see that the witnesses whom he proposes to have sworn do not enter the courtroom before they are called to testify.¹⁰ A more usual course is to require counsel to state to the judge the names of the witnesses to be affected in the order and for the judge to direct the sheriff as to the time at which their appearance will be required in court for the purpose of testifying, and as to the other particulars of the order.¹¹

A common practice is for the judge merely to announce from the bench that certain witnesses are directed to withdraw. The effect of their failure to do so, or of their returning to the courtroom before being called for the purpose of testifying,¹² or of their conversing or consulting with other witnesses or third persons, either while the trial is actually going on or during adjournment,¹³ may be, and usually are also stated to them. It is within the adminis-

2. Shaw v. State, 102, Ga. 660, 29 S. E. 477 (1897) (two witnesses assisting in the prosecution).

3. Roberts v. State, 122 Ala. 47, 25 So. 238 (1898); Atlantic & B. Ry. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482 (1907). State v. Forbes, 111 La. 473, 35 So. 710 (1903).

4. McGuff v. State, 88 Ala. 147, 150, 7 So. 35 (1889); May v. State, 94 Ga. 76 (1894) (brother); Hinkle v. State, 94 Ga. 595, 21 S. E. 595 (1894); Bond v. State, 20 Tex. App. 337 (1896).

5 1 Chamberlayne, Evidence, § 195.

6. Roach v. State, 41 Tex. 261, 263 (1874).

7. Hey v. Com. 32 Gratt. (Va.) 946, 34 Am. R. 799 (1879).

8. Anon., 1 Hill (S. C.) 251 (1833).

9. Anon., 1 Hill (S. C.) 251 (1833).

10. Anon., 1 Hill (S. C.) 251, 254 (1833).

11. Golden v. State, 19 Ark. 590, 598 (1858).

12. Golden v. State, 10 Ark. 590, 598 (1858).

13. Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389 (1895).

trative powers of the court to decline to allow the offending witness to testify,¹⁴ though it is also within his power to receive the evidence.¹⁵

§ 92. [Functions of Judicial Office]; Consequences of Disobedience.¹⁶— Where an express order of separation has been made¹⁷ and a witness, though aware of its terms and that it applies to himself,¹⁸ willfully¹⁹ violates it, by listening to the evidence of the other witness as given in court, either before he has testified or after²⁰ he has himself testified; or mingling with persons who have heard the other witnesses,²¹ he is in contempt of court and ready to be dealt with by the presiding judge as seems just and proper under the particular circumstances of the case.

§ 93. [Functions of Judicial Office]; Party's Relation to Violation.²²— If the disobedience is not only wilful on the part of the witness, but is aided and abetted by a party²³ or his counsel,²⁴ the right and propriety²⁵ of refusing to hear the evidence of the witness is undoubted, and would in many instances be exercised. Where the party is himself without fault in the matter, to exclude a guilty witness is in reality to punish an innocent person,²⁶ or enable one of his witnesses to do so; and at the same time, avoid the possibly unwelcome or irksome task of testifying at all.²⁷

It is, therefore, the practice, i.e., a customary exercise of judicial administration, to receive the testimony of the offending witness, in the absence of facts from which the inference of connivance by the party or his counsel in the misconduct of the witness²⁸ can reasonably be drawn.

§ 94. [Functions of Judicial Office]; Proceedings against offending Witness.²⁹— The witness, in any event, may himself be dealt with by the court, as for a contempt.

14. *Alabama*.— *Sloss-Sheffield Steel & Iron Co. v. Smith*, 40 So. 91 (1905); *Jarvis v. State*, 138 Ala. 17, 34 So. 1025 (1902).

Kentucky.— *Crenshaw v. Gardner*, 25 Ky. Law Rep. 506, 76 S. W. 26 (1903); *Gilbert v. Com.*, 111 Ky. 793, 64 S. W. 846 (1901).

15. *Sharpton v. Augusta & A. Ry. Co.*, 72 S. C. 162, 51 S. E. 553 (1905).

16. 1 *Chamberlayne*, Evidence, § 196.

17. *R. v. Fursey*, 3 State Tr. (N. S.) 548, 564 (1833).

18. A bystander unexpectedly called upon to testify after the making of an order is not excluded from the witness stand by reason of his previous presence in the court room. *Laughlin v. State*, 18 Oh. 99 (1849).

19. An inadvertent violation without connivance by the party is not ground for exclusion. *State v. Sumpter*, 153 Mo. 436, 55 S.

W. 76 (1899); *Clemmons v. Clemmons* (Nebr.) 96 N. W. 404 (1901); *Pile v. State*, 107 Tenn. 532, 64 S. W. 476 (1901).

20. *Sartorius v. State*, 24 Miss. 602 (1852).

21. *Porter v. State*, 2 Ind. 435 (1851).

22. 1 *Chamberlayne*, Evidence, § 197.

23. *Kentucky*.— *Crenshaw v. Gardner*, 76 S. W. 26 (1903).

Virginia.— *Com. v. Brown*, 90 Va. 671, 675, 19 S. E. 447 (1894).

24. *Bird v. State*, 50 Ga. 585, 589 (1874); *Com. v. Crowley*, 168 Mass. 121, 46 N. E. 416 (1897).

25. *Dyer v. Morris*, 4 Mo. 214 (1835); *Trujillo v. Terr.* (N. M. 1892), 30 Pac. 870.

26. *Hubbard v. Hubbard*, 7 Oreg. 42 (1879).

27. *Keith v. Wilson*, 6 Mo. 435, 441 (1840).

28. *Holder v. U. S.*, 150 U. S. 91 (1893).

29. 1 *Chamberlayne*, Evidence, § 198.

Direct Punishment of Conniving Party.— If a party has aided and abetted the offense, he may be treated in like manner.³⁰

The inference of bad faith is still more cogent in case of a party,³¹ and the jury may be asked to consider his conduct in weighing the evidence.³²

§ 95. [Functions of Judicial Office]; *Swearing of Witnesses.*³³— *General Rule.*— Where not regulated by statute the administration of the oaths imposed upon interpreters and other witnesses takes place under the direction of the court. As the sanction of truthfulness which the imposition of an oath seeks to attain, consists in “laying hold of the conscience of the witness and appealing to his sense of accountability,”³⁴ it must be, so far as possible, imposed in a form binding upon his conscience, or such as to arouse his fear of punishment.³⁵ The duty of ascertaining the nature of such an oath devolves upon the judge, as a preliminary finding of fact, on *voir dire*; though he may delegate to a party the duty of eliciting any facts necessary to his contention;³⁶ and, in any event, counsel have the right to bring out by examination conducted by themselves, facts of advantage to their position; the burden of proof being on the party objecting to the competency of the witness.³⁷

§ 96. [Functions of Judicial Office]; *Method of Inquiry.*³⁸— The subject of inquiry, being as to the existence of a particular mental state, belief or fear, may logically be proved by any of the methods employed in proof of mental states. The natural and frequently the only source of information on these particulars is the person himself. His mental attitude may be gathered, (1) directly from his answers as a witness upon *voir dire*, or (2) indirectly from evidence of his declarations as narrated by others.

§ 97. [Functions of Judicial Office]; *Children as Witnesses; Insane Persons.*³⁹— The examination of children as to a belief in future punishment sufficient to make the oath, when administered, of binding effect, is usually conducted by the judge himself,⁴⁰ whose finding will not, as a rule, be revised.⁴¹

Feeble-Minded and Insane Persons.— Feeble-minded and insane persons

30. Hagan v. State, 45 La. Ann. 830 (1893).

31. Laughlin v. State, 18 Oh. 99 (1849).

32. Davenport v. Ogg, 15 Kan. 363 (1875).

33. 1 Chamberlayne, Evidence, §§ 199, 200.

34. Clinton v. State, 33 Oh. St. 27 (per Ashburn J.) (1877).

35. The modern purpose of the oath is to call the attention of the witness to God. Blackburn v. State, 71 Ala. 319 (1882); Curtiss v. Strong, 4 Day (Conn.) 51, 56 (1809); Clinton v. State, 33 Ohio, 27, 33 (1877). Its ancient object was rather to direct the attention of God to the witness.

36. Com. v. Smith, 2 Gray (Mass.) 516

(1854); Gray v. Macallum, 2 Brit. Col. 104 (1892).

37. Smith v. Coffin, 18 Me. 157 (1841); Donnelly v. State, 26 N. J. L. 463, 601 (1857); Den v. Vancleve, 5 N. J. L. 589 (1819); Attorney-Gen. v. Bradlaugh, 14 Q. B. Div. 667 (1885).

38. 1 Chamberlayne, Evidence, § 201.

39. 1 Chamberlayne, Evidence, § 202.

40. State v. Crocker, 65 N. J. L. 410, 47 Atl. 643 (1900).

41. Com. v. Lynes, 142 Mass. 577, 580 (1886).

should be examined as to their understanding of the nature and obligation of an oath in the same manner as is done in the case of children.⁴² It has been doubted whether a difficulty of so permanent a nature might reasonably be overcome by instruction during an adjournment.⁴³

§ 98. [Functions of Judicial Office]; Form of Oath.⁴⁴—No particular form of oath is essential⁴⁵ unless one is prescribed by the religion of the witness.⁴⁶

Telephone administration.—Although the officer administering an oath may be familiar with the voice of the person swearing, the administration of an oath over the telephone is not valid for the purpose.⁴⁷

§ 99. [Functions of Judicial Office]; Executive.⁴⁸—Inherent in the judicial office are certain powers conferred upon the presiding judge and designed to enable him to preserve order, maintain the dignity of his office, to compel and preserve popular respect for the public administration of justice. Such powers may, with apparent propriety, be designated the *executive* or “police” powers of a presiding judge; although it may fairly be objected that the difference between these and the administrative function of the court is but slight. The power of the judge to enforce, by summary proceedings,⁴⁹ by compliance with any order for securing calm deliberation and orderly quiet in the courtroom⁵⁰ is undoubted,⁵¹ subject to the limitation imposed by constitutional or statutory provisions.⁵²

Federal Courts.—The power to punish for contempt is an inherent attribute

42. *Holcomb v. Holcomb*, 28 Conn. 179 (1859); *R. v. Whitehead*, L. R. 1 C. C. 33, 38 (1866); *R. v. Hill*, 2 Den. C. C. 254 (1851).

43. *R. v. Whitehead*, L. R. 1 C. C. R. 33 (1866) (idiot).

44. 1 Chamberlayne, Evidence, § 203.

45. *Miller v. Salomons*, 7 Exch. 475 (1852); *Atcheson v. Everitt*, Cowp. 382 (1776); *Omychund v. Barker*, 1 Atk. 21 (1744). “A Jew is to be sworn on the Book of the Law and with his head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like.” *Miller v. Salomons*, 7 Exch. 535, 558 (per Alderson, B.).

46. *R. v. Pah-Mah-Gay*, 20 Q. B. U. C. 195 (1860).

47. *Sullivan v. First Nat. Bank* (Tex. Civ. App. 1904) 83 S. W. 421.

48. 1 Chamberlayne, Evidence, § 204.

49. Only a breach of order and decorum in the presence of the court in actual session and within its view and hearing can be properly dealt with without notice to show cause. *Reymert v. Smith* (Cal. App. 1907), 90 Pac.

470; *State ex rel. Stewart v. Reid*, 118 La. 827, 43 So. 455 (1907).

50. A summary proceeding, in this connection may mean one where the party offending is not given a trial by jury. *Yoder v. Com.* (Va. 1907), 57 S. E. 581.

51. *Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383 (1904); *State v. Rose* (Kan. 1906), 85 Pac. 803; *Back v. State* (Nebr. 1906), 106 N. W. 787. The primary purpose of such punishment is the vindication of public authority. *Powers v. People*, 114 Ill. App. 323 (1904).

52. *Arkansas*.—*Ford v. State*, 69 Ark. 550, 64 S. W. 879 (1901).

Indiana.—*Mahoney v. State*, 72 N. E. 151 (1904).

North Carolina.—*In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901). While courts do not derive their power to punish for contempt from any statute, it is their duty to conform to a statute which does not abridge this power, but simply points out the manner in which it shall be exercised. *Ex parte Morris*, 28 Ohio Cir. Ct. R. 611 (1906).

of the federal courts, vested in them by Const. U. S. art. 3, § 1, granting to them the judicial power of the nation.⁵³

Protected by Constitution.—The right to prevent the commission of breaches of order in the presence of the judge while sitting at a trial is protected by a judicial power, in the proper exercise of which, the entire community is deeply interested and concerned. Any attempt on the part of the legislature to abridge this right is invalid, as tending to alter the constitutional distribution of power between different branches of government.⁵⁴

§ 100. [Functions of Judicial Office]; Require Order and Decorum.⁵⁵—The court may punish insulting language,⁵⁶ or disorderly conduct⁵⁷ such as carrying weapons⁵⁸ or appearing in court intoxicated⁵⁹ or indulging in objectionable language.⁶⁰ So insults in papers submitted to the court⁶¹ or filed⁶² are punishable. Abuse of the trial court may properly be deemed contrary to the administration of justice⁶³ when used on appeal and so with attacks on the court officers of the lower court.⁶⁴ Writing letters to the court designed to influence his conduct in the pending litigation⁶⁵ or to upbraid him for past conduct⁶⁶ may also be punished, but merely writing to the opposing attorney

53. *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622 (1902).

54. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

55. 1 Chamberlayne, Evidence, §§ 205-212.

56. *State ex rel. Stewart v. Reid*, 118 La. 827, 43 So. 455 (1907). *In re Chartz* (Nev. 1905), 85 Pac. 352.

In a certain case defendant, an attorney of the Supreme Court of Nevada, in a petition for rehearing of a cause in which the Supreme Court had held a statute limiting the hours of labor constitutional, stated that in his opinion the decisions favoring the power of the state to limit the hours of labor on the ground of the police power of the state were all wrong, were written by men who have never performed manual labor, and by politicians and for politics, and that they did not know what they wrote about. Such a statement was regarded as constituting a contempt of Supreme Court, which was not purged by defendant's disavowal of any intent to commit a contempt and by his apology. *In re Chartz* (Nev. 1905) 85 Pac. 352

Davies v. State (Ark. 1905), 84 S. W. 633.

State ex rel. Stewart v. Reid, 118 La. 827, 43 So. 455 (1907) district attorney.

Hill v. Crandall, 52 Ill. 70 (1869).

57. *Holman v. State*, 105 Ind. 513, 5 N. E. 556 (1885); *U. S. v. Patterson*, 26 Fed. 509 (1886).

58. *Sharon v. Hill*, 24 Fed. 726 (1885) (attorney).

59. *Marcum v. Hargis*, 31 Ky. Law. Rep. 1117, 104 S. W. 693 (1907); *Com. v. Clark*, 13 Pa. Co. Ct. 430 (1893).

60. *Indiana*.—*Dodge v. State*, 140 Ind. 284, 39 N. E. 745 (1894).

Iowa.—*Russell v. French*, 67 Iowa 102, 24 N. W. 741 (1885).

North Dakota.—*State v. Crum*, 7 N. D. 299, 74 N. W. 992 (1898).

61. *Lamberson v. Superior Court of Tulare County* (Cal. 1907), 91 Pac. 100.

62. *Lamberson v. Superior Court of Tulare County* (Cal. 1907), 91 Pac. 100; *Sommers v. Torrey*, 5 Paige 54, 28 Am. Dec. 411 (1835); *U. S. v. Church*, 6 Utah 9, 21 Pac. 503, 524 (1889). Where the papers are filed in the ordinary course of the proceedings, it will not be assumed that the attorney filing them acted in bad faith. *Tracy v. State*, 28 Ohio Cir. Ct. R. 453 (1906) (motions).

63. *Sears v. Starbird*, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123 (1888). *In re Thompson*, 46 Kan. 254, 26 Pac. 674 (1891); *In re Dalton*, 46 Kan. 253, 26 Pac. 673 (1891).

64. *In re Breck*, 4 Fed. Cas. No. 1,823 (1876).

65. *State v. Johnson* (Ohio (1908), 83 N. E. 702.

66. *State v. Waugh*, 53 Kan. 688, 37 Pac. 165 (1894); *In re Pryor*, 18 Kan. 72, 26

criticizing the court is not objectionable as it is not calculated to influence the court.⁶⁷

§ 101. [Functions of Judicial Office]; **Compel Obedience to Directions; Administrative Orders.**⁶⁸—The directions of a presiding judge, regarding any matter pertaining to the administration of justice or the use of the judicial machinery by which it is sought to attain it, are to be promptly and unreservedly obeyed. In the event of a refusal, it is within the power and it may become the duty of the judge to enforce his order.

Enforcement of Rights.—Closely analogous to this requirement of obedience to an order of the court relating to the administration of justice, is that which arises where an order is made in favor of one of the parties against the other in vindication of a right previously ascertained to exist;—or provisionally assumed for administrative purposes, as where a preliminary order is made, by way of injunction or otherwise.

Civil Contempts.—Where the order is made in connection with relief granted a party, as part of a right established by him, as where a defendant is ordered to comply specifically with the terms of a contract which he is found to have made, a failure to obey such an order is a civil contempt. In other words, a person who fails or refuses to do something which he has been ordered to do, or does something that he has been ordered not to do, for the benefit of the opposite party to a cause, is guilty of a civil contempt, and the object of the punishment is to coerce the performance of an act remedial in its nature.⁶⁹

Criminal Contempts.—Should it happen, however, that the act which a person is ordered to do is one which affects the due and orderly administration of justice, rather than applies to the rights of the parties, the dignity of the court itself is involved and an entirely different situation, viewed from a moral or social standpoint, is developed. The interests of society demand that such an order should be enforced in its own behalf, i.e., by punishment. Such a contempt is a criminal one. In all cases where such an offense is claimed, an element of wilful intent may well be required.

Advice of Counsel.—Advice of counsel is no defense to a proceeding for contempt of court; although where the party said to be in contempt is a layman and not an officer charged with the enforcement of the law the fact may be considered in mitigation.⁷⁰

Notice Necessary.—In either case the person to be affected by proceedings in contempt must have had notice of the issuance of the order.⁷¹

Am. Rep. 747 (1877); *Matter of Wallace*, 4 Moore P. C. N. S. 140, L. R. 1 P. C. 283, 36 L. J. P. C. 9, 15 Wkly. Rep. 533, 16 Eng. Reprint 269 (1866).

67. *Fellman v. Mercantile Fire & Marine Ins. Co.*, 116 La. 723, 41 So. 49 (1906).

68. 1 Chamberlayne, Evidence, § 213.

69. *Ex parte Clark*, 208 Mo. 121, 106 S. W. 990 (1907).

70. *Coffin v. Burstein*, 74 N. Y. S. 274, 68 App. Div. (1902); *Royal Trust Co. v. Washburn, etc., Ry. Co.* (Wis. 1902), 113 Fed. 531.

71. *State v. McGahey* (N. D. 1903), 97

Impossibility of performance, not caused by the fault of the person in question is an excuse.⁷²

Jurisdiction.—In all proceedings for the enforcement of a judicial order, the fact that the court making the order had jurisdiction is an important preliminary fact to be affirmatively shown.⁷³ If the court has jurisdiction, the order must be obeyed though it may have been improvidently or erroneously granted.⁷⁴

§ 102. [Functions of Judicial Office]; Attorneys.⁷⁵—A practitioner who counsels and advises the commission of an act contrary to the dignity of the court is deservedly deemed guilty of the same offense, as he who follows his advice.⁷⁶ Counsel must at once desist from speaking for a client when ordered by the court to do so.⁷⁷

Advice given in good faith does not, however, subject the attorney to punishment. A lawyer has the right to advise his client as to the validity of an order of court, or of a writ issued under its authority, so far as this affects the client's interests; and his advice to the effect that such order or writ is illegal and void, if given in good faith, will not render him liable for contempt, because of an error in judgment. But he is guilty of contempt if he goes beyond the right to advise in matter of law and, actuated by a spirit of resistance, counsels or conspires with his client or others to disobey an order of court and obstruct its enforcement.⁷⁸

§ 103. [Functions of Judicial Office]; Others Subject to Directions.⁷⁹—The duty to obey the orders of the court extends to corporations and to their

N. W. 865. It has even been held that where disobedience to a decree is not wilful, and does not clearly appear to have arisen from an intent to set at naught or bid defiance thereto, the power to punish for contempt cannot be properly exercised. *Kahlbon v. People*, 101 Ill. App. 567 (1902). A contempt must be wilful, and cannot arise from mere inability. *Moseley v. People*, 101 Ill. App. 564 (1902). If a person has actual knowledge of an order of court, he is liable for the consequences of violating it, although he has not been formally served with it. *In re Wilk* (N. Y. 1907) 155 Fed. 943.

Personal service has, however, been required. *Grant v. Greene*, 106 N. Y. S. 532, 121 App. Div. 756 (1907).

72. *McHenry v. State* (Miss. 1907), 44 South. 831.

73. *Early v. People*, 117 Ill. App. 608 (1905).

74. *Meeks v. State*, 80 Ark. 579, 98 S. W.

378 (1906); *Swedish-American Telephone Co. v. Fidelity & Casualty Co. of New York*, 208 Ill. 562, 70 N. E. 768 (1904; *Pike v. Frost* (Wis. 1905), 139 Fed. 865. See also *Russell v. Lumber Co.*, 102 Ga. 563, 29 S. E. 271 (1897).

75. 1 Chamberlayne, Evidence, §§ 214-220.

76. *People v. Tenth Judicial Dist. Ct.*, 29 Colo. 182, 68 Pac. 242 (1901); *Lowenthal v. Hodge*, 120 N. Y. App. Div. 304, 105 N. Y. Suppl. 120 (1907). See *Territory v. Clancy*, 7 N. M. 580, 37 Pac. 1108 (1894).

77. *Ex parte Shortridge* (Cal. App. 1907), 90 Pac. 478.

78. *Anderson v. Comptois*, 109 Fed. 971, 48 C. C. A. 1 (1901); *In re Dubose*, 109 Fed. 971, 48 C. C. A. 1 (1901). [Judgment affirmed on rehearing 111 Fed. 998, 50 C. C. A. 76.] See also *Wells v. Com.*, 21 Grat. 500, 508 (1871).

79. 1 Chamberlayne, Evidence, §§ 221-226.

officers,⁸⁰ and to municipal⁸¹ or unincorporated⁸² associations to court officers⁸³ and clerks of court⁸⁴ or other attendants, to sheriffs⁸⁵ or constables or to jurors.⁸⁶ The power also extends to the conduct of proceedings before inferior tribunals⁸⁷ or to boards⁸⁸ or to the general public.⁸⁹ The court also has control of witnesses and may enforce their attendance⁹⁰ or may require them to produce documents as directed,⁹¹ to be separated⁹² or to be sworn.⁹³

§ 104. [Functions of Judicial Office]; Protect the Course of Justice.⁹⁴—The presiding judge will protect the purity and unobstructed course of justice as a matter of paramount importance: More insulting to the dignity of a court of justice than any disorderly disturbance of its outward proceedings, or the most contemptuous refusal to obey the will of its minister presiding at the

80. *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147 (1889); *Una v. Dodd*, 39 N. J. Eq. 173 (1884); *Davis v. New York*, 2 Duer 451 (1853).

81. *Marson v. City of Rochester*, 185 N. Y. 602, 78 N. E. 1106 (1906) [affirming 97 N. Y. Suppl. 881]; *Marson v. City of Rochester*, 112 N. Y. App. Div. 51, 97 N. Y. Suppl. 881 (1906).

82. *Patterson v. Wyoming Valley Dist. Council*, 31 Pa. Super. Ct. 112 (1906).

83. *In re Birdsong*, 39 Fed. 599, 4 L. R. A. 628 (1889).

State v. O'Brien, 87 Minn. 161, 91 N. W. 297 (1902).

84. *State v. Simmons*, 1 Ark. 265 (1839); *In re Contempt by Two Clerks*, 91 Ga. 113, 18 S. E. 976 (1893); *Ex p. Thatcher*, 7 Ill. 167 (1845); *Territory v. Clancey*, 7 N. M. 580, 37 Pac. 1108 (1894).

Cross v. State, 11 Tex. App. 84 (1881).

85. *Arkansas*.—*In re Lawson*, 3 Ark. 363 (1840).

Georgia.—*Hunter v. Phillips*, 56 Ga. 634 (1876).

86. *In re Summerhayes*, 70 Fed. 769 (1895).

Georgia.—*State v. Helvenston*, R. M. Charl. 48 (1820).

Indiana.—*Murphy v. Wilson*, 46 Ind. 537 (1874).

New Jersey.—*Crane v. Sayre*, 6 N. J. L. 110 (1822).

New York.—*Ex p. Hill*, 3 Cow. 355 (1824).

87. *California*.—*In re Rogers*, 129 Cal. 468, 62 Pac. 47 (1900).

88. *Spokes v. Banbury, etc.*, Bd. of Health, 11 Jur. (N. S.) 1010, 35 L. J. Ch. 105, 13 L. T. Rep. (N. S.) 453 (1865) [affirming L. R. 1 Eq. 42, 14 Wkly. Rep. 128].

89. *Orman v. State*, 24 Tex. App. 495, 6 S. W. 544 (1887).

State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671 (1868); *State v. Keene*, 11 La. 596 (1837); *Thomas v. Gwynne*, 8 Beav. 312 (1845); *McCartney v. Simonton, Jr.* R. 5 Eq. 594 (1843).

90. *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820 (1890); *State v. Newton*, 62 Ind. 517 (1878); *Tredway v. Van Wagenen*, 91 Iowa 556, 60 N. W. 130 (1894).

91. The documents should be both relevant and material.

California.—*Ex p. Zeehandelaar*, 71 Cal. 238, 12 Pac. 259 (1886).

Kansas.—*Davis' Petition*, 38 Kan. 408, 16 Pac. 790 (1888). Compare *In re Merkle*, 40 Kan. 27, 19 Pac. 401 (1888).

Montana.—*In re MacKnight*, 11 Mon. 126, 27 Pac. 336, 28 Am. St. Rep. 451 (1891).

New York.—*Matter of Leich*, 65 N. Y. Supp. 3, 31 Misc. 671 (1900); *Matter of Odell*, 19 N. Y. St. 259, 6 Dem. Sur. 344 (1887).

Pennsylvania.—*Rauschmeyer v. Bank*, 2 L. T. (N. S.) 67 (1880).

92. *California*.—*People v. Boscovitch*, 20 Cal. 436 (1862).

Georgia.—*Hoxie v. State*, 114 Ga. 19, 39 S. E. 944 (1901).

Ohio.—*Dickson v. State*, 39 Ohio St. 73 (1883).

Texas.—*Cross v. State*, 11 Tex. App. 84 (1881).

Canada.—*Sadler v. Smith*, 14 U. C. L. J. (N. S.) 30 (1877).

93. *Ex p. Stice*, 70 Cal. 51, 11 Pac. 459 (1886); *Heard v. Pierce*, 8 Cush. 338, 54 Am. Dec. 757 (1851); *Com. v. Roberts*, 2 Pa. L. J. Rep. 340, 4 Pa. L. J. 126 (1841).

94. 1 Chamberlayne, Evidence, §§ 227, 228.

trial, is any attempt to corrupt or debauch the moral quality of justice itself. The judge will be prompt to resent and punish so grave an offense against those interests of society of which he is guardian. No person whatever will be permitted to assail in public addresses, or otherwise, the motives and character of the judges of courts in such a manner as to bring the administration of justice into contempt.⁹⁵ From this point of view, a charge against a judge may be none the less objectionable because it is true.⁹⁶

Intent not Material.— If the effect of an intentional act is to embarrass the orderly administration of justice, the fact that the actor disclaims having had any such purpose or desire is not important.⁹⁷

§ 105. [Functions of Judicial Office]; Attorneys.⁹⁸— Any attorney who wilfully obstructs the course of justice, even by a nonfeasance,⁹⁹ as where he contumaceously absents himself from court,¹ may be summarily treated. A lawyer who advises a course which results in contempt is himself guilty of that offense.² Indeed, the professional knowledge of an attorney renders any assault on the integrity of justice especially heinous.³

In general, where an attorney is pursuing in good faith what he supposes to be his right in a court of justice, he is not guilty of contempt though he falls into error and violates rules of court and statutes not penal. To constitute contempt in such a case, there must be something in the circumstances under which the act is done that is disrespectful to the judge or a hindrance of the administration of the affairs of the court. The act must, moreover, be done wilfully and for an illegitimate or improper purpose.⁴

§ 106. [Functions of Judicial Office]; Court Officers.⁵— A court will protect officers and appointees exercising powers under it from indignities offered to them in the discharge of their official duty by attacking them⁶ or by attempting to bribe them.⁷ So newspaper attacks on grand jurymen⁸ or attempts to

95. U. S. v. Gehr, 116 Fed. 520 (1902).

96. Tracy v. State, 28 Ohio Cir. Ct. R. 453 (1906).

97. Terry v. State (Nebr. 1906), 110 N. W. 733; King v. Charlier (Can. 1903), Rap. Jud. Que. 12 B. R. 385

98. 1 Chamberlayne, Evidence, § 229.

99. *Ex parte* Clark, 208 Mo. 121, 106 S. W. 990 (1907).

1. *In re* Clark, 126 Mo. App. 391, 103 S. W. 1105 (1907). The absence from the courtroom of an attorney, to the delay and embarrassment of a trial, if it amounts to a contempt.

2. *People v. District Court of Tenth Judicial District*, 29 Colo. 182, 68 Pac. 242 (1901).

3. *Seastream v. New Jersey Exhibition Co.* (N. J. Ch. 1905), 61 A. 1041.

4. *Hunt v. State*, 27 Ohio Cir. Ct. R. 16 (1904).

5. 1 Chamberlayne, Evidence, §§ 230-237.

6. *O'Neal* (Fla. 1903), 125 Fed. 967; *Ex parte* McLeod, 120 Fed. 130 (1903). The highest consideration of the public good demands that the courts protect their officers against revenges induced in consequence of the performance of their duties, as well as against violence while engaged in the actual discharge of such duties. *Ex parte* McLeod, 120 Fed. 130 (1903).

7. *Sinnott v. State*, 11 Lea, 281 (1883). See also *Keppeler v. Williams*, 1 Dall. 29, 1 L. ed. 23 (1776) (pocketing venire).

8. *Allen v. State*, 131 Ind. 599, 30 N. E. 1093 (1892); *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088 (1892).

Matter of Tyler, 64 Cal. 434, 1 Pac. 884

influence jurymen by discussions about a pending case⁹ or by attempting to bribe them¹⁰ will be punished by the court. Neither can a jurymen be permitted to disqualify himself by expressing an opinion on a pending case.¹¹ So where a lower officer like a coroner seeks to deceive the court by presenting a fictitious claim this is an obstruction to justice.¹²

§ 107. [Functions of Judicial Office]; Embarrassing the Administration of Justice.¹³—Any publication concerning a pending cause or regarding a matter likely to become a subject of judicial inquiry, which in any way tends to embarrass¹⁴ the orderly administration of justice will be deemed an offense against the dignity of the court.¹⁵ To charge, for example, the supreme court of a state and certain of its judges with having been influenced by corrupt motives in their rulings in causes still pending for rehearing, is obviously calculated to bring justice into contempt.¹⁶ It is not material, in this connection, whether the statements made are true¹⁷ or false; or whether, if false, they were by reason of intention or inadvertence,¹⁸ or that the assault was directed at the members of the court and that the latter were not affected by it.¹⁹ The protection is not designed for the *personnel* of the court, but for the dignity of judicial administration. The existence of a pending suit which the publication may affect, while a usual incident in the mischief, is not one absolutely essential to liability for publication. The true object of the court's action is the protection from public assault of the administration of justice. The following distinction has properly been taken: Contempts relating to a pending cause may either consist in abusing parties concerned in cases pending in court, or in prejudicing mankind against persons before the cause is heard, while con-

(1884). See also *Bergh's Case*, 16 Abb. Pr. (N. S.) 266 (1875); *In re Van Hook* (N. Y. 1818), 3 City Hall Rec. 64.

9. *Baker v. State*, 82 Ga. 776, 9 S. E. 743, 14 Am. St. Rep. 192, 4 L. R. A. 128 (1889); *Drady v. Dist. Court of Polk County* (Iowa, 1905), 102 N. W. 115; *In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901); *Davidson v. Manlove*, 2 Cold. 346 (1865).

10. *Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677 (1905); *Nichols v. Judge Super. Ct.* (Mich. 1902), 89 N. W. 691; *Langdon v. Judges of Wayne Cir. Ct.*, 76 Mich. 358, 43 N. W. 310 (1889); *Gandy v. State*, 13 Nebr. 445, 14 N. W. 143 (1882); *U. S. v. Carroll*, 147 Fed. 947 (1906).

11. *U. S. v. Devaughan*, 25 Fed. Cas. No. 14,952, 3 Cranch C. C. 84 (1827).

12. *Ex parte Toepel* (Mich. 1905), 102 N. W. 369, 11 Detroit Leg. N. 759.

13. 1 Chamberlayne, Evidence, §§ 238-244.

14. *R. v. Parke*, 72 Law J. K. B. 839

(1903), 2 K. B. 432, 89 Law T. 439, 52 Wkly. Rep. 215, 67 J. Pac. 421 (1904).

It is not material, in the matter of liability, that the cause is not pending nor to be tried at a time then determined. But the circumstance that the matter was to be heard judicially at a time then unascertained may be relevant upon the question of a suitable punishment for the offense. *Globe Newspaper Co. v. Com.*, 188 Mass. 449, 74 N. E. 682 (1905).

15. *Globe Newspaper Co. v. Com.*, 188 Mass. 449, 74 N. E. 682 (1905); *In re Providence Journal Co.* (R. I. 1907), 68 Atl. 428.

16. *People v. News-Times Pub. Co.* (Colo. 1906), 84 Pac. 912.

17. *Hughes v. Terr.* (Ariz. 1906), 85 Pac. 1058; *People v. News-Times Pub. Co.* (Colo. 1906), 84 Pac. 912.

18. *In re Providence Journal Co.* (R. I. 1907), 68 Atl. 428.

19. *People v. News-Times Pub. Co.* (Colo. 1906), 84 Pac. 912.

tempts consisting of scandalizing the court itself need not relate to a pending suit.²⁰

So the circulation in the community of stories calculated to influence the outcome of litigation²¹ or efforts at intimidation²² is a grave indignity against justice. The press has, however, a right to publish a correct report of judicial proceedings.²³ The newspaper may be guilty of a contempt although it is published in a different place from that of the trial if it circulates at the place of trial.²⁴

For a litigant to seek by any means to avoid the due and lawful effect of the process of a court to whose judgment he has become subject richly merits rebuke. Thus, when one court has made an order in a cause pending before it, for a party to institute similar proceedings in another court in order to prevent the enforcement of the prior order is an insult to the court first obtaining jurisdiction.²⁵

§ 108. [Functions of Judicial Office]; Service of Process.²⁶—A court will require that the due and regular service of its process should not be impeded, delayed or obstructed,²⁷ by those who have notice of the facts.²⁸ Delaying a messenger of a court will, therefore, be resented by the judge.²⁹ Counseling and advising disobedience or resistance to the commands of such a writ is reprehensible as an insult to the cause of judicial administration.³⁰ Personal violence inflicted upon one who is serving the process, because he is doing so, is an affront to the court out of which it issues.³¹

20. *State v. Shepherd*, 177 Mo. 205; 76 S. W. 79 (1903).

21. — *In re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626 (1860); *Tenney's Case*, 23 N. H. 162 (1851).

— *In re Cheeseman*, 49 N. J. L. 115, 6 Atl. 513, 60 Am. St. Rep. 596 (1886).

— *State v. Edwards*, 15 S. D. 383, 89 N. W. 1011 (1902).

22. *State v. Bee Pub. Co.*, 60 Nebr. 282, 83 N. W. 204, 50 L. R. A. 195 (1900); *Burke v. Territory*, 2 Okla. 409, 37 Pac. 829 (1894); *Mackett v. Herne Bay*, 24 Wkly. Rep. 845 (1876). The threat employed may be that of popular disapproval. *People v. Wilson*, 64 Ill. 195, 16 Am. Dec. 528 (1872).

23. *McClatchy v. Sacramento Co. Super. Ct.*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691 (1897).

Stuart v. People, 4 Ill. 395 (1842); *In re Press-Post*, 6 Ohio S. & C. Pl. 10, 3 Ohio N. P. 180 (1806).

24. *State v. Judge Civ. Dist. Ct.*, 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282 (1893); *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280,

44 L. R. A. 159 (1899); *In re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626 (1860); *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638 (1889).

25. *Terry v. State* (Nebr. 1906), 110 N. W. 733.

26. 1 Chamberlayne, Evidence, § 245.

27. — *De Witt v. Fresno Co. Super. Ct.*, 47 Pac. 871 (1897).

— *Clark v. Parkinson*, 10 Allen 133, 87 Am. Dec. 628 (1865).

— *People v. Gilmore*, 26 Hun 1 (1881); *Conover v. Wood*, 5 Abb. Pr. 84 (1857).

— *Alberston v. The T. I. Nevius*, 45 Fed. 927 (1892).

28. *State v. District Court of Seventh Judicial Dist.*, 29 Mont. 230, 74 Pac. 412 (1903).

29. *Ex p. Page*, 1 Rose 1 (1810).

30. *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182, 415, 23 N. Y. St. 263 (1889) [*affirming* 31 Hun 550, 4 N. Y. Suppl. 247, 22 N. Y. St. 47, 51, 54 (1889)]; *In re Noyes*, 121 Fed. 209, 57 C. C. A. 445 (1902).

31. *Price v. Hutchinson* (Eng.), L. R. 9 Eq. 534, 18 Wkly. Rep. 204 (1870).

§ 109. [Functions of Judicial Office]; Witnesses.³²—The witnesses have a right to be protected against the use of threatening language or insults³³ or against arrest³⁴ while attending court or while going to or from the court house or against attempts at bribery.³⁵ The witness may himself be guilty of contempt by false swearing³⁶ which is a grave insult to the court. Other forms of obstructing justice are by intimidating³⁷ a witness or by preventing a witness duly summoned from attending³⁸ and giving his testimony or by advising him to leave the jurisdiction³⁹ or by refusing to produce a clerk⁴⁰ or other person under his control.

§ 110. [Functions of Judicial Office]; Enforcement of Contempt Proceedings.⁴¹—As mentioned elsewhere, the executive powers of the court are most frequently ascertained and vindicated upon proceedings for contempt, so called. The proceeding is a special one, without direct connection with the matter in which it occurs.⁴² No court is required *ex debito justitiæ* to find a person in contempt and award punishment for it. The matter is one of administration. Long delay in applying for relief may furnish ground for declining to act.⁴³ Being to ascertain guilt and, if found, to award punishment for it, the proceeding partakes of the nature of a criminal trial.⁴⁴ The complaint requires equal particularity of statement,⁴⁵ and proof of guilt should be clear and satisfactory.⁴⁶ A contempt proceeding is summary, and the extent of the hearing as to questions of law rests in the discretion of the court, though one charged with contempt has the right to be heard in his defense.⁴⁷

32. 1 Chamberlayne, Evidence, §§ 246-252.

33. U. S. v. Carter, 25 Fed. Cas. No. 14,740, 3 Cranch C. C. 423 (1829); U. S. v. Emerson, 25 Fed. Cas. No. 15,050, 4 Cranch C. C. 188 (1831); Welby v. Still (Eng. 1892), 66 L. T. Rep. (N. S.) 523.

34. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598 (1884); State v. Buck, 62 N. H. 670 (1883). See also Butler v. People, 2 Colo. 295 (1874).

35. U. S. v. Carroll, 14 Fed. 947 (1906); Fisher v. McDaniel, 9 Wyo. 457, 64 Pac. 1056 (1901).

36. Beattie v. People, 33 Ill. App. 651 (1889); Gibson v. Tilton (Md. 1829), 1 Bland 352, 17 Am. Dec. 306; Ricketts v. State (Tenn. 1903), 77 S. W. 1076; Berkson v. People, 154 Ill. 81, 39 N. E. 1079 (1894); Bernheimer v. Kelleher (N. Y. 1900), 31 Misc. 404, 64 N. Y. Suppl. 409; In re Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299 (1895); In re Fellerman, 149 Fed. 244 (1906); In re Goslin, 180 N. Y. 505, 72 N. E. 1142 (1904); Seastream v. New Jersey Exhibition Co. (N. J. Ch. 1905), 61 Atl. 1041.

37. Shaw v. Shaw, 8 Jur. (N. S.), 141, 31 L. J. P. M. 35, 6 L. T. Rep. (N. S.) 477, 2

Swab. 6 Tr. 517 (1861); Re Young, 137 N. C. 552, 50 S. E. 220 (1905).

38. Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148 (1894).

39. Whitem v. State, 36 Ind. 196 (1871); In re Whetstone, 9 Utah 156, 36 Pac. 633 (1893).

40. Green v. Hill, 3 Del. Ch. 92 (1866).

41. 1 Chamberlayne, Evidence, § 253.

42. In re Depue, 185 N. Y. 60, 77 N. E. 798 (1906).

Therefore, it is no defense to such proceedings that the prior conduct of the main action has been irregular. Christensen v. People, 114 Ill. App. 40 (1904).

43. Matheson v. Hanna-Schoellkopf Co., 122 Fed. 836 (1903).

44. U. S. v. Richards, 1 Alaska 613 (1902).

45. Back v. State (Nebr. 1906), 106 N. W. 787. But a statute allowing for criminal appeals does not apply to judgments enforcing the dignity of the court. State v. Peralta, 115 La. 530, 39 So. 550 (1905).

46. Wells v. Dist. Court of Polk County (Iowa 1905), 102 N. W. 106.

47. State v. Nicoll, 40 Wash. 517, 82 Pac. 895 (1905).

§ 111. [Functions of Judicial Office]; Civil and Criminal Cases.⁴⁸—*Civil contempts* have been defined as being such contempts as affect a private person, as, for instance, where a party refuses to obey an order of court which will benefit such private persons.⁴⁹

Criminal contempts are those which are committed in presence of the court and disturb its administration of justice either physically and directly, as by disorderly conduct, or morally and indirectly by bringing the administration of justice into public disgrace. Criminal contempts are all acts committed against the majesty of the law, or against the court as an agency of the government, and in which, therefore, the whole people are concerned.⁵⁰

§ 112. [Functions of Judicial Office]; Direct and Constructive.⁵¹—*Direct Contempts*.—The administrative power and dignity of the court necessarily involve the right of punishing summarily for offenses against justice committed in the immediate presence and hearing of the judge,⁵² or so near as to interrupt proceedings before him.⁵³ These are called direct contempts.⁵⁴ The judge needs no evidence; he is himself, in such cases, the percipient witness;⁵⁵ should pleadings be deemed advisable, they may be of the briefest and simplest description.⁵⁶

Constructive Contempts.—Constructive contempts, on the other hand, may be defined as those arising from matters not occurring in court, but which tend to degrade or make impotent the authority of the judge, or which tend to impede or embarrass the administration of justice.⁵⁷ In dealing with contempts not committed in the presence of the judge, the offender must be brought before the court by a rule or some sufficient process.⁵⁸

§ 113. [Functions of Judicial Office]; Constructive Presence of Judge.⁵⁹—The court is said to be present wherever during its sessions, the judge, court officers,

48. 1 Chamberlayne, Evidence, § 254.

49. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903). Contempt proceedings in connection with equity processes as for the violation of an injunction are civil in their nature and a deposition may be used. *Davidson v. Munsey* (Utah 1905), 80 Pac. 743.

50. *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

51. 1 Chamberlayne, Evidence, § 255.

52. *Illinois*—*Ferriman v. People*, 128 Ill. App. 230 (1906).

Indiana.—*Mahoney v. State*, 72 N. E. 151 (1904).

Kansas.—*State v. Anders*, 68 Pac. 668 (1902).

53. *Ex parte Clark*, 208 Mo. 121, 106 S. W. 990 (1907).

54. The court can punish for a direct contempt only where the offense took place

in the sight and hearing of the judge. *Fellman v. Mercantile & M. Ins. Co.*, 116 La. 733, 41 So. 53 (1906). A court may punish for a direct contempt without issue or trial in any form. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878 (1904).

Venue.—In a prosecution for contempt in the presence of the court, defendant is not entitled to a change of venue because of alleged prejudice. *Connell v. State* (Nebr. 1907) 114 N. W. 294.

55. *Gordon v. State* (Nebr. 1905), 102 N. W. 458.

56. *Ferriman v. People*, 128 Ill. App. 230 (1906).

57. *O'Neil v. People*, 113 Ill. App. 195 (1904).

58. *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878 (1904).

59. 1 Chamberlayne, Evidence, § 256.

jurors and other persons in attendance for the performance of judicial or ministerial functions in aid of judicial proceedings, are present, engaged in their respective duties, in the part of the courthouse reserved to their use.⁶⁰

§ 114. **Judge Sitting as a Jury.**⁶¹—With exceptions due to differences in intellectual equipment and a consequent absence of danger of being misled by certain classes of evidence liable to be overestimated by an untrained mind,⁶² the rules which govern the action of a jury apply equally to a judge sitting instead of one. Thus, a verdict will be directed where but one outcome of a hearing would be rational.⁶³ There must be a finding on every material fact alleged in the complaint and controverted by the answer necessary to support the judgment rendered.⁶⁴ Where the evidence is uncontradicted, the party is entitled to definite and direct findings with reference thereto.⁶⁵

§ 115. **[Judge Sitting as a Jury]; Rulings of Law.**⁶⁶—While there is a certain appearance of incongruity in the spectacle of a judge solemnly laying down rules of law to himself as a jury to guide his deliberations as to matters of fact, it is within the right of a litigant to demand that he do so.⁶⁷ provided there is sufficient evidence to render a proposition applicable to the case.⁶⁸ On trial by the court, a party asking a ruling correct in law has a right to know whether in deciding the case against him the judge acted on the rule of law stated.⁶⁹ Where a decision rests on one of two alternatives, one adjudged under a correct ruling, and the other under an incorrect one, the decision cannot be sustained.⁷⁰

§ 116. **[Judge Sitting as a Jury]; Administrative Questions.**⁷¹—Where the judge is satisfied as to the evidence he is not obliged to listen to argument,⁷² but he may if he wishes take a view.⁷³ The court deals with the weight of

60. 1 Com. v. Clark, 13 Pa. Co. Ct. 439 (1893); U. S. v. Anonymous, 21 Fed. 761 (1884). A claim to occupy a room in the courthouse as a matter of right, coupled with retention of possession cannot be deemed an insult to the order of a commissioner's court which requires the tenant to vacate. Watson v. Scarbrough (Ala. 1906), 40 So. 672.

See *Ex parte Hedden* (Nev. 1907), 90 Pac. 737.

61. 1 Chamberlayne, Evidence, § 257.

62. In the trial of an action by the court without a jury there is no necessity for the rigid insistence upon the rules of evidence which would otherwise be proper. Shelley v. Wescott, 23 App. D. C. 135 (1904).

63. *Infra*, §§ 184 et seq.

64. Bell v. Adams (Cal. 1907), 90 Pac. 118; Shuler v. Lashhorn, 67 Kan. 694, 74 Pac. 264 (1903); Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190 (1903).

65. Lackmann v. Kearney, 142 Cal. 112, 75 Pac. 668 (1904).

66. 1 Chamberlayne, Evidence, § 259.

67. Murphy v. Smith, 112 Ill. App. 404 (1904); White v. Black, 115 Mo. App. 28, 90 S. W. 1153 (1905); E. E. Souther Iron Co. v. Laclede Power Co., 109 Mo. App. 353, 84 S. W. 450 (1904).

68. Hayes v. Metropolitan St. Ry. Co., 84 N. Y. Suppl. 271 (1903).

69. Jaquith v. Morrill, 191 Mass. 415, 78 N. E. 93 (1906).

70. Jaquith v. Morrill, 191 Mass. 415, 78 N. E. 93 (1906).

71. 1 Chamberlayne, Evidence, §§ 264, 265.

72. Barnes v. Benham, 13 Okl. 582, 75 Pac. 1130 (1904).

73. Hatton v. Gregg (Cal. App. 1906), 88 Pac. 592; Atlantic & B. Ry. Co. v. City of Cordele, 125 Ga. 373, 54 S. E. 155 (1906);

the evidence in the same way that a jury would deal with it⁷⁴ and on appeal the only question is whether the verdict is one which may be justified in reason from the facts found.⁷⁵ The court should carefully distinguish between findings of fact and rulings of law⁷⁶ to preserve the rights of the parties on appeal and the parties are entitled to separate findings of fact and rulings of law on all material issues as to which they request such findings.⁷⁷

§ 117. **Evidence as a Matter of Administration.**⁷⁸—In no branch of judicial procedure is the proportion of administration naturally and normally so great as in the law of evidence. In none are the elements characteristic of administration so prominent as here. Administration, for example, is guided by sound reasoning. Thus reason is the controlling influence in the law of evidence.

It cannot be doubted that in the law of evidence is a large element of positive or substantive law. Nor is it questionable that a still larger admixture of procedural rules having the force of law must be regarded as part of it. But, in a special sense, and to an extent beyond that which is true in case of other forms of procedure, the law of evidence is a matter of administration.

§ 118. **Stare Decisis as Applied to the Law of Evidence.**⁷⁹—The objection to any proposed exercise of administrative power, that no case has gone so far in a particular jurisdiction, may easily be accorded undue importance. The motto of *stare decisis* is of and should concern only the substantive law. No question can properly arise as to the propriety of following precedent in passing upon the substantive rights of the parties, including those relating to established rules of procedure as distinguished from those of practice or administration. Nothing but confusion could result, uncertainty as to all tenures of property, were any other course generally followed. But it is otherwise with regard to administration. A litigant has, in the nature of things, no better right to insist that a particular course be pursued in arriving at truth by the use of reason than he would have that his judges shall or shall not wear gowns. Matters of administration, rules of evidence, are, properly considered, purely utilitarian, mere methods of doing something else. In this, indeed the parties may have rights, but not in the *method* by which it is done. This is more properly a subject of direct judicial control, of rules of court, or even the mere establishment of a practice.

Blending Substantive Law with Administration.—But recognition of the

Bigham v. Clubb (Tex. Civ. App. 1906), 95 S. W. 675.

74. Allis v. Hall, 76 Conn. 322, 56 Atl. 637 (1904).

75. Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841 (1903).

76. Musselman v. Musselman, 140 Cal. 197, 73 Pac. 824 (1903); Kent v. Common Council of City of Binghamton, 86 N. Y. Supp.

411, 90 App. Div. 553 (1904); Pittsburg Stove & Range Co. v. Pennsylvania Stove Co., 208 Pa. 37, 57 Atl. 77 (1904).

77. Contaldi v. Errichetti, 79 Conn. 273, 64 Atl. 211 (1906); Wood v. Broderson (Idaho 1906) 85 Pac. 490; State v. Baird, 13 Idaho 29, 80 Pac. 298 (1907).

78. 1 Chamberlayne, Evidence, § 266.

79. 1 Chamberlayne, Evidence, § 267.

fact that no legal right exists to any particular exercise of an administrative power apparently ceases when jurisprudence comes to deal with the admissions of evidence or rulings as to the probative weight of particular inferences. The interblending of substantive law with the rules of practice or administration is apt to occur when the significant ruling is made that "evidence is admissible" or "not admissible" to prove a particular fact; that it is a "presumption of law" that certain inferences are correct; that a jury "would be justified" in finding from certain facts a given result. Here this blending has most frequently taken place. It has ended by largely obscuring the very important and essential principle of judicial administration on which it originally rested, the free hand of the court in dealing with matters of evidence. For it necessarily resulted when a proposition of substantive law was thus blended with or made to assume the garments of a rule of evidence, that, whatever might be the proper claim of the litigant in the part which was really a rule of administration, he undoubtedly had legal rights in that portion of the blended whole which was substantive law. If the two could be separated, the legal rights might be made to attach to the substantive law alone.

§ 119. **Recapitulation.**⁸⁰— To recapitulate this brief outline of the judge's functions, it may be said that these powers are of three general classes or descriptions: (1) Judicial functions which specially concern the enforcement of the rules of law, the ascertainment of the existence of facts and the application of the rule of law to the facts so ascertained; (2) administrative powers which concern the manner in which the rules of law, substantive or procedural or the usages of practice are to be conditioned in scope and operation by the higher social objects of litigation; and, (3) executive and police powers conferred for the purpose of enabling the judge to protect the dignity of his office, the public respect due to it and the purity of justice itself. It is further to be observed that the essential and fundamental consideration, so far as relates to the law of evidence, is not as to whether a rule of law which controls the action of the judge is substantive or procedural; but as to whether there is a *rule* on this subject, or there is none, i.e., as between law, on the one hand, and administration on the other. The presiding judge announces the rule of substantive law and applies it to the facts or allows or requires the jury to do so, according to their respective duties. The judge is bound by and applies the rules of procedural law in the same way. In exercising powers of administration the sole procedural rule and condition is that *reason* must be exercised, other control and direction being exerted by broad principles or canons designed for the doing of justice, which it is the special object of administration to attain. In judging of the reasonableness of the court's administrative action, the existence of any custom or usage of practice relating to it or any similar administrative questions, may properly be considered. It may be

⁸⁰. 1 Chamberlayne, Evidence, § 268.

noted that the executive or police powers of the presiding judge are but specific illustrations of his general functions of administration.

Applying these broad classifications to the subject of the law of evidence, it becomes clear that while a large admixture of substantive law is present within its boundaries, and a still greater proportion of procedural rules, either by statute or judicial legislation, which also have the force of law, that, in essence and by necessary consequence of the objects which it seeks to attain and the variety of means by which it endeavors to reach them, the law of evidence is a branch of judicial administration. As such, it is properly controlled, not by precedent, but by these canons or principles to the consideration of which the inquiry is soon to advance.

Before entering upon this inquiry, it seems appropriate, however, to consider, in the succeeding chapter, certain of the procedural rules and administrative principles connected with what is, so far as the law of evidence is concerned, probably the most dominating and characteristic factor in an English trial at common law — the institution of the jury.

CHAPTER V.

COURT AND JURY: JURY.

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§ 120. **The Growth of the Jury System.**¹—The modern jury system is a historical outgrowth of certain early crude forms of procedure which were not really trials at all but tests through which the party went to prove his claim to facts which had nothing to do with the test itself. There was for example the *trial by witnesses*, which was a proceeding in which the party produced witnesses or backers, called *secta*. Another form was proof by *bargain witnesses* who were persons selected in advance to prove the nature of a contemplated transaction.

1. 1 Chamberlayne, Evidence, §§ 269-274.

Another mode of trial was *wager of law* or *compurgation* where the proof was also entirely one-sided and the party produced certain backers who swore that his oath was a true one. These were both forms of *trial by ordeal* which flourished until the thirteenth century and consisted in suitors undergoing certain forms of torture to prove their case. *Trial by battle* was introduced by the Normans and consisted in a physical contest by the suitors themselves or by their champions.

The institution of the jury itself came gradually and at first through leaving to the freemen of the district a disputed question and depending on their common knowledge of the facts. One form of this procedure was known as the *Frankish Inquisition* where the judges summoned those who were likely to know about a matter in controversy to tell what they knew. The next step was giving a suitor the absolute right to demand a trial by inquisition, or "assize" as it was popularly called. One of the difficulties of the jury system was that for a long time the accused or defendant could not be forced to submit to trial by jury, and various expedients including torture were employed to force such submission. The first form of the assize was known as the grand assize selected from among the knights with great formality and these were supplemented for certain purposes by the Petty Assize composed of freemen who knew the facts in controversy.

The final stage in the development of the jury is the introduction of witnesses and allowing the jury to make findings based on their statements. This introduces the real modern function of the jury which is to ascertain the facts, and the great difference between the ancient and modern jurymen sufficiently appears in the fact that the modern jurymen is disqualified if he has any relations with the parties which might influence his judgment.²

§ 121. Function of the Jury; Jury Confined to the Issue.³—"This function of ascertainment is one which the jury is well adapted to discharge; and a very useful contribution to the administration of justice is thus effected by the introduction of the average common sense, experience and standards of conduct prevalent in the community for the purpose of determining what is the truth regarding disputed matters of fact with which the jurors are familiar.

§ 122. Comment on Facts.⁴—A difference of judicial opinion and practice exists as to whether the court, in discharge of its duty to promote the attainment of substantial justice, is at liberty while recognizing the right of the jury to judge as to the truth of the facts, including the credibility of witnesses and the general weight of evidence, to endeavor to assist them by his comments in these and other particulars. In the normal and typical discharge of the jury's function of ascertaining truth, it would have the benefit of the

2. *Hufnagle v. Delaware & H. Co.*, 227 Pa. 476, 76 Atl. 205, 40 L. R. A. (N. S.) 982 (1910) (employee of litigant disqualified).

3. 1 Chamberlayne, Evidence, § 275.

4. 1 Chamberlayne, Evidence, § 276.

suggestions and comments of the court, which while not affecting their autonomy and independence of action, furnished them help from a trained and disinterested mind, controlled by the wider social interests of litigation and enriched by long professional experience in dealing with questions which the jury are usually approaching for the first time. Such was trial by judge and jury at common law.

§ 123. [Comment on Facts]; English and Federal Courts.⁵—The common law relation of judge and jury in this particular continues to be the practice of the English judges, a fact which assists largely to account for the very satisfactory efficiency of the system of jurisprudence over which they preside.

Federal Courts.—Such also is and for many years has been the practice of the judges of the Federal courts of the American Union.⁶ In these courts the judge is permitted to comment on the weight of the evidence,⁷ provided the jury be distinctly and cogently informed that it is mere advice and suggestion which they are entitled to disregard.

§ 124. [Comment on Facts]; The American Minority.⁸—The Federal courts do not stand entirely alone among the tribunals of America in preserving the common law landmarks as to the respective provinces of court and jury, but the English and Federal rule is still followed in some form in Connecticut,⁹ Minnesota,¹⁰ and in Pennsylvania.¹¹

§ 125. [Comment on Facts]; American Majority.¹²—The great majority of the American states have in their constitutions and statutory legislation turned “trial by judge and jury” as it existed at common law into “trial by jury”—a very anomalous and modern type of judicial procedure. In this conception of the proper position of a presiding judge, his duty is merely to preserve order in the courtroom, rule as requested upon sufficient points of evidence or substantive law to enable the defeated party to take an appeal to a higher court; and, having done this, simply turn the case over to the joint control of counsel acting as masters of ceremony and of the jury sitting as arbitrators between the litigants.¹³

In pursuance of the line of thought above referred to as dominating a majority of American courts, a judge is forbidden to comment upon the facts of

5. 1 Chamberlayne, Evidence, § 277.

6. Simmons v. United States, 142 U. S. 148, 155 (1891); U. S. v. Hall, 44 Fed. 864 (1890); Lovejoy v. U. S. 128 U. S. 171, 173, 8 Sup. Ct. R. 77 (1888); United States v. Philadelphia, etc., Co., 123 U. S. 113 (1887).

7. Vicksburg R. Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. 1 (1886).

8. 1 Chamberlayne, Evidence, §§ 278-280.

9. Sackett v. Carroll, 80 Conn. 374, 68 Atl. 442 (1908).

10. Bonness v. Felsing, 97 Minn. 227, 106 N. W. 909 (1906).

11. Sperry v. Seidel, 218 Pa. 16, 66 Atl. 853 (1907).

12. 1 Chamberlayne, Evidence, § 281.

13. Illinois.—Frame v. Badger, 79 Ill. 441 (1875).

any given case in instructing or otherwise addressing the jury,¹⁴ or even in their hearing intimating the opinion he has formed from the evidence; and a caution to disregard this observation, addressed directly to the jury, may well be regarded as ineffective for the purpose.¹⁵ The error is rendered the more prejudicial where a judge incorrectly states to the jury that there is no evidence to a given effect;¹⁶ or assumes that there is evidence of a particular fact where in reality there is none.¹⁷

§ 126. [Comment on Facts]; Assumption of Facts.¹⁸—The judge will not give expression to any idea which could only exist properly in his mind if the truth of a controverted fact were proved or disproved.¹⁹ In like manner, a judge cannot assume that evidence has been introduced which has not, in fact, been received;²⁰ nor that there is no other evidence on a given point.²¹

§ 127. [Comment on Facts]; Refusal of Assumptive Instructions.²²—It follows that the judge will not give a charge at the request of counsel which presents the feature of assuming the existence or nonexistence of certain facts.²³

§ 128. [Comment on Facts]; Uncontroverted Facts.²⁴—The administrative reason why a judge is not at liberty to instruct the jury on the basis of an assumption of the existence of a disputed fact, is that so doing implies an intimation to the jury as to what effect the evidence on that point has had

14. *Loveman v Birmingham Ry., L. & P. Co.* (Ala. 1907), 43 So. 411; *Indianapolis Traction & Terminal Co. v. Richey* (Ind. App. 1907), 80 N. E. 170; *Rubinovitch v. Boston Elevated Ry. Co.* (Mass. 1906), 77 N. E. 895; *Corrigan v. Funk*, 96 N. Y. Supp. 910, 109 App. Div. 846 (1905); *Keen v. Keen*, 90 Pac. 147, 10 L. R. A. (N. S.) 504 (1907).

15. *Davis v. Dregne* (Wis. 1903), 97 N. W. 512.

16. *Rose v. Kansas City*, 125 Mo. App. 231, 102 S. W. 578 (1907); *McLaughlin v. Syracuse Rapid Transit Ry. Co.*, 115 N. Y. App. Div. 774, 101 N. Y. Suppl. 196 (1906). Statement of an obvious and uncontroverted inference carries no prejudice. *Webb v. Atlantic Coast Line R. Co.*, 76 S. C. 193, 56 S. E. 954, 9 L. R. A. (N. S.) 1218 (1907).

17. *Steltemeier v. Barrett*, 115 Mo. App. 223, 91 S. W. 56 (1905); *Texas & Louisiana Lumber Co. v. Rose* (Tex. Civ. App. 1907), 103 S. W. 444.

18. 1 Chamberlayne, Evidence, § 282.

19. *Atlantic & B. Ry. Co. v. Hattaway*, 126 Ga. 333, 55 S. E. 21 (1906); *Springfield*

Consol. Ry. Co. v. Gregory, 122 Ill. App. 607 (1905).

20. *Brazis v. St. Louis Transit Co.*, 102 Mo. App. 224, 76 S. W. 708 (1903).

21. *Duncan v. St. Louis & S. F. R. Co.* (Ala. 1907), 44 So. 418. This prohibition extends to an announcement that there is no evidence on a given point. *Patten v. Town of Auburn*, 41 Wash. 644, 84 Pac. 594 (1906).

22. 1 Chamberlayne, Evidence, §§ 283, 284.

23. *Western Coal & Mining Co. v. Burns*, 84 Ark. 74, 104 S. W. (1907); *Kelley v. Town of Torrington*, 80 Conn. 378, 68 Atl. 855 (1908); *Lewter v. Tomlinson*, 54 Fla. 215, 44 So. 935 (1907); *Northern Ohio Ry. Co. v. Rigby*, 69 Ohio St. 184, 68 N. E. 1046 (1903). Requests intimating to the jury the inference to be drawn from the facts therein carefully set out in detail are properly refused. *Insurance Co. of North America v. Leader*, 121 Ga. 260, 48 S. E. 972 (1904); *Picard v. Beers* (Mass. 1907), 81 N. E. 246; *Weaver v. Southern Ry. Co.*, 76 S. C. 49, 56 S. E. 657 (1907).

24. 1 Chamberlayne, Evidence, § 284.

on his mind. This makes such an instruction a comment upon the evidence within the prohibition of the substantive or procedural law in the majority of the American states.²⁵ An instruction, however, may properly assume the existence of facts where the evidence with respect to them is conclusive and uncontroverted.²⁶ The same result follows where a fact is admitted.²⁷ The court may even legitimately assume that a fact exists where it has been proved beyond the range of controversy.²⁸

The elements of damage universally recognized by the courts may be stated where the fact of injury is not disputed.²⁹ It is, however, prejudicial error for the court, in a personal injury action, to state to the jury, in his charge, his calculation of the amount of damages sustained by plaintiff by loss of employment.³⁰

§ 129. [Comment on Facts]; Weight and Credibility.³¹—The judge will not in these jurisdictions, be permitted to give the jury his impression as to the probative force of the testimony given by a witness, or any set of witnesses,³² the probability of their story³³ or the general weight of the evidence,³⁴ including the credibility of those who testify.³⁵ He cannot intimate to the jury as to what inference he draws from the evidence as to the truth of any issue in the case.³⁶ Nor can he express, directly or indirectly, his views as to the good faith of the parties.³⁷

§ 130. [Comment on Facts]; When Comment is Permitted.³⁸—Practical convenience has established certain limitations upon the scope of the administrative or procedural rule which forbids, in a majority of American jurisdictions, a judge to comment on the evidence. He must, at least, hold the

25. *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 60 S. E. 258 (1908).

26. *W. A. Greer & Co. v. Raney*, 120 Ga. 290, 47 S. E. 939 (1904); *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035 (1907); *Lownsdale v. Gray's Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904 (1904).

27. *Shults v. Shults*, 229 Ill. 420, 82 N. E. 312 (1907).

28. *Shafer v. Russell* (Utah 1905), 79 Pac. 559; *Halverson v. Seattle Electric Co.*, 35 Wash. 600, 77 Pac. 1058 (1904).

29. *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435 (1904); *Jennings v. Edgefield Mfg. Co.*, 72 S. C. 411, 52 S. E. 113 (1905).

30. *Heller v. Donellan*, 90 N. Y. Suppl. 352, 45 Misc. Rep. 355 (1904).

31. 1 Chamberlayne, Evidence, § 285.

32. *Lingle v. Scranton Ry. Co.*, 214 Pa. 500, 63 Atl. 890 (1906).

33. *Norman Printers' Supply Co. v. Ford*,

77 Conn. 461, 59 Atl. 499 (1904); *Belt Ry. Co. of Chicago v. Confrey*, 111 Ill. App. 473 (1903); *Hayes v. Moulton* (Mass. 1907), 80 N. E. 215; *Imboden v. Imboden's Estate* (Mo. App. 1905), 86 S. W. 263.

34. *North Carolina*.—*Hancock v. Western Union Tel. Co.*, 142 N. C. 163, 55 S. E. 82 (1906).

South Carolina.—*McGrath v. Piedmont Mut. Ins. Co.*, 74 S. C. 69, 54 S. E. 218 (1906).

35. *Lingle v. Scranton Ry. Co.*, 214 Pa. 500, 63 Atl. 890 (1906).

36. *Douglas v. Metropolitan St. Ry. Co.*, 119 N. Y. App. Div. 203, 104 N. Y. Suppl. 452 (1907); *Ruffin v. Atlantic & N. C. R. Co.*, 142 N. C. 120, 55 S. E. 86 (1906); *Louisville & N. R. Co. v. Bohan*, 116 Tenn. 271, 94 S. W. 84 (1906).

37. *Rondinella v. Metropolitan Life Ins. Co.*, 24 Pa. Super. Ct. 293 (1904); *Rich v. Victoria Copper Min. Co.*, 147 Fed. 380, 77 C. C. A. 558 (1906).

38. 1 Chamberlayne, Evidence, § 286.

scales and tell the jury how to strike a balance and recognize one when struck. While the judge is restrained from intimating to the jury an idea of how, were he a jurymen, he would apply the reasoning faculty to the evidence or the law to the facts, no objection exists to his leading the jury up to their task of logical or legal reasoning and suggesting its nature to them.³⁹

§ 131. [Comment on Facts]; Customary Cautions.⁴⁰— While, as is said elsewhere^{40a} a presiding judge is restrained in a majority of American state jurisdictions from commenting on the weight of the evidence in the case on trial or as to the credibility of the witnesses by which it is given, it would be an error to conclude that, even in these states, judges are absolutely prevented from commenting upon the evidence.

General cautions as to the relative probative weight to be given oral admissions would seem legitimate, and even, occasionally, necessary. So, where an instruction as to the relative probative value of admissions as contrasted with that of self-serving statements by a party as a witness would amount to a comment on the evidence, it is to be refused.⁴¹

A judge also may properly caution a jury against one whom they shall find has willfully attempted to deceive them.⁴² In instructing a jury it is not objectionable to inform the jury that testimony concerning verbal statements of others should be received with great caution; that the repetition of oral statements is subject to imperfection and mistake; that such kind of testimony should be scanned closely; and that, where a witness can only give what he thinks was the substance of what was said, the weight to be given to such testimony depends largely upon the strength of memory and intelligence of the witness. This does not invade the province of the jury.⁴³

The court may properly instruct the jury as to the mental attitude in which properly to approach the consideration of "expert" evidence⁴⁴ or the inference of observers,⁴⁵ or of the misleading nature of photographs in estimating distance⁴⁶ or the court may instruct that positive testimony is more to be believed than negative if the qualification is added that the witnesses are of equal credibility.⁴⁷ The court may also comment on the probative force of

39. *Central of Georgia Ry. Co. v. Harper*, 124 Ga. 836, 53 S. E. 391 (1906).

40. 1 Chamberlayne, Evidence, § 287.

40a. *Supra*, § 125.

41. 2 *Brown v. Quincy, O., etc., R. Co.*, 127 Mo. App. 614, 106 S. W. 551 (1908).

42. *Sanders v. Davis* (Ala. 1907), 44 So. 979; *Alabama Steel & Wire Co. v. Griffin* (Ala. 1907), 42 So. 1034.

43. *Pumorio v. City of Merrill* (Wis. 1905), 103 N. W. 464.

44. *Infra*, §§ 808 et seq.

45. *Ellis v. Republic Oil Co.* (Iowa 1906), 110 N. W. 20.

46. *McLean v. Erie R. Co.* (N. J. 1904), 57 Atl. 1132.

47. *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000 (1903); *Central of Georgia Ry. Co. v. Sowell*, 3 Ga. App. 142, 59 S. E. 323 (1907); *Cleveland, C., etc., Ry. Co. v. Schneider*, 40 Ind. App. 38, 82 N. E. 538 (1907).

various witnesses⁴⁸ as on their experience⁴⁹ or probable bias⁵⁰ or on the weight to be attached to the relative numbers of witnesses on each side.⁵¹ He may also explain to them the relative value of written and oral evidence⁵² and may point out to them the issues⁵³ without singling out or unduly emphasizing the contentions of either side.⁵⁴ He may also use such illustrations as serve to explain the evidence⁵⁵ and explain the meaning of scientific or legal terms⁵⁶ or may properly correct a mistake of counsel or any other person in stating the evidence.⁵⁷

§ 132. Subordination of Judge to Jury.⁵⁸—The American tendency to subordinate the power and prestige of the judge to the supremacy of the jury, by clothing them with power to apply the law to the facts, without comment by the court as to the facts; and to exercise other powers of judicial administration, seems of extremely doubtful value to the cause of jurisprudence, not only on account of the bulk of the tribunal from which unanimous action is expected but for various other reasons among which are (1) The fact that the mental operations of a jury are largely guided by *emotion* while those of the judge are dominated by *reason*; (2) That while the jury have special experience of life in general, the judge has a valuable technical knowledge of the psychology of the courtroom which would materially assist the correction of the jury's action; and, in view of the judge's right to set aside a verdict if, in his opinion, unreasonable or against the weight of the evidence, helpful also in procuring a speedy termination of litigation; (3) That the jury, as a general rule, adopt the personal interests of litigation, as the basis of their action, while the judge represents the higher and more valuable interests of society in the efficient, correct and speedy attainment of justice through the administration of law.

Yet the time is certain to arrive when the jurisprudence of America will stop long enough to take a full look over its shoulder for the purpose of determining whether the danger from which it is so persistently running away is

48. Strickler v. Gitchel, 14 Okl. 523, 78 Pac. 94 (1904).

49. Indianapolis Northern Traction Co. v. Dunn (Ind. App. 1905), 76 N. E. 269.

50. Kirkpatrick v. Allemania Fire Ins. Co., 92 N. Y. Supp. 466, 102 App. Div. 327 (1905); Kavanaugh v. City of Wausau (Wis. 1904), 98 N. W. 550; Strasser v. Goldberg (Wis. 1904), 98 N. W. 554.

51. Kozlowski v. City of Chicago, 113 Ill. App. 513 (1904); Hammond, etc., Electric Ry. Co. v. Antonia (Ind. App. 1908), 83 N. E. 766. See W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210 (1903); Indianapolis St. Ry. Co. v. Schomberg (Ind. App. 1904), 71 N. E. 237.

52. Lee v. Williams, 30 Pa. Super. Ct. 349,

357 (1906); Johnson County Sav. Bank v. Walker, 79 Conn. 348, 65 Atl. 132 (1906).

53. McClure v. Lenz (Ind. App. 1907), 80 N. E. 988.

54. Jones & Adams Co. v. George, 227 Ill. 64, 81 N. E. 4 (1907) [*reversing* 125 Ill. App. 503 (1906)]; Calvert Bank v. J. Katz & Co., 61 Atl. 411 (1905); Morrell v. Lawrence, 203 Mo. 363, 101 S. W. 571 (1907); Galveston, etc., Ry. Co. v. Wallis (Tex. Civ. App. 1907), 104 S. W. 418.

55. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 S. W. 675 (1907).

56. Union Traction Co. v. Bick (Ind. App. 1907), 81 N. E. 617 ("car plant").

57. State v. Lane (Or. 1906), 84 Pac. 804.

58. 1 Chamberlayne, Evidence, §§ 300-306.

a real one or a memory to which no present reality corresponds; to decide calmly whether a judge elected under universal suffrage by a popular vote at short intervals presents the same danger to popular liberty that was threatened by Mr. Justice Buller or the Court of High Commission; and whether society has not a vital interest under, above and beyond the interest of the litigants themselves that law should be speedily and justly administered.

§ 133. Granting of New Trials; Verdicts Against Reason or Weight of Evidence.⁵⁹— Normally and properly, the presiding judge should set aside a verdict rendered in a trial before him where he finds that the jury have failed to exercise the reasoning faculty, where their verdict cannot be defended as the act of rational men.⁶⁰ Trial courts have been sustained in going further and setting aside verdicts as against the weight of the evidence, because the testimony and other proofs, while they might justify, in point of reason, the verdict of the jury, would, in the opinion of the presiding judge, with greater reason, have warranted the opposite conclusion.⁶¹

A judge may, indeed, be justified in allowing a verdict to stand though he himself would not have reached it on the evidence.⁶²

In an appellate court the question of the propriety of the trial judge's action commonly assumes not the form of asking whether the verdict of the jury can be sustained, in point of reason, which was the question presented to the trial judge; but takes the form of asking; Can the action of the trial judge be sustained in point of reason?⁶³ This seems entirely correct, as a matter of principle. The question is, in reality, one of law.⁶⁴ The appellate court, not having heard the evidence or seen the witnesses, will not reverse the action of the trial judge if there is evidence on which it can reasonably be sustained.⁶⁵

§ 134. [Granting of New Trials]; Palpable Confusion.⁶⁶— The effort to reconcile these antagonistic conceptions, that of a jury whose finding is conclusive as to matters of fact, and to whose wisdom a very marked deference is con-

59. 1 Chamberlayne. Evidence, §§ 307-310.

60. Birdseye's Appeal, 77 Conn. 623 (1905).

The court may always disregard evidence which is contrary to recognized scientific principles. So the appellate court may reverse a verdict for the plaintiff where the only evidence of negligence was that the defendant turned the water into its pipes and the plaintiff's faucet was found open as it is clear that the water could not have turned the faucet which was of the screw variety. Louisville Water Co. v. Lally, 168 Ky. 348, 182 S. W. 186, L. R. A. 1916, D 300 (1916).

61. Green v. Soule, 145 Cal. 96 (1904); Coal, etc., Co. v. Stoop, 56 Kan. 426 (1896);

Ulman v. Clark, 100 Fed. 183 (1900). "The maxim at present adopted [is] this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another." 1 Black. Comm. 387.

62. Reeve v. Dennett, 137 Mass. 315 (1884); Dickerson v. Payne, 66 N. J. L. 35 (1901); McCord v. R. R. Co., 134 N. C. 53 (1903).

63. Bishop v. Perkins, 19 Conn. 300 (1848); Capital and Counties Bank v. Henty, 7 App. Cas. 776 (1882).

64. *Infra*, § 188.

65. Ruffner v. Hill, 31 W. Va. 428 (1888).

66. 1 Chamberlayne. Evidence, §§ 311, 312.

tinually paid,⁶⁷ with an autocratic power of the judge to set the results of this wisdom aside, practically at his option, as the only condition which will make trial by jury even "tolerable," naturally leads to some conflict in statement on the part of the courts.⁶⁸ Certain tribunals state the scientific rule, of permitting a rational verdict to stand, with great precision.⁶⁹ On the other hand, the position of an arbiter as to where the preponderance of the evidence rests has been authoritatively assigned to the trial judge;⁷⁰ in other words, where two courses, both rational, are open to the jury, it is the right of the court to compel them by vetoing the other, to adopt the one which he, rather than they, may happen to prefer.

§ 135. [Granting of New Trials]; Technical Errors as to Evidence.⁷¹— The same duty of enforcing the rules of correct reasoning which presses upon the trial judge in his administrative relation to the jury rests upon all revising or appellate tribunals in passing upon the action of trial judges or inferior courts. Sound reasoning is the legal standard of proper conduct, whether in a court of any relative position or outside, in the world of affairs. The need for it is, in reality, a requirement of law. That a verdict will not be disturbed where sound reason has been exercised, truth ascertained, and substantial justice done, is the rule of administration adopted in England. In the United States the more technical rule is frequently observed that error in law, departure from precedent, being shown, a verdict will be set aside and a new trial granted;— regardless of whether substantial justice has or has not been done. If the game has not been correctly played, the fact that it turned out as it should is not material. It must be played over.

§ 136. [Granting of New Trials]; Substantive Law.⁷²— Wherever, under the confusion and blending of the rules of substantive law with those of procedure or practice to which reference is elsewhere made a ruling of a trial court, though apparently one as to a question of evidence, really involves a decision as to substantive law, a more technical rule may properly be applied to the action of the trial judge. Wherever the admissibility of a fact is conditioned, not upon its logical effect to prove a given fact, but upon whether the ultimate *factum probandum* which it is offered as tending to prove is, as matter of law, constituent of the right or liability asserted in the action, obviously the court is dealing with a question of substantive law, however disguised by the phraseology in which it is stated.

§ 137. [Granting of New Trials]; English Rule; Harmless Error.⁷³— Where it appears that substantial justice has been done, or, as the phrase goes, the

67. *Capital Traction Co. v. Hof*, 174 U. S. 13 (1899).

68. *R. R. Co. v. Ryan*, 49 Kan. 1 (1892); *Williams v. Townsend*, 15 Kan. 563 (1875); *Agnew v. Adams*, 26 S. O. 105 (1886).

69. *Pleasants v. Fant*, 22 Wall. 116, 122 (1874).

70. *Clark v. Ry. Co.*, 37 Wash. 537 (1905).

71. 1 Chamberlayne, Evidence, § 312.

72. 1 Chamberlayne, Evidence, § 313.

73. 1 Chamberlayne, Evidence, §§ 314-319.

[trial] judge "is satisfied with the verdict," no reversal will be had, on account either of the erroneous admission or rejection of evidence; — especially where it appears that adding or subtracting the evidence in question would not alter, or should not alter, the result.

Thus, a new trial will not be granted in England on account of the admission of objectionable testimony where unexceptional evidence to the same effect, sufficient to sustain it,⁷⁴ has been given.

In a similar way, where an English appellate court feels that a correct result has been reached, reason has been exercised and justice done, no new trial will be granted on account of a rejection of evidence, however competent in itself, which, under the exercise of sound reasoning, would not have altered the result.⁷⁵

§ 138. [Granting of New Trials]; American Majority.⁷⁶— In a majority of the American jurisdictions the more technical rule to the effect that every improper ruling regarding the admissibility of evidence should be ground for a new trial, was at once adopted and steadily maintained.⁷⁷

§ 139. [Granting of New Trials]; Federal Courts.⁷⁸— The early rule announced by the Supreme Court of the United States in dealing with the granting of new trials for technical error of the trial court in the admission or rejection of evidence was entirely unexceptional; — endorsing, as it did, the sound rule, that the use of reason by lower courts is the standard of requirement to be imposed by an appellate tribunal.⁷⁹ In later years, however, few, if any, courts have applied the erroneous rule of administration adopted in this matter by state tribunals with greater relentlessness and indifference to social consequences than the Supreme Court of the United States.⁸⁰

§ 140. [Granting of New Trials]; Criminal Cases.⁸¹— If the action of Ameri-

74. *R. v. Ball*, R. & R. 133 (1907).

75. "If the evidence had been admitted, it could have made no difference, at least it ought not to have made any in the verdict." *R. v. Teal*, 11 East 311 (1809) per Lord Ellenborough, C. J. The same rule has been adopted in equity. *Pemberton v. Pemberton*, 11 Ves. 50, 52 (1805); *Barker v. Ray*, 2 Russ. 76 (1826); *Bullen v. Michel*, 4 Dow 297, 319, 330 (1816). "The true consideration always is whether upon the whole there appears to be such a case as enables the judge in equity satisfactorily to administer the equities between the parties without the assistance of another trial." *Lorton v. Kingston*, 5 Cl. & F. 269, 340 (1838) per L. C. Cottonham

76. 1 Chamberlayne, Evidence, § 320.

77. *Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989 (1896); *Carpenter v.*

Lingenfelter, 42 Neb. 728, 60 N. W. 1022 (1894) (material contradiction); *Cutler v. Skeels*, 69 Vt. 154, 37 Atl. 228 (1897) (improper remark of counsel on his argument).

78. 1 Chamberlayne, Evidence, § 321.

79. *M'Ianahan v. Ins. Co.*, 1 Pet. 170, 183 (1828).

80. *Carver v. U. S.*, 160 U. S. 553, 16 Suppl. 388 (1896) (reversed 164 U. S. 694, 17 Suppl. 228).

"It is elementary that the admission of illegal evidence over objection necessitates a reversal." *Waldron v. Waldron*, 156 U. S. 380, 15 Suppl. 383 (1894).

The United States Supreme Court shows a later tendency to adopt the sounder view. *Motes v. U. S.*, 178 U. S. 458, 20 Suppl. 993 (1899).

81. 1 Chamberlayne, Evidence, § 322.

can courts of last resort in dealing with rulings on evidence deemed improper is devoid of scientific justification, still more impressive is their practice in criminal matters. The rule is carried so far that even where the error is clearly immaterial, having had, as the court admit, "no reference whatever to the guilt or innocence of the defendant;"⁸² or where the verdict was warranted by the other evidence,⁸³ a reversal is granted.

A typical statement of this view is that of Judge Miller of Louisiana:⁸⁴ "The admission of illegal evidence in a civil case is comparatively unimportant. . . . But in a criminal case . . . it is for the jury to convict, and it is presumed to act on all the evidence submitted. . . . It is the right of the accused to be tried on legal evidence alone. . . . The conviction must be by legal evidence only."

§ 141. [Granting of New Trials; Action of Appellate Courts; Technical Errors as to Evidence; American Majority]; A Purely Voluntary Situation.⁸⁵—Judges speak of a "presumption" of prejudice from an erroneous admission or rejection of evidence. The term "presumption" connotes the idea of logic enforced by procedural law;—that, by a rule of law an inference of fact is given a *prima facie* effect in the absence of evidence to the contrary. In point of fact, neither law nor logic, legal or logical reasoning, are in the least involved in this so-called presumption of prejudice from error. There is no "presumption," properly speaking; at most there is but a pure "assumption" of administration. With the observation of this fact, the entire theory of the "rule" falls. As a matter of administration, which is based on and tested by reason alone, the assumption is entirely indefensible. A court of justice cannot within the bounds of reason, so administer legal rules as to recognize and protect the right to commit injustice. Viewed from the standpoint of administration, the desired end is already attained, the verdict is a *just* one.

§ 142. [Granting of New Trials]; Futile Legislation.⁸⁶—Even the legislature has found itself impotent to control the insistence of the appellate judges upon reversals for technical error in matters of evidence. So deep-rooted is the feeling that a new trial should follow any slip, however slight, in this connection, that statutes providing a sounder rule have been customarily disregarded by the courts.⁸⁷

§ 143. [Granting of New Trials]; Technical Inerrancy Required.⁸⁸—The impressive feeling of the American appellate courts that they *must* reverse

82. *People v. Bell*, 53 Cal. 119 (1878) (contradicting proof that a murderer's victim was habitually profane)

83. *State v. Jefferson*, 125 N. C. 712, 34 S. E. 648 (1899).

84. *State v. Callahan*, 47 La. Ann. 497, 15 So. 50 (1895).

85. 1 Chamberlayne, Evidence, § 323.

86. 1 Chamberlayne, Evidence, §§ 324, 325

87. *People v. Strait*, 154 N. Y. 165, 47 N. E. 1090 (1897); *Kohl v. State*, 59 N. J. L. 445, 37 Atl. 73 (1897). See however, *Rutherford v. Com.*, 78 Ky. 639, 643 (1880).

88. 1 Chamberlayne, Evidence, § 326.

if error, however far from the substantial merits, has occurred, has been elsewhere noticed. It all apparently proceeds on the theory that certain rules of law *must* be followed, regardless of consequences. It involves a requirement of absolute inerrancy on the part of a trial judge. He must, at the peril of justice, comply absolutely with every technical requirement of the law of evidence — working out, in the hurry and other embarrassments of a *nisi prius* trial, a result to which the greater calm and leisure of an appellate court will not enable them to find any possible exception. When the number of administrative problems, accentuated by the desire of counsel to “get error into the record,” is considered, the unfairness of this to a trial judge is obvious. A practically impossible standard is erected. Penalty, reversal. Result, delay and expense to litigants; disrespect for law.⁸⁹

The result is a general breakdown in the effectiveness of criminal procedure to deal with crime, general lawlessness and popular contempt for the work of the courts. Happily England, where democracy is not without an enormous influence in government, has wisely escaped much of this. In America, justice steadily awarding injustice rather than sacrifice a jot or title of the legal formality by which it is hampering itself is by no means an impressive spectacle.

§ 144. [Granting of New Trials]; American Minority.⁹⁰— In a minority of the American jurisdictions the rule, originally adopted and finally established in England, that the improper admission or rejection of evidence would not be permitted to set aside a verdict which did substantial justice, has been employed. Many valiant protests against the majority rule have been registered by dissenting judges, whose opinions normally carry weight.⁹¹

§ 145. [Granting of New Trials]; Prejudice from Error.⁹²— In these jurisdictions, the so-called “presumption” of prejudice from error does not obtain. When the verdict is a just one, these courts naturally fail to see either (1) why there should be any need of presumption in the matter; or, (2) why, if presumption is to be indulged at all it should be assumed or presumed that a party is *prejudiced* by a just verdict.

If the record shows all the facts, the reasonableness of the decision is a matter of law. It is this question of law which is the appropriate duty of the appellate court to resolve. The verdict reached being the correct one, reason clearly has been used and the verdict should stand.⁹³ Where the facts thus

⁸⁹. See *Davis v. State*, 51 Nebr. 301, 70 N. W. 984 (1897).

⁹⁰. 1 Chamberlayne, Evidence, § 327.

⁹¹. *People v. Stanley*, 47 Cal. 113, 119 (1874), per Wallace, J.; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730 (1897), per Haight, J.; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813 (1897), per Brannon, J.;

Lipscomb v. State, 75 Miss. 559, 23 So. 210, 228 (1898).

⁹². 1 Chamberlayne, Evidence, §§ 328–330.

⁹³. “The judgment was manifestly for the right party; and where such is the case, the judgment will not be reversed because some incompetent testimony was admitted.” *Gardner v. R. Co.*, 135 Mo. 90, 36 S. W. 214

appear, it would seem that the necessity for assumption or presumption as to what should be taken to be the case *in the absence of evidence*, does not arise.

§ 146. **Taking Jury's Opinion.**⁹⁴—The judge, in discharging his own duty, may take the opinion of the jury; giving it such weight as he deems proper. He may, in like manner, ask their view as to the meaning of a document.⁹⁵ Where a trial by jury is not a constitutional or statutory right, but the court seeks the aid of the jury in determining questions of fact, it may adopt, modify or disregard their findings.⁹⁶ This convenient practice has the sanction of statute in certain jurisdictions.⁹⁷ The judge may, however, prefer the shorter procedure of leaving the entire question to the jury under appropriate instructions as to what rule of law they should apply in the event of their contingent findings of fact.⁹⁸

(1896). These courts follow the same rule in equity (*Dowie v. Droschell*, 203 Ill. 480, 68 N. E. 56 (1903)) or in criminal cases. Where the ruling "could not properly have changed the result, then he [defendant] was not aggrieved by the ruling." *State v. Beaudet*, 53 Conn. 536, 539, 4 Atl. 237 (1885).

94. 1 Chamberlayne, Evidence, § 331.

95. *Stewart v. Merchant, etc., Ins. Co.*, 16

L. R. B. D. 619, 627, 34 W. R. 208, 210 (1885).

96. *Kelly v. Home Sav. Bank*, 92 N. Y. Suppl. 578, 103 App. Div. 141 (1905).

97. *Willeford v. Bell* (Cal. 1897), 49 Pac. 66, 7; *Maier v. Lillebridge* (Mich. 1897), 70 N. W. 1032.

98. *Hawes v. Forster*, 1 M. & R. 368 (1834).

CHAPTER VI.

PRINCIPLES OF ADMINISTRATION; A. PROTECT SUBSTANTIVE RIGHTS.

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§ 147. **Principles of Administration.**¹— The exercise by judges of the broad and somewhat ill-defined powers of administration connected with the judicial office is necessarily governed rather by principles than by rules. These principles in turn are naturally somewhat indeterminate, eluding complete and definite statement. They grow out of and are guided by the accurate judicial instinct, the appreciation of highly intellectual skilled observers as to what should be the ultimate results of litigation.

Conveniently epitomized, these broad canons of judicial administration may be said to be four:

- A. Protection of Substantive Rights.
- B. Furtherance of Justice.
- C. Expediting Trials.
- D. Perfecting Substantive Law.

The operation of these canons of administration may conveniently be considered in this order.

§ 148. [**Principles of Administration**]; **Protection of Substantive Rights.**²— The primary principle of judicial administration regarding the admission of evidence is to preserve during the course of the trial the fundamental rights of the parties. This principle is justly deemed paramount to all others.

It will be expedient, however, to consider the right as separable. A party may claim to be entitled to insist (1) that he be given a reasonable opportunity to prove his case or establish his defense; (2) that he be accorded fair, reasonable opportunity to test the affirmative case relied on by his opponent; (3) that both branches of the tribunal shall employ, in the discharge of their respective functions, processes of correct reasoning; (4) that he be granted a trial by judge or jury, or both, according to the established course of legal proceedings; — each branch of a mixed tribunal discharging the duty of judging imposed upon it by law; (5) that he be allowed to *confront* the witnesses against him.

§ 149. **Right to Prove One's Case.**³— The substantive law secures to every litigant a fair opportunity to prove, in the best method at his command, and at a designated time, the substance of his contention. In other words, the party seeking the assistance of the court should be enabled to lay his case before the appropriate tribunal; — while it is equally the right of his adversary to unfold the substantial part of his defense at an appropriate time before the same tribunal. To this end, as to the object of the entire proceedings, all rules of administration regarding the admission of evidence are subservient.

The right of a party to a reasonable opportunity of proving his case implies the right to have it tried in such a manner as to enable him to present his contention with reasonable fullness. The right may be considered, (a) as it

1. 1 Chamberlayne, Evidence, § 332.

2. 1 Chamberlayne, Evidence, § 333.

3. 1 Chamberlayne, Evidence, §§ 334-338.

applies to the matter as to which proof may be offered; (b) the *mêans* by which these matters are established; (c) as to the scope of the right; (d) the order of the stages at which it should be enforced; (e) the order of topics at each stage.

The right of a party to prove his case may fairly require that his counsel be permitted to testify. If so, this will be allowed.⁴ The court may impose conditions, e.g., that the counsel withdraw from the case.

§ 150. [Right to Prove One's Case]; Right to Use Secondary Evidence.⁵— Good faith to the tribunal, and fair play to his adversary require that original observers, original documents, facts rather than reasoning should be presented to the court. But if a *necessity* for using secondary evidence is shown, the principle of administration now under consideration permits the use of evidence of that grade; — although possessing less probative force.

This, by far the most important in practical effect, of all aspects of the principle permitting proof of a party's case, is the permissive, indulgent portion of the "best evidence rule" which qualifies and conditions the mandatory section of that rule — also enforced as an administrative principle. The principle of administration under consideration is thus seen to be intimately involved with the familiar "Best Evidence Rule." As commonly stated, the "rule" contains these two distinct, though connected propositions: (1) The best evidence which the nature of the case permits must always be presented; (2) when the best evidence of which the case is susceptible is presented it will be admitted. The second half is the principle of administration under consideration.

§ 151. [Right to Prove One's Case]; Documents.⁶— Loss, destruction, inability to find, or other sufficient reason for failing to produce an original document having first been satisfactorily established, the party's right to prove his cause authorizes or requires, as the case may be, that he be permitted to prove its contents by parol evidence. Verbal precision is not required,⁷ as a demand to that effect would be subversive of the indulgence itself.⁸ In case a docu-

4. *Greenfield v. Kaplan*, 52 Misc (N. Y.) 132, 101 N. Y. Suppl. 567 (1906).

5. 1 Chamberlayne, *Evidence*, §§ 339, 340.

6. 1 Chamberlayne, *Evidence*, §§ 341-346.

7. In proving the contents of a lost instrument, it is sufficient to show who executed it and to whom it was executed, the time of execution, the consideration and the property conveyed, or the subject-matter of the contract. *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538, 56 N. E. 63 (1900).

If the consideration of a deed be stated in it the parol evidence of contents must include proof of that fact, as it is a material part of the deed. *Capell v. Fagan* (Mont. 1904), 77 Pac. 55.

Due and proper execution must be affirmatively proved. A reasonable latitude, neither assenting to vagueness on the one hand, nor imposing strictness with which it is impossible to comply on the other, is observable in this connection: — as in cases involving the requirements for proof of *contents* of lost or otherwise unavailable instruments. *Shorter v. Sheppard*, 33 Ala. 648 (1859); *Hawley v. Hawley*, 187 Ill. 354, 58 N. E. 332 (1900); *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329 (1897).

8. *Perry v. Burton*, 111 Ill. 138 (1884) (deed).

ment is constituent, i.e., is one of those which in themselves constitute or create legal results, wills, etc., proof of contents by parol testimony must be, upon natural grounds of public policy, particularly comprehensive and exact.

Bills of Sale.—The contents of a bill of sale must be proved to a reasonable certainty by clear and satisfactory evidence as to all material parts.⁹

Contracts.—A contract originally reduced to writing may be a constituent document. Its contents should be proved with fullness and precision.¹⁰

Deeds.—In case of a deed, in the language of an early Indiana decision,¹¹ "The property conveyed,¹² the estate created,¹³ the conditions annexed,¹⁴ the signing,¹⁵ sealing¹⁶ and delivery, are required to be proved with reasonable certainty by witnesses who can testify clearly to its tenor and contents."¹⁷

Negotiable Instruments.—Negotiable instruments¹⁸ and other commercial specialties must be proved with great particularity, as, in respect practically to all parts of the paper, a close approach to verbal precision is permitted by the nature of the document.¹⁹

Public records do not require for proof of contents by parol any other or different rule than is applied to private instruments. The substance of the contents of public documents,²⁰ in all material particulars,²¹ must be proved when the original is lost, destroyed or is for some other reason, practically unavailable. Verbatim testimony is not necessary.²²

9. Hooper v. Chism, 13 Ark. 496, 501 (1853); Brown v. Hicks, 1 Ark. 233, 243 (1838).

10. Shouler v. Bonander, 80 Mich. 531, 535, 45 N. W. 487 (1890) (agreement); Ross v. Williamson, 14 Ont. 184 (1887) (agreement).

A party who negligently loses a contract cannot be allowed to put in a copy according to a recent case. Missouri Oklahoma, etc., Co. v. West, Okl. 151 Pac. 212. It would seem however that the exclusion should be confined to cases where the loss was collusive or intentional, and that there is no sound reason now for the early rule.

11. Thompson v. Thompson, 9 Ind. 323, 333 (1857).

12. The courses of the description are not essential. Jackson v. M'Vey, 18 John. (N. Y.) 330, 333 (1820).

13. A lease, or surrender stand in the same position in relation to proof of contents. Doe v. Jack, 1 All. N. Br. 476 (1849).

14. "It should be made satisfactorily to appear what were the substantial conditions and covenants." Rector v. Rector, 8 Ill. 105, 122 (1846).

15. Elyton Land Co. v. Denny, 108 Ala. 553, 561, 18 So. 561 (1895); Neely v. Carter, 96 Ga. 197, 23 S. E. 313 (1895).

16. *Seals.*—For some consideration as to how far a record copy should show the existence of a seal upon an original instrument requiring a seal for its validity, see Strain v. Fitzgerald, 128 N. C. 396, 38 S. E. 929 (1901).

17. Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803 (1903).

18. Bond v. Whitfield, 32 Ga. 215, 217 (1861) (bill of exchange); State v. Peterson, 29 N. C. 556, 40 S. E. 9 (1901).

19. But see Bell v. Young, 3 Grant (Pa.) 175 (1854) (amount of a note; about \$80; above \$70 received).

20. Sturtevant v. Robinson, 18 Pick. (Mass.) 175, 179 (1836) (writ); Cunningham v. R. Co., 61 Mo. 33, 36 (1875).

Where the original order of publication in a tax proceeding has been lost the files of the newspaper in which it was published are admissible to prove it. Miller v. Keaton, 260 Mo. 708, 168 S. W. 1140, L. R. A. 1915 C 690 (1914).

21. In case of familiar and formal documents, a mere abstract may suffice. Brown v. Flanagan, 22 N. J. L. 567, 571 (1849) (writ).

22. Com. v. Roark, 8 Cush. (Mass.) 210, 213 (1851).

Wills.— The maximum of strictness in requirement as to proof of contents is made in the case of wills. That the contents of a lost will may, in a proper case, be established by parol is beyond question.²³ The rule that the substance of all material portions of the instrument must be proved is equally applicable in the case of wills as in that of other constituent instruments. A peculiarity of this class of documents is that the complexity of provision is frequently so great and the interdependence of the several parts is so intimate that practically all parts of a will are “material,” within the meaning of the rule.

§ 152. [Right to Prove One's Case]; Probative Documents.²⁴— The contents of other than constituent documents may be shown by any appropriate evidence,²⁵ including that of a witness who can testify directly from memory or from a recollection suitably refreshed by the use of appropriate memoranda, including the use, as part of the testimony of the witness of a memorandum which revives no present recollection but which the maker swears to have been accurate when made.

With letters,²⁶ books of account²⁷ and other non-constituent documents,²⁸ verbal precision is less requisite than in case of constituent documents;²⁹— though, of course, highly desirable, where it may be had. The substance³⁰ of any portions relevant to the inquiry will,³¹ as a rule, be deemed sufficient.

Letters as Contracts.— Where letters are relied on to establish a contract, the same particularity of proof in regard to essential parts is required as in case of more formal instruments designed for that purpose.³² The effect of a letter is to be distinguished from its substance. That a witness should be permitted to state the effect of the document would be, in certain cases, to substitute his conclusion for that of the jury in point of law,³³ or fact.

§ 153. [Right to Prove One's Case]; Means of Communication.³⁴— The regular and satisfactory means of communication between the witness and the tribunal

23. *Sugden v. St. Leonards*, L. R., 1 P. D. 154 (1876).

24. 1 *Chamberlayne*, Evidence, §§ 347, 348.

25. *Hardy's Trial*, 24 *How. St. Tr.* 681 (1794).

26. *Case v. Lyman*, 66 *Ill.* 229, 233 (1872); *Strange v. Crowley*, 91 *Mo.* 287, 294, 2 *S. W.* 421 (1886); *Poague v. Spriggs*, 21 *Gratt.* 220, 231 (1871).

27. *Mayson v. Beazley*, 27 *Miss.* 106 (1854) (abstract sufficient).

28. *Camden v. Belgrade*, 78 *Me.* 204, 3 *Atl.* 652 (1886) (marriage certificate); *Wilkinson v. Allen*, 67 *Mo.* 502, 510 (1878) (advertisement).

Where way-bills have been lost it is error to exclude letter press copies of them. *Barker v. Kansas City Mexico & Orient R. Co.*, 88 *Kan.* 767, 129 *Pac.* 1151, 43 *L. R. A.* (N. S.) 1121 (1913).

29. *Tobin v. Shaw*, 45 *Me.* 331, 349 (1858) (letter: “So far as she recollected,” sufficient).

Some real recollection, however, is requisite.— A witness who “thought he might perhaps state” the contents of a letter was held to have been properly rejected. *Graham v. Chrystal*, 2 *Abb. App. C.* 263 (1865).

30. *Camden v. Belgrade*, 78 *Me.* 204, 3 *Atl.* 652 (1886).

31. *People v. McKinney*, 49 *Mich.* 334, 336, 13 *N. W.* 619 (1882); *Sizer v. Burt*, 4 *Den.* 426, 429 (1847) (memorandum of claim).

32. *Elwell v. Walker*, 52 *Iowa* 256, 261, 3 *N. W.* 64 (1879) (antenuptial agreement).

33. *Baltimore v. War.* 77 *Md.* 593, 603, 27 *Atl.* 85 (1893) (that a letter was an “order”).

34. 1 *Chamberlayne*, Evidence, §§ 349, 350.

is that the witness should address the judge or jury in the oral language to which they are accustomed and which they understand. But should a witness not understand the vernacular, should he be a deaf mute, were it to prove that an important document, constituent or probative, is in a foreign tongue, the present right permits a party to insist upon offering interpreters, translations or any other reasonable substituted means of communication of thought between the witness or declarant and the court.

§ 154. [Right to Prove One's Case]; Interpreters.³⁵— The power to appoint interpreters is frequently conferred in express terms by statute,³⁶ though such an act is merely declaratory of the existence of a common law administrative power of the judge.³⁷ Unless this administrative power is unreasonably exercised, the result will not be revised by an appellate court.³⁸ The interpreter is subject to cross-examination as to his qualifications,³⁹ and, unless found to be disqualified, in the court's opinion, by reason of relationship to the parties⁴⁰ or other bias,⁴¹ the office may be discharged by any competent witness.⁴²

*The interpreter must, however, understand*⁴³ or have a fair knowledge⁴⁴ of both languages as spoken; but it is not necessary that he should be able to read English as written.⁴⁵

§ 155. [Right to Prove One's Case]; Deaf Mutes, etc.⁴⁶— The witness may understand English and still be unable, by reason of some organic imperfection, to express himself in words. He may, for example, be a deaf mute; and, as such, confined to the use of signs. The necessity for it being shown, the signs he makes must be translated into language by an interpreter⁴⁷ skilled in the code of signs employed by the witness.⁴⁸

35. 1 Chamberlayne, Evidence, §§ 351-354.

36. California Code C. P. § 1884 ("any person a resident of the proper county" may be selected); *People v. Morine*, 138 Cal. 626, 72 Pac. 166 (1903); *Schall v. Eisner*, 58 Ga. 190 (1877); Rev. Stat. (Ind.) 1897, § 508; *Skaggs v. State*, 108 Ind. 57, 8 N. E. 695 (1886) (the number of interpreters is discretionary with the court); *Com v. Sanson*, 67 Pa. St. 322 (1871).

37. *Schall v. Eisner*, 58 Ga. 190 (1877); *Livar v. State*, 26 Tex. App. 115 (1888). The consent of the opposite party is not necessary. *Mennella v. Metropolitan St. Ry. Co.*, 86 N. Y. Suppl. 930, 43 Misc. 5 (1904).

38. *Kozlowski v. City of Chicago*, 113 Ill. App. 513 (1904).

39. *People v. John*, 137 Cal. 220, 89 Pac. 1063 (1902); *Scheerer v. Harber*, 36 Ind. 536 (1871); *In re Wiltsey's Will* (Iowa), 98 N. W. 294 (1904).

40. *State v. Thompson*, 14 Wash. 285, 44 Pac. 553 (1896); *Barber, etc., Co. v. Odasz*, 57 U. S. App. 129, 85 Fed. 754 (1898).

41. *State v. Thompson*, 14 Wash. 285, 44 Pac. 533 (1896).

42. — *State v. Weldon*, 39 S. C. 318, 17 S. E. 688 (1893); *People v. Thiede*, 11 Utah 241, 39 Pac. 837 (1895) (juror); *State v. Thompson*, 14 Wash. 285, 44 Pac. 533 (1896) (witness).

43. *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37 (1897).

44. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695 (1886). The witness need not be one exceptionally well skilled to act as an interpreter. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695 (1886).

45. *Central, etc., Ry. Co. v. Joseph*, 125 Ala. 313, 28 So. 35 (1899).

46. 1 Chamberlayne, Evidence, §§ 355, 356.

47. *People v. Weston*, 236 Ill. 104, 86 N. E. 188 (1908); *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695 (1886). A second interpreter may be another deaf mute. *Skaggs v. State*, 108 Ind. 57, 8 N. E. 695 (1886); *State v. Burns*, 78 N. W. 681 (1899).

48. Writing by a deaf-mute has been sug-

The same considerations apply to a witness who cannot speak on account of shock⁴⁹ or who is of tender years⁵⁰ or bashful.⁵¹

§ 156. [Right to Prove One's Case]; Scope of Right.⁵²— The scope of a party's case, which is protected by the administrative principle under consideration, is such as will cover the proof of all facts as to which at any stage of the case he has the burden of evidence.⁵³ In other words, it extends to proof of every fact which he needs or on which he relies to establish his claim or defense. It is the positive, affirmative evidence on which he rests his position; — as distinguished from evidence testing or rebutting the affirmative case against him, the right of introducing which is elsewhere considered.

Evidence in Chief or in Rebuttal.— The difference between these two classes of facts, those covered by the scope of the first and those covered by that of the second of the party's legal rights in a judicial trial is obvious. The first set of facts is, as it were, placed originally by the actor in the scale to establish a *prima facie* case⁵⁴ or by the non-actor,⁵⁵ to make an equilibrium in a civil, or a reasonable doubt in a criminal one, as the case may be, by means of a defense. The second set of facts are those adduced at a later stage of the trial by these respective litigants, in order to maintain their contentions by offsetting any unfavorable inferences arising from facts first introduced by the adversary at the last preceding stage. The original case of either party is covered by his evidence in chief. The evidence which antagonizes that produced by his opponent, is evidence in rebuttal.

§ 157. [Right to Prove One's Case]; Limited to Proof of *Res Gestæ*.⁵⁶— The right to insist upon presenting to a tribunal the best evidence within the proponent's power is subject to a procedural qualification of great importance. The right does not apply equally to all branches of a party's case. His claim is confined to proof of the *res gestæ*, or more properly to such facts found inferentially or in specie among the *res gestæ* as are constituent. Where direct proof of the *res gestæ* is unattainable, he may, as of right, establish probative

gested as a preferable substitute for signs. *Morrison v. Leonard*, 3 C. & P. 127 (1827). But the better reasoning seems to be with the cases which deny such a modification of the usual rule. *State v. De Wolf*, 8 Conn. 98 (1830); *State v. Howard*, 118 Mo. 127, 144, 24 S. W. 41 (1893).

49. *Roberson v. State* (Tex. Cr. 1899) 49 S. W. 398.

50. *Lord Mohun's Trial*, 12 How. St. Tr. 950 (1692).

51. *Connor v. State*, 25 Ga. 515 (1858); *Earl of Wintowns Case*, 15 How. St. Tr. 804, 861 (1716).

52. 1 Chamberlayne, Evidence, § 357.

53. *Infra*, §§ 402 et seq.

"This burden, however, which [in a criminal case] was simply to meet the *prima facie* case of the government, must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff." *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 92, 24 Supp. Ct. 33, 35, 36 (1903).

54. *Infra*, § 409.

55. Actor in this treatise will be used as designating the party having the burden of proof: non-actor, or *reus*, as indicating his opponent.

56. 1 Chamberlayne, Evidence, § 358.

facts, from which, as circumstantial evidence, the existence of the *res gestæ* or constituent facts may be inferred.

The ultimate possible relations of any fact are infinite in number. For the practical purposes of a trial lines or perhaps more properly, circles of logical relevancy must be drawn upon the proposition in issue as a *quasi* center. The circles are two; and precisely where each circle shall be drawn is necessarily determined by an exercise of administrative power. When these circles are formed, within the first will lie the facts which *must* be considered; within the second are properly placed facts which *may* be investigated. Beyond lie irrelevant facts, which *should not* be investigated. The first circle includes *res gestæ* or constituent facts. The second embraces those which are relevant but not constituent. Outside the second circle, are the irrelevant, nonprobative facts.

In other words, the right of a party is to prove the *res gestæ* or constituent facts; by direct proof if and so far as in his power; by probative facts so far as he is forced to resort to these.

§ 158. [Right to Prove One's Case]; Order of Stages.⁵⁷— The order in which evidence may be introduced is within the administrative power of the presiding judge. His action must be reasonable, in view of all the circumstances of the case, including the existence of any rule of practice on the observance of which the parties may have relied, the reasons upon which such a rule of practice has been founded, the action of other judges on similar states of fact and the like. If the action is reasonable it will be sustained, though each judge of an appellate court would himself have acted otherwise under the same state of facts.

§ 159. [Right to Prove One's Case]; Right to Open and Close.⁵⁸— At each stage of a judicial trial, by a fairly uniform practice, the parties alternate; — the litigant who has the right to open and close preceding at each stage and being immediately followed by his opponent. This continues until neither party has further relevant facts to present for consideration.

Plaintiff Has Right.— In certain jurisdictions as, Alabama,⁵⁹ California,⁶⁰ Maryland,⁶¹ and Massachusetts⁶² the rule of practice, except so far as modified by statute, is that the plaintiff invariably opens and closes, regardless of the state of the pleadings. With these infrequent exceptions, however, the rules of practice award the right, from obvious considerations of fairness, to the party having the burden of proof.⁶³

The right may be waived, and a waiver of the right to open implies the

57. 1 Chamberlayne, Evidence, § 359.

58. 1 Chamberlayne, Evidence, § 360.

59. Chamberlain v. Gaillard, 26 Ala. 504 (1855).

60. Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342 (1852).

61. Townsend v. Townsend, 7 Gill. (Md.

10) 25 (1848). See also Yingling v. Hesson, 16 Md. 112, 121 (1860).

62. Dorr v. Tremont Bank, 128 Mass. 349 (1880). See also Bradley v. Clark, 1 Cush. (Mass.) 293 (1848).

63. Semler Milling Co. v. Fyffe, 127 Ill. App. 514 (1906).

waiver of the right to close where the other party omits argument.⁶⁴ Who is actor is a question which, under the common law system, would be decided upon an inspection of the pleadings.⁶⁵

§ 160. [Right to Prove One's Case]; Plaintiff as Actor.⁶⁶— Should the plaintiff have the burden of proof on any issue,⁶⁷ including that of damages,⁶⁸ or if, there being several defendants, he is found to have the burden of proof as to any of them,⁶⁹ he will be accorded, as a rule, the right to open and close the entire case.⁷⁰

§ 161. [Right to Prove One's Case]; Defendant as Actor.⁷¹— A defendant's confession, in order to confer on him the privileges of the actor to open and close must as in other cases, be full and complete as to the existence of sufficient constituent of component facts to constitute a *prima facie* case in the plaintiff. A partial confession is not sufficient.⁷² Nor is this right lost because the plaintiff fails to introduce any evidence on his own behalf.⁷³ At common law, unless defendant by his pleadings admits plaintiff's cause of action and relies on affirmative defenses, he is not entitled to open and reply.⁷⁴ Where the defendant is actor, he will receive, as a rule, the right to open and close.⁷⁵

§ 162. [Right to Prove One's Case]; Code and Common Law Pleading; Admissions.⁷⁶— Under common law pleading, when a defendant, by not denying, admitted all the material allegations of the plaintiff's declaration, the burden of proof was assumed by the defendant.⁷⁷ Under code pleading the rule takes on the following form: The defendant may acquire the right to open and close by admitting all the material ⁷⁸ allegations of the plaintiff's complaint ⁷⁹ and assigning an affirmative defense.⁸⁰ Probably the same right accrues to him by making the same admissions at the trial.⁸¹

64. *St. Louis & S. F. R. Co. v. Johnson* (Kan. 1906), 86 Pac. 156.

65. *Beale-Doyle Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S. W. 58 (1906).

66. 1 Chamberlayne, Evidence, § 362.

67. *Taylor v. Chambers*, 2 Ga. App. 178, 58 S. E. 369 (1907).

68. *Geringer v. Novak*, 117 Ill. App. 160 (1904).

69. *Clodfelter v. Hulett*, 92 Ind. 426 (1883). See also *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267 (1830).

70. A co-defendant who pleads affirmatively has, however, been granted the same right as if he were sole defendant. *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267 (1830).

71. 1 Chamberlayne, Evidence, § 363.

72. *Southern Ry. Co. v. Smith*, 102 S. W. 232, 31 Ky. L. Rep. 243 (1907).

73. *Dickey v. Smith*, 127 Ga. 645, 56 S. E. 756 (1907).

74. *Leesville Mfg. Co. v. Morgan Wood & Iron Works*, 75 S. C. 342, 55 S. E. 768 (1906).

75. *Gibson v. Reiselt*, 123 Ill. App. 52 (1905). *Shaffer Bros. v. Warren*, (Iowa 1905) 102 N. W. 497.

76. 1 Chamberlayne, Evidence, §§ 364, 365.

77. *Infra*, § 396.

78. *List v. Kortepeter*, 26 Ind. 27 (1866); *Murray v. New York, etc., Co.*, 85 N. Y. 236 (1881).

79. *Fairbanks v. Irwin*, 15 Colo. 366 (1890); *Jackson v. Delaplaine*, 6 Hous. (Del.) 358 (1880); *Osgood v. Grosellose*, 159 Ill. 511, 42 N. E. 886 (1896).

80. An argumentative denial though affirmative in form, is not sufficient. There must be an explicit admission. *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660 (1889). See also *Turner v. Cool*, 23 Ind. 56 (1864); *Bradley v. Clark*, 1 Cush. (Mass.) 293 (1848).

81. *Campbell v. Roberts*, 66 Ga. 733

Again the plaintiff may in his reply or perhaps by verbal admissions at the trial concede the existence of the affirmative facts relied upon by the defendant in his answer,⁸² and so retain the right to open and close, but he must make his admissions clear and comprehensive, leaving nothing, no matter how inconsequential, to be proved by plaintiff in order to establish a *prima facie* case.⁸³ For example, where a plaintiff charges gross negligence, a defendant cannot acquire a right to open and close by admitting simple negligence.⁸⁴

§ 163. [Right to Prove One's Case]; Proceedings in Rem.⁸⁵— On proceedings *in rem* he who concedes that his adversary is entitled to succeed unless he can show that he is himself entitled to do so, has the right of an actor. Where, in a claim case, the claimant admits that the plaintiff has a *prima facie* case, he will be deemed to have acquired the right to open and close.⁸⁶

§ 164. [Right to Prove One's Case]; Variations in Order of Evidence.⁸⁷— If he think proper, a presiding judge may receive a relevant fact at any time prior to final judgment;⁸⁸— provided that when evidence is offered at a stage at which alone it can be effective for the purpose for which it is offered the discretion of the presiding judge does not extend to declining to receive it until a later stage. In other words, the order of evidence is a matter of administrative control; it is, as is usually said, "within the court's discretion."⁸⁹ So long as the action of the trial court is reasonable, it will stand.⁹⁰ A judge may in any case reject tenders of evidence for the non-actor made before the actor has rested his case.⁹¹

In all cases of variation, good reasons must be furnished.⁹² No concession

(1881); *City of Aurora v. Cobb*, 21 Ind. 492 (1863). But compare *Wigglesworth v. Atkins*, 5 Cush. (Mass.) 212 (1849); *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367 (1890). See *contra*, *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367 (1890).

82. *Cilley v. Preferred Acc. Ins. Co.*, 187 N. Y. 517, 79 N. E. 1102 (1907) [*affirming* 109 N. Y. App. Div. 394, 96 N. Y. Suppl. 282 (1905)].

83. *Southern Ry. Co. in Kentucky v. Steele*, 28 Ky. L. Rep. 764, 90 S. W. 548 (1906).

84. *Illinois*.— *Edwards v. Hushing*, 31 Ill. App. 223 (1888).

Iowa.— *Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83 (1868).

North Carolina.— *Love v. Dickerson*, 85 N. C. 5 (1881).

United States.— *Hall v. Weare*, 92 U. S. 728, 738 (1875).

85. 1 Chamberlayne, Evidence, § 366.

86. *Turner v. Elliott*, 127 Ga. 338, 56 S. E. 434 (1907). It is the sounder rule in a will

case that the proponent has the burden and is the actor throughout the hearing. Where all claimants stand on an equal footing the allotment of the order of argument is purely a matter of administration. *Sorensen v. Sorensen*, (Neb. 1904) 98 N. W. 837.

87. 1 Chamberlayne, Evidence, §§ 367, 368.

88. *Western Union Tel. Co. v. Bowman*, (Ala. 1904) 37 So. 493; *Van Camp v. City of Keokuk*, (Iowa 1906) 107 N. W. 933; *Pharr v. Shadel*, (La. 1905) 38 So. 914; *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209 (1905).

89. *Alquist v. Eagle Ironworks*, (Iowa 1904) 101 N. W. 520.

Burnside v. Town of Everett, 186 Mass. 4, 71 N. E. 82 (1904).

90. *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822 (1906).

91. *Bowen v. White*, 26 R. I. 69, 58 Atl. 252 (1904).

92. *Cincinnati, N. O. & T. Ry. Co. v. Cox*, (Tenn. 1906) 143 Fed. 110; *Wilkie v. Richmond Traction Co.*, (Va. 1906) 54 S. E. 43.

will be given to evidence which is immaterial,⁹³ or simply cumulative.⁹⁴ Among administrative reasons is that of expediting trials.⁹⁵ In judging of the reasonableness of the action of the trial judges, the existence of certain regular stages approved in practice is a consideration of much importance. Variations require explanation, i.e., the assignment of an administrative reason. On the other hand, the preservation of the established order requires no defense or explanation.

§ 165. [Right to Prove One's Case]; Evidence in Chief.⁹⁶—A party on his original case may introduce evidence appropriate only to rebuttal.⁹⁷ On the other hand, the actor may supplement his evidence in chief at that stage.⁹⁸ Either party may be permitted to do this not only after his case has been stated by him to be closed,⁹⁹ and after both parties have rested their respective cases,¹ but after one party has rested and the other declined to introduce any evidence.² Nor is it even material that a motion for a verdict³ or nonsuit has been made,⁴ or even allowed⁵ or refused.⁶ Nor have the limits of the judge's power in this respect yet been reached. Although the practice should be discouraged as a rule,⁷ additional evidence may, in the interests of justice, be received even after counsel have concluded their arguments,⁸ the case been taken under advisement by the court,⁹ or the judge has given his charge to the jury.¹⁰ Nor is even this the extent of administrative power. A party may ask and be permitted to introduce new evidence even after the jury have retired to deliberate as to their verdict;¹¹ and in fact, it is said, at any time before they are discharged

93. *Potsdam Electric Light & Power Co. v. Village of Potsdam*, 97 N. Y. Suppl. 551, 112 App. Div. 810 (1906).

94. *In re Walker's Estate*, (Cal. 1905) 82 Pac. 770.

95. *Bartlett & King v. Illinois Surety Co.*, (Iowa 1909) 119 N. W. 729.

96. 1 Chamberlayne, *Evidence*, §§ 369–371.

97. *Stephens v. Elliott*, 36 Mont. 92, 92 Pac 45 (1907). See *Witnesses*.

98. *Blair v. State*, 69 Ark. 558, 64 S. W. 948 (1901); *Hathaway v. Hemingway*, 20 Conn. 191, 195 (1850).

99. *Hartrick v. Hawes*, 202 Ill. 334, 67 N. E. 13 (1903) [*affirming judgment*, 103 Ill. App. 433 (1902)]. *Cathcart v. Rogers*, 115 Ia. 30, 87 N. W. 738 (1901). *Com. v. Biddle*, 200 Pa. 640, 50 Atl. 262 (1901).

1. *Watson v. Barnes*, 125 Ga. 733, 54 S. E. 723 (1906).

2. *Pocahontas Collieries Co. v. Williams*, 105 Va. 708, 54 S. E. 868 (1906); *Reiff v. Coulter*, (Wash. 1907) 92 Pac. 436

3. *Bridger v. Exchange Bank*, 126 Ga. 821,

56 S. E. 97 (1906); *Cathcart v. Rogers*, 115 Iowa 30, 87 N. W. 738 (1901).

4. *Hill v. City of Glenwood*, (Iowa 1904) 100 N. W. 522; *Richardson v. Agnew*, (Wash. 1907) 80 Pac. 404.

5. *Penn v. Georgia, S. & F. Ry. Co.*, 129 Ga. 856, 60 S. E. 172 (1908).

6. *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.*, (Iowa 1905) 103 N. W. 1003; *Anderton v. Blais*, 28 R. I. 78, 65 Atl. 602 (1906).

7. *Law v. Merrills*, 6 Wend. (N. Y.) 268, 281 (1830).

8. *Dyer v. State*, 88 Ala. 225, 229, 7 So. 267 (1889). See also *Western Union Tel. Co. v. Bowman*, (Ala. 1904) 37 So. 493.

9. *Gross v. Watts*, 206 Mo. 373, 104 S. W. 30 (1907).

10. *Dyer v. State*, 88 Ala. 225, 229, 7 So. 267 (1889); *Braydon v. Goulman*, 1 T. B. Monr. 115 (1824).

11. *McComb v. Ins. Co.*, 83 Iowa 247, 48 N. W. 1038 (1891) *Van Huss v. Rainbolt*, 2 Coldw. 139, 141 (1865).

by order of court; ¹²— though at law, ¹³ as distinguished from equity, ¹⁴ no such permission would probably be accorded after the verdict ¹⁵ or other final adjudication. ¹⁶

The principles are the same whether the evidence offered is by a new witness ¹⁷ or by the further examination of one who has already testified. ¹⁸

Should the court admit the evidence out of course, the right of the opponent to meet and test it is obvious. ¹⁹

Opening of Case for Limited Purpose.— This opening of a case for the purpose of receiving new evidence is not of necessity a general opening of the case for all purposes. Its effect may be limited to furnishing an opportunity for introducing the specific fact alleged. ²⁰

Reason Required.— So long as this administrative power to vary the order of evidence is exercised with reason, its exercise will not be revised. ²¹

The higher interests of the furtherance of justice, ²² which it is the appropriate function of the court to regard in the discharge of its administrative functions, supervenes as soon as the legal right of the party to a reasonable opportunity to present his case, ²³ or test that of his opponent, ²⁴ has been met in the course of the trial. The order of evidence, in this sense, is within the administrative power of the presiding judge. ²⁵

The maximum of concession will be extended where the evidence which the party asks to supply is of a formal nature, or where it has been assumed that it has been shown, that its existence is not controverted or that, as matter of law, it could not be controverted; ²⁶ or where the evidence offered is already in the case in another form. ²⁷ This may be done up to the time when the jury retire. ²⁸

12. "According to the course of practice and common justice, before them in their several Courts, upon trial by jury, as long as the prisoner is at the bar and the jury not sent away, either side may give their evidence and examine witnesses to discover truth." Answer of judges in Lord Strafford's Trial, Lords' Journals, April 10, 1642.

13. *Meadows v. Ins. Co.*, 67 Iowa 57, 24 N. W. 951 (1885).

14. *Clavey v. Lord*, 87 Cal. 413, 416, 419, 25 Pac. 493 (1891).

15. See, however, *Bahnsen v. Horwitz*, 90 N. Y. Suppl. 428 (1905).

16. *Commercial Bank v. Brinkerhoff*, (Mo. App. 1905), 35 S. W. 121.

17. *Rucker v. Eddings*, 7 Mo. 115, 118 (1841).

18. *Rucker v. Eddings*, 7 Mo. 115, 118 (1841).

19. *Bergman v. London & L. Fire Ins. Co.*, 34 Wash 398, 75 Pac. 989 (1904).

20. *Alling v. Weissman*, 77 Conn. 394, 59

Atl. 419 (1904); *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97 (1906). The restriction originally imposed by the Court upon the testimony to be admitted may, in the judge's discretion, itself be removed by subsequent order. *Alling v. Weissman*, 77 Conn. 394, 59 Atl. 419 (1904).

21. *Hill v. City of Glenwood*, (Iowa 1904) 100 N. W. 522.

22. *Infra*, § 226.

23. *Supra*, §§ 149 et seq.

24. *Supra*, §§ 171 et seq.

25. *Ellison v. Branstrator*, 153 Ind. 54, N. E. 433 (1899); *Hess v. Wilcox*, 58 Iowa 380, 383, 10 N. W. 847 (1882).

Kansas.— *Wilson v. Hays' Ex'r*, 109 Kan. 321, 58 S. W. 773 (1900); *Webb v. State*, 29 Ohio St. 351, 356 (1876).

26. *Browning v. Huff*, 2 Bail. 174, 179 (1831).

27. *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842 (1904).

28. "Where mere formal proof has been

The minimum of administrative indulgence will be shown where the course of the trial has developed a fatal weakness, unconsidered by the party now offering the evidence, and where the latter²⁹ or other interested or friendly person is offered as a witness for the purpose of repairing the difficulty.³⁰

§ 166. [Right to Prove One's Case]; Evidence in Chief; Actor.³¹— It will be convenient, therefore, to assume as universal that which is so general and say that the party having the burden of proof — the actor, as he may be shortly called — after making such an “opening” as is permitted or deemed advisable, first presents his case to the jury. He calls and examines his witnesses — the stages of whose examination present a matter for separate consideration³² — submits his documents, exhibits to the perception of the court, any article, animate or inanimate, which is in any way relevant, and rests his case. This is his evidence in chief. It should contain every fact necessary to the establishment of a *prima facie* case,³³ it covers the entire *res gestæ* out of which the right or liability claimed or asserted arises.

§ 167. [Right to Prove One's Case]; Nonactor.³⁴— His adversary — the non-actor, the *reus* — whose only burden in proof in civil cases is the creation of an equilibrium or, in criminal cases, establishing a reasonable doubt,³⁵ at the close of the actor's evidence in chief, becomes entitled to an opportunity to present his case, by way of defense.³⁶ Before doing so, a preliminary question should be resolved: Has the actor presented to the court a *prima facie* case? In other words, has he produced such evidence in favor of his contention that the jury, or judge, as the case may be, would be justified as reasonable men in acting in accordance with it? This point is raised by a request for a ruling upon the basis that such is not the case. The court may, upon suitable terms, rule as to such a motion.

If the result is adverse to the actor, that is the end of the case. Otherwise, i.e., if the point is not raised or not sustained, the nonactor proceeds. He “opens” his case to the jury, calls his witnesses, who are examined at the same successive stages as those of his opponent.³⁷ produces his documents, offers for inspection such articles as may be deemed relevant; and, in turn rests his case. This is his evidence in chief, his case in reply. The non-

omitted, courts have allowed witnesses to be called or documents to be produced at any time before the jury retire, in order to supply it” *Rucker v. Eddings*, 7 Mo. 115, 118 (1841).

29. *Lewis v. Helm*, (Colo. 1907) 90 Pac. 97; *Commercial Bank v. Brinkerhoff*, (Mo. App. 1905) 85 S. W. 121.

30. *Law v. Merrills*, 6 Wend. 268, 281 (1830).

31. 1 Chamberlayne, Evidence, § 372.

32. See Witnesses, *Infra*, § 1171 et. seq.

33. *Southern Ry. Co. v. Gullatt*, (Ala. 1907) 43 So. 577.

34. 1 Chamberlayne, Evidence, § 373.

35. *Infra*, § 480.

36. The rights of co-defendants to be heard with respect to the contentions of each other are considered in *Grundy v. Janesville*, 84 Wis. 574, 54 N. W. 1085 (1893); *R. v. Cooke*, 1 C. & P. 322 (1824).

37. See Witnesses § 1171 et. seq

actor's evidence in chief should contain proof of all facts necessary to meet the claim of right or liability advanced by the actor.³⁸

At this point it is open to the actor to ask for a ruling to the effect that his *original prima facie* case has not been impaired and that, consequently, there is nothing for the jury to try. He may, in other words, ask the court to rule that the jury could not, as reasonable men, find otherwise than in favor of his contention.

§ 168. [Right to Prove One's Case]; Order of Topics.³⁹— While it is not disputed that what is preliminary should precede in proof that which is subsequent in point of time,⁴⁰ or causation, counsel claim and customarily exercise the right to open their cases to the jury in any order of topics which seems to them effective for their purpose. In connection with the order of topics, an administrative question is presented to the court which, unless it should appear that the issue is likely to be befogged or the jury misled, will usually be exercised by leaving the matter to the determination of the parties. This order is not commonly disturbed by the court, where the facts alleged are relevant, unless as adopted it is obviously unfair or prejudicial.⁴¹ Therefore, the order in which counsel may see fit to offer evidence of the respective topics covered by their contentions at any particular stage of the proof, is largely left to the unhampered option of counsel.⁴² They have the right to call witnesses at the appropriate stage in proof of relevant topics in any order they may see fit, in the absence of general or special regulation — as that requiring a party who declines to go out with his witnesses to testify before they do.⁴³ This right connotes liberty of placing the topics in any order which he desires. The reverse is equally true — that the right to vary the order of topics connotes that of calling witnesses in any order which may seem judicious.

§ 169. [Right to Prove One's Case]; Conditional Relevancy; Bearing Apparent.⁴⁴ — The right of counsel to present facts in any order of topics is also subject to the very important qualification that it should affirmatively appear, or be made to appear, that the fact offered in any case is relevant. Where the actual or potential relevancy is obvious, on its face, the party as of right may introduce it; — though it be not, unless supplemented by other evidence sufficient to warrant a finding in his favor.⁴⁵ But where the relevancy of the fact offered

38. *Hathaway v. Hemingway*, 20 Conn. 191, 195 (1850).

39. 1 *Chamberlayne, Evidence*, § 374.

40. *White v. Wilmington City Ry. Co.*, (Del. Super. 1906) 63 Atl. 931.

41. "It is certainly the privilege of a party to present his testimony in the mode his judgment or fancy may dictate; and, if relevant, it cannot be objected to, although it may

be of no avail without further proof." *Branch Bank v. Kinsey*, 5 Ala. 9, 12 (1843).

42. *McDanel v. Logi*, 143 Ill. 487, 32 N. E. 423 (1892).

43. *Barkley v. Bradford*, 100 Ky. 304, 38 S. W. 432 (1896); *Clemons v. State*, 92 Tenn. 282, 288, 286, 21 S. W. 525 (1892).

44. 1 *Chamberlayne, Evidence*, § 375.

45. *Adams v. Adams*, 29 Ala. 433 (1856). *Earnhardt v. Clement*, 49 S. E. 49 (1904).

is dependent upon proof of other facts, a somewhat different situation is presented, though the logical bearing is obvious.

The court is custodian of the time of the tribunal. In discharge of its administrative function to expedite trials,⁴⁶ it is quite justified in insisting that time be not fruitlessly consumed. If evidence is offered which will be of no consequence unless another fact be also shown to have existed, ample warrant is furnished for requiring some satisfactory assurance, before admitting the fact offered, that evidence will at some time be furnished as to the existence of the conditioning fact.⁴⁷ In other words, if proof of two facts is essential to the relevancy of either, the court may well insist upon knowing that both are to be shown before he admits proof as to either of them.⁴⁸ Still, the party evidently can prove only one of these facts at a time,⁴⁹ and cannot reasonably be required to prove all his facts, even those inseparably connected, by a single witness.⁵⁰ He may, in general, present either fact he chooses first; and, if the fact so selected has an apparently logical bearing upon the truth of some proposition in issue,⁵¹ if connected with it later in an appropriate manner,⁵² the evidence is competent;⁵³—though standing alone it is irrelevant.

§ 170. [Right to Prove One's Case]; Bearing not Apparent.⁵⁴—Where the actual or potential relevancy of the statement or other fact offered is not apparent, the court may well ask the assurance of counsel as to proof of connecting facts, and, if the information is not satisfactory, may require immediate proof of the connecting facts as a condition for admitting the statement originally offered.⁵⁵ With such an assurance the court will, as a rule, rest content,⁵⁶ and the evidence is admitted *de bene*—provisionally—to be connected later,⁵⁷ by evidence which will render it relevant.⁵⁸ If the connection is not made, if the appropriate fact is *not* proved, the remedy is to have the fact already introduced in evidence stricken out,⁵⁹ and this has been deemed a suf-

46. *Infra*, § 304.

47. *Bashore v. Mooney*, (Cal. App. 1906) 87 Pac. 553; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803 (1903).

48. *Rogers v. Brent*, 10 Ill. 573, 587 (1849); *Sloan v. Sloan*, (Or. 1904) 78 Pac. 893.

49. *Palmer v. McCafferty*, 15 Cal. 334, 335 (1860); *Rogers v. Brent*, 10 Ill. 573, 587 (1849).

50. *Rogers v. Brent*, 10 Ill. 573, 587 (1849).

51. *Rogers v. Brent*, 10 Ill. 573, 588 (1849).

52. *Weidler v. Farmers' Bank*, 11 S. & R. (Pa.) 134, 140 (1824).

53. *Palmer v. McCafferty*, 15 Cal. 334, 335 (1860); *Rogers v. Brent*, 10 Ill. 573, 587, 588 (1849); *Ming v. Olster*, 195 Mo. 460, 92 S. W. 898 (1906).

54. 1 *Chamberlayne, Evidence*, § 376.

55. *Hagan v. McDermott*, (Wis. 1908) 115 N. W. 138.

56. *Wilson v. Jernigan*, 57 Fla. 277, 49 So. 44 (1909); *Lanier v. Hebard*, 123 Ga. 626, 51 S. E. 632 (1905); *Ellis v. Thayer*, 183 Mass. 309, 67 N. E. 325 (1903).

57. *Hoffman v. Harrington*, 44 Mich. 183, 184, 6 N. W. 225 (1880). *Pennsylvania*.—*American Car, etc., Co. v. Alexandria Water Co.*, 218 Pa. 542, 67 Atl. 861 (1907).

58. *McCoy v. Watson*, 51 Ala. 466, 467 (1874); *Bischof v. Mikels*, 147 Ind. 115, 46 N. E. 348 (1897). *Cramer v. Burlington*, 42 Iowa 315, 319 (1875).

Minnesota.—*Lane v. Agric. Soc.*, 67 Minn. 65, 69 N. W. 463 (1896).

59. *Hix v. Gulley*, 124 Ga. 547, 52 S. E. 890 (1905). *Rogers v. Brent*, 10 Ill. 573, 587 (1849). *Dorr Cattle Co. v. Chicago & G. W. Ry. Co.*, 103 N. W. 1003 (1905).

ficient protection to the rights of the adverse party,⁶⁰ or as a fair risk of litigation.⁶¹ If the motion to strike out is not made, the objection to the admission itself is regarded as waived.⁶²

§ 171. **Right to Test Adversary's Case.**⁶³—The right to test an opponent's case which is conferred on every litigant by substantive law is of an importance to him which makes its denial or unreasonable curtailment contrary to the principle of judicial administration now under consideration. This right of testing is, in the normal course of judicial proceedings, exercised by the parties at two principal stages, (a) on cross-examination, and (b) on rebuttal.

§ 172. [**Right to Test Adversary's Case**]; **Cross-examination.**⁶⁴—*The right to a reasonable opportunity for cross-examination, at an appropriate stage, and in relation to matters then open for consideration,*⁶⁵ is undisputed in any quarter. The right to cross-examine is, however, conditioned by the existence of a direct examination. No right exists in the absence of direct examination. A party has no just legal claim to insist upon cross-examining a witness whom his adversary has merely called and sworn.⁶⁶ The rule as to the right of cross-examination in a criminal⁶⁷ case is the same which is applied to a civil⁶⁸ one; — although what is reasonable as to scope in any particular instance may be affected by the nature of the proceeding in which the question arises.⁶⁹ The right of cross-examination in criminal cases has also been conferred by constitutional provisions.⁷⁰

60. *Palmer v. McCafferty*, 15 Cal. 334, 335 (1860); *Alexander v. Grover*, 190 Mass. 462, 77 N. E. 487 (1906); *Haigh v. Belcher*, 7 C. & P. 389, 390 (1836).

61. *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588 (1900).

62. *Alexander v. Grover*, 190 Mass. 462, 77 N. E. 487 (1906).

63. 1 Chamberlayne, Evidence, § 377.

64. 1 Chamberlayne, Evidence, § 378.

65. *City of Chicago v. Marsh*, 238 Ill. 254, 87 N. E. 319 (1909). The supreme court of North Dakota states a familiar and conceded rule of procedure in saying: *State v. Foster*, (N. D. 1905) 105 N. W. 938, per Young, J.—“An opportunity to cross-examine is a matter of right, but the latitude and extent of the cross-examination rests largely in the discretion of the presiding judge, and he may place a reasonable limit upon the time which shall be allowed for the examination or cross-examination of a witness.” The limitations upon this exercise of discretionary power are thus stated by the Illinois Court of Appeals: —“This discretion should be exercised for the

discovery of truth and in furtherance of justice, and not be so restricted as to defeat these ends.” *Prussian Nat. Ins. Co. v. Empire Catering Co.*, 113 Ill. App. 67 (1904), per Vickers, J., citing *Hanchett v. Kimbark*, 118 Ill. 121 (1886).

66. *Harris v. Quincy, O. & K. C. Ry. Co.*, 115 Mo. App. 527, 91 S. W. 1010 (1906); *Aikin v. Martin*, 11 Paige 499 (1845).

67. *Howard v. Com.*, 25 Ky. L. Rep. 2213, 80 S. W. 211 (1904) [rehearing denied, 26 Ky. L. Rep. 36, 81 S. W. 704]; *People v. Billis*, 110 N. Y. Suppl. 387, 58 Misc. Rep. 150 (1908).

68. *Nickelson v. Dial*, 93 Pac. 606 (1908). *Sullivan v. Fugazzi*, 193 Mass. 518, 79 N. E. 775 (1907).

69. **Right of co-defendants.**—In a criminal case, where two co-defendants are being tried together, it has been held bad administration to require that the counsel for only one of the defendants should cross-examine the state witnesses. *People v. Billis*, 110 N. Y. Suppl. 387, 58 Misc. Rep. 150 (1908).

70. *Wray v. State*, (Ala. 1908) 45 So. 697.

§ 173. [Right to Test Adversary's Case]; Rebuttal.⁷¹—A party has a legal right not only to test by cross-examination or otherwise,⁷² the case made by his opponent, at any stage; it is a further part of the right, at present under consideration, that he should be at liberty to introduce evidence to offset any affirmative matter on which his opponent relies. In other words, each litigant has a right to *rebuttal*.⁷³ Whenever a party at a particular stage of rebuttal, original or subsequent, introduces to the attention of the tribunal new matter, it becomes the right of his opponent to introduce evidence to meet it. Should the opponent, at this stage, in turn set up new matter, or a new aspect of old matter, the right to a subsequent stage of rebuttal to meet it enures to the benefit of the original pleader; — and so on, until the supply of relevant facts is exhausted.

Testing on Rebuttal.—But the litigant may not only introduce at this stage facts which tend directly to meet and *disprove* those set up by his opponent; he may introduce evidence which *tests* them and merely minimizes or destroys their probative force.

Scope of Rebuttal.—The object of rebutting evidence is to meet, antagonize or confute new facts introduced by the adverse party at the next previous stage.⁷⁴ whether given by himself,⁷⁵ or by his other witnesses⁷⁶ or on cross-examination;⁷⁷—mere reassertion of the propositions advanced on the evidence in chief not being permitted at this stage.⁷⁸ The facts offered in rebuttal being in their nature deliberative,⁷⁹ strong probative force is not essential to admissibility;⁸⁰—although some evidentiary cogency, actual or potential, must be made to appear.⁸¹ On the other hand, no test of admissibility is furnished by the fact that the rebutting evidence tends to *strengthen* the case made by the evidence in chief in a civil or criminal⁸² case. That is, directly or indirectly, the object of any rebuttal.

§ 174. [Right to Test Adversary's Case]; Actor.⁸³—If the actor fail at the end of the nonactor's case to move for a verdict in his own favor; or if, when such a motion is made, it has been overruled; the actor has reached the stage of re-

71. 1 Chamberlayne. Evidence. § 379.

72. *Supra*, § 172.

73. "Rebutting evidence means not merely evidence which contradicts the evidence on the opposite side, but evidence in denial of some affirmative fact which the answering party is endeavoring to prove." *State v. Fourchy*, 51 La. Ann. 228, 240, 25 So. 109, 114 (1899).

74. *Pronskevitch v. Chicago & A. Ry. Co.*, 232 Ill. 136, 83 N. E. 545 (1908); *Alpena Tp. v. Mainville*, 153 Mich. 732, 117 N. W. 338, 15 Detroit Leg. N. 605 (1908).

75. *Wells v. Gallagher*, (Ala. 1905) 39 So. 747; *State v. Beckner*, 194 Mo. 281, 91 S. W. 892 (1906) (self defense).

76. *Cross v. State*, (Ala. 1906) 41 So. 875.

77. *Thomas v. State*, (Ala. 1907) 43 So.

371. *Roberts v. Terre Haute Electric Co.*, (Ind. App. 1906) 76 N. E. 895 [denied petition for rehearing. 76 N. E. 323 (1905)].

78. *State v. Kelly*, 77 Conn. 266, 58 Atl. 705 (1904). *Hallwood Cash Register Co. v. Rollins*, 62 Atl. 380 (1905).

79. *Supra*, § 34.

80. *State v. Gallagher*, 14 Idaho 656, 94 Pac. 581 (1908).

81. *Wojtylak v. Kansas & T. Coal Co.*, 188 Mo. 260, 87 S. W. 506 (1905); *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287 (1906).

82. *State v. Howard*, (La. 1908) 45 So. 260.

83. 1 Chamberlayne. Evidence. § 380.

buttal. The evidence in chief of the nonactor, as is characteristic of the general position of one who will succeed if he but offsets the case against him, has consisted largely of what practically amounts to rebuttal in the average instance.⁸⁴ But, so far as the actor is concerned, the first opportunity for rebuttal occurs at the close of the nonactor's case. He is not entitled to reiterate his evidence in chief, nor to reaffirm what his antagonist has denied, or to introduce evidence which he should have offered as part of his original case.⁸⁵ All this may be done by leave of court;⁸⁶ but, in the average instance, to permit it would amount to trying the case over again by the use of cumulative evidence.

The normal scope of rebuttal is that it should meet the new matter given in the nonactor's evidence in chief;⁸⁷ nor is it material that the nonactor should have interpolated part of his case into the actor's evidence in chief.⁸⁸ His rights at this stage are confined to attacking the inferences from this new matter.⁸⁹

§ 175. [Right to Test Adversary's Case]; Use of "Experts."⁹⁰—Where a nonactor introduces expert testimony in support of his position, the actor may, as a rule, introduce similar evidence on rebuttal.⁹¹

§ 176. [Right to Test Adversary's Case]; Anticipatory Rebuttal.⁹²—Where the position of the nonactor is known to the actor, a very natural impatience is often shown, especially by inexperienced practitioners, to come at once to the real point upon which the issue will ultimately turn, by means of what may be called an "anticipatory rebuttal."⁹³ It is, however, clear that a fact is not competent in an actor's evidence in chief merely because it may be received upon rebuttal, when that stage is reached.⁹⁴ In general, therefore, such anticipatory rebuttal is excluded;—except by leave of court.

^{84.} *Supra*, § 166.

^{85.} *Wilkinson v. State*, 44 So. 611 (1907) (diagram); *Patterson v. San Francisco & S. M. Electric Ry. Co.*, 147 Cal. 178, 81 Pac. 531 (1905).

^{86.} *Birmingham Ry., Light & Power Co. v. Mullen*, 138 Ala. 614, 35 So. 701 (1903). *Minard v. West Jersey & S. Ry. Co.*, 64 Atl. 1054 (1906). *Hall v. Wagner*, 97 N. Y. Suppl. 570, 111 App. Div. 70 (1906).

^{87.} *American Car & Foundry Co. v. Alexandria Water Co.*, 218 Pa. 542, 67 Atl. 861 (1907). *Morgan v. Hendricks*, 80 Vt. 284, 67 Atl. 702 (1907). Evidence offered by plaintiff in rebuttal which rebuts no evidence offered by defendants is properly excluded. *Saucier v. New Hampshire Spinning Mills*, 72 N. H. 292, 56 Atl. 515 (1903).

^{88.} *Bade v. Hibbard* (Or. 1908), 93 Pac. 364.

The interpolation itself may not be permitted. *McGregor v. Oregon R. Co.*, (Or. 1908) 93 Pac. 465.

^{89.} *Hoggson & Pettis Mfg. Co. v. Sears*, 77 Conn. 587, 60 Atl. 153 (1905). *Mueller v. Rebhan*, 94 Ill. 142, 150 (1879). *Bazelon v. Lyon*, 128 Wis. 337, 107 N. W. 337 (1906).

^{90.} 1 Chamberlayne, Evidence, § 381.

^{91.} *Guenther v. Metropolitan R. Co.*, 23 App. D. C. 493 (1904); *William Grace Co. v. Larson*, 227 Ill. 101, 81 N. E. 44 (1907) [*affirming* 129 Ill. App. 290 (1906)].

^{92.} 1 Chamberlayne, Evidence, § 382.

^{93.} *Atlas Lumber & Coal Co. v. Flint*, (S. D. 1905) 104 N. W. 1046.

^{94.} *Maurice v. Hunt*, 80 Ark. 476, 97 S. W. 664 (1906).

§ 177. [Right to Test Adversary's Case]; Nonactor.⁹⁵—At the close of the actor's stage of rebuttal, the burden of evidence⁹⁶ returns to the nonactor to rebut, as it were, the actor's rebuttal. The opportunity to meet rebuttal is, for purposes of distinction, called the *surrebuttal*. The rights of the nonactor on surrebuttal are analogous to the rights of the actor on rebuttal.⁹⁷ He is not at liberty, without leave of court,⁹⁸ to reaffirm the allegation of his evidence in chief. The stage for that is past.⁹⁹ His rights are entirely in connection with the new matter introduced by the actor on his rebuttal. He may directly deny the existence of those facts or set up other facts inconsistent with their effect, supplementing facts;¹ or he may attempt to discredit this new matter or the witnesses by which it is sought to establish it.

§ 178. [Right to Test Adversary's Case]; Subsequent Rebuttal.²—An actor may be permitted³ to exercise, at the stage of *re-rebuttal*, as regards the witnesses and new facts set up by the nonactor on surrebuttal, the same rights as were exercised by the latter at that stage. If new matter appears in the re-rebuttal the nonactor becomes entitled to a *re-surrebuttal*, where the rights are similar to those on surrebuttal, *mutatis mutandis*:—and so on, in alternating stages to which specific names are not, as a practical matter, usually assigned.

§ 179. Right to the Use of Reason.⁴—“At the outset, and for centuries after the beginnings of our law as an established system there was no clear conception of Substantive Law as such. The whole legal theory was embodied in forms of remedy. Ceremonies had been embalmed as primary and immutable principles of law. Forms and modes of procedure stood in the place of substantive rights; nor could justice see beyond them or above them.”⁵ In the slow evolution of legal institutions of Englishmen the use of reason has succeeded the application of the more formal tests with which our ancestors were familiar.

A Substantive Right to Reason.—In an attempt, at the present day, to determine the truth of a proposition of fact by the use of reason, it is one of the inherent fundamental rights of the parties to insist that this test should be

95. 1 Chamberlayne, Evidence, § 383.

96. *Infra*, §§ 402 *et seq.*

97. *Connecticut*.—Belden v. Allen, 61 Conn. 173, 23 Atl. 963 (1891).

Illinois.—Willard v. Pettitt, 153 Ill. 663, 39 N. E. 991 (1895).

Michigan.—Devonshire v. Peters, 104 Mich. 501, 63 N. W. 973 (1895).

Pennsylvania.—Koenig v. Bauer, 57 Pa. 168, 172 (1868).

Vermont.—Pratt v. Rawson, 40 Vt. 183, 188 (1868).

98. Crosby v. Wells, 73 N. J. L. 790, 67 Atl. 295 (1907); Wysong v. Seaboard Air Line Ry., 74 S. C. 1, 54 S. E. 214 (1906).

99. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108 (1905).

1. Cooke v. Loper, (Ala. 1907) 44 So. 78; Duckworth v. Duckworth, (Md. 1903) 56 Atl. 490; Maloney v. King, (Mont. 1904) 76 Pac. 4.

2. 1 Chamberlayne, Evidence, § 384.

3. State v. Alford, 31 Conn. 40, 46 (1862).

4. 1 Chamberlayne, Evidence, § 385.

5. Hepburn, The Development of Code Pleading. Salmond, Jurisp., (2d ed.) 451. For some consideration of forms of trial in England antecedent to the use of reason, see *supra*, § 120.

reason alone and that the test should be properly applied. The presiding justice should so discharge his administrative functions in dealing with the admission of evidence as to preserve this right.

§ 180. [Right to the Use of Reason]; Should Prevent Jury from Being Misled.⁶— In enforcing the use of reason upon the jury, the court will be vigilant to prevent the use of any evidence or argument which will tend to mislead them; or to replace reason as a guide by any form of emotionalism.⁷

Thus a bitter attack by one party or witness on another party may justify the court in withdrawing the case from the jury.⁸ If counsel insist on asking irrelevant questions the court may require him to dictate them out of the presence of the jury.⁹ So appeals to sympathy as by testifying from a stretcher¹⁰ or by showing wounds to the jury should be avoided.

Many of the rules of evidence, procedural or administrative, e.g., excluding hearsay,^{10a} rejecting inference—"opinion," as it is called¹¹—and the like, have been adopted and are being enforced, with the very object of protecting the jury from being misled. Similarly, where the undisputed circumstances show that the testimony of a witness cannot by any possibility be true, it is the duty of the court to withdraw such testimony from the jury.¹²

§ 181. [Right to the Use of Reason]; Guessing not Permitted.¹³— The jury will not be permitted to guess. Where they cannot reason to a conclusion involving the necessity of judicial action, they must decline to act. It is the administrative duty of the court to enforce this rule. It is, for example, error to submit a cause to a jury where the evidence only enables the latter to guess as to which one of the several causes produced a certain result.¹⁴

§ 182. [Right to the Use of Reason]; Striking Out Prejudicial Evidence.¹⁵— Where inadmissible evidence has been received and is of such a nature as to prejudice the party, the court will, in general, grant a motion to strike it out of the record. Of this nature would be prejudicial hearsay.¹⁶ The same course may properly be followed where the evidence is irrelevant.¹⁷ The fact that the probative force of evidence is seriously impaired by cross-examination¹⁸ or in some other similar way furnishes no ground for striking it out.

6. 1 Chamberlayne, Evidence, § 386.

7. Union Pac. R. Co. v. Field, (U. S. 1905) 69 C. C. A. 536, 137 Fed. 14.

8. Hale v. Hale, 32 Pa. Super. Ct. 37 (1906).

9. Marcum v. Hargis, 31 Ky. Law Rep. 1117, 104 S. W. 693 (1907).

10. Blanchard v. Holyoke St. Ry. Co., 186 Mass. 582, 72 N. E. 94 (1904). Blanchard v. Holyoke St. Ry. Co., 186 Mass. 582, 72 N. E. 94 (1904). Felach v. Babb (Neb. 1904), 101 N. W. 1011.

10a. *Infra*, § 859.

11. *Infra*, § 672.

12. Wolf v. City Ry. Co. (Or. 1907), 91 Pac. 460.

13. 1 Chamberlayne, Evidence, § 387.

14. Fuller v. Ann Arbor R. Co., (Mich. 1905) 12 Detroit Leg. N. 348, 104 N. W. 414.

15. 1 Chamberlayne, Evidence, § 388.

16. Skinner Mfg. Co. v. Dowville, 54 Fla. 251, 44 So. 1014 (1907).

17. Johnston v. Beadle, (Cal. App. 1907) 91 Pac. 1011.

18. Platt v. Rowand, 54 Fla. 237, 45 So. 32 (1907).

Nor will this course be adopted merely on the ground that the evidence is *insufficient*.¹⁹

Irresponsiveness.—Where an answer is irresponsive, either party may move to strike it out.²⁰ But here, as in other cases where objection to the reception of evidence is taken, the objecting party, to secure consideration in an appellate court, will be required to obtain a ruling upon the question by the trial judge. If the ruling is adverse to him, he may then except.²¹

Objection must have been made to an obvious incompetent question if the motion to strike out is to be urged as a matter of right.²² But where the evidence has been admitted without objection, the judge is under no obligation to strike out cumulative testimony on the same point.²³ But this proceeds upon the ground of *waiver*, in failing to assert a legal right at the proper time. If nothing in the question appears objectionable, no rights are lost by failing to object to it, if a motion to strike out is promptly made.²⁴ On a general objection and motion to strike out, if any part of the evidence is competent, the motion will properly be overruled.²⁵

Where evidence is improperly admitted it may be withdrawn if the evidence is not very material and the error corrected but if the evidence is of a material character and is calculated to affect the jury the withdrawal of the same from their consideration would not heal the vice of its admission.²⁶

§ 183. [Right to the Use of Reason]; Withdrawal of Jury.²⁷—Where an argument on any point if conducted in the presence of the jury would tend to mislead them, they may be required to withdraw.²⁸ The court is to judge, as a question of administration, whether it be preferable, in the interests of justice, to order such a withdrawal and have the same thing gone over by counsel in his argument to the jury; or, on the contrary, to expedite the trial²⁹ by having the entire matter discussed in their presence in the first instance. Counsel have no right to have the court adopt the latter course.³⁰

19. *Platt v. Rowand*, 54 Fla. 237, 45 So. 32 (1907).

20. *Kramer v. Haeger Storage, etc., Co.*, 108 N. Y. Suppl. 1, 123 App Div. 316 (1908).

21. *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907). In the taking of testimony the occasional ejaculation of the word "exception" is in the nature of a running and unfavorable comment on the proceedings, and nothing more. It raises no question for the decision of the court and reserves nothing." *Sheldon v. Wright*, 80 Vt. 298, 304 (1907).

22. *Iowa*.—*Aughey v. Windrem*, 114 N. W. 1047 (1908). *Darrin v. Whittingham*, 68 Atl. 269 (1907).

23. *Skinner Mfg. Co. v. Dowville*, 54 Fla. 251, 44 So. 1014 (1907).

24. *Johnston v. Beadle* (Cal. App. 1907), 91 Pac. 1011; *Skinner Mfg. Co. v. Dowville*, 54 Fla. 351, 44 So. 1014 (1907).

25. *Platt v. Rowand*, 54 Fla. 237, 45 So. 32 (1907); *Darrin v. Whittingham*, (Md. 1907) 68 Atl. 269; *Galveston, etc., Ry. Co. v. Janert*, (Tex. Civ. App. 1908) 107 S. W. 963.

26. *Andrews v. State*, 64 Tex. Crim. Rep. 2, 141 S. W. 220, 42 L. R. A. (N. S.) 747 (1911).

27. 1 Chamberlayne. Evidence, § 389.

28. *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863 (1904).

29. *Infra*, §§ 304 et seq.

30. *Rice v. Dewberry*, (Tex. Civ. App. 1906) 93 S. W. 715.

§ 184. [Right to the Use of Reason]; Preventing Irrational Verdicts.³¹— As is stated more at length elsewhere,³² the justice presiding at a jury trial may direct a verdict for either party, when a contrary finding could not, as a matter of reason, be sustained by the evidence.³³ The judge, being charged with the duty of enforcing upon the jury the use of the reasoning faculty, may also set aside a verdict which is irrational, either as a matter of logical³⁴ or legal³⁵ reasoning.

Actions for a penalty follow the same rules. In such a case a verdict against the defendant has been ordered.³⁶

§ 185. [Right to the Use of Reason]; Directing Verdicts.³⁷— But a result which it would be the administrative duty of the court to nullify as irrational and therefore illegal by awarding a new trial,³⁸ the judge may properly look upon as something which it is his administrative duty to prevent. He may, therefore, intervene either on motion or *sua sponte*, at an earlier stage by withdrawing the case from the jury and directing a verdict against one of the parties.³⁹

§ 186. [Right to the Use of Reason]; Relation to Grant of a New Trial.⁴⁰— As a verdict by a jury may properly be set aside by the presiding judge if reason has not been exercised⁴¹ and as a verdict will be directed where only one conclusion is logically, i.e., legally permissible,⁴² it may properly be said, the test being the same, that where the court would be constrained to set aside a verdict for a party complaining, it would be justified in directing a verdict in his favor.⁴³ It is stating the same proposition to say that a verdict will be ordered when the evidence at the trial, with all the inferences which the jury could justifiably draw from it, is so insufficient to support a verdict that were it returned it would be set aside.⁴⁴

In jurisdictions, on the contrary, where new trials may be granted because the verdict is against the weight or preponderance of the evidence,⁴⁵ a jury cannot be ordered to return a verdict where there is enough evidence to warrant

31. 1 Chamberlayne, Evidence, § 390.

32. *Infra*, §§ 191 et seq.

33. Wilson v. Alcatraz Asphalt Co., 142 Cal 182, 75 Pac. 787 (1904). Kelly v. Ins. Co., 126 Ill. App. 528 (1906). Young v. Chandler, 102 Me. 251, 66 Atl. 539 (1906). Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081, 13 Detroit Leg. N. 631 (1906). Loper v. Somers, 71 N. J. L. 657, 61 Atl. 85 (1905). Guild v. Pringle, 145 Fed. 312 (1906).

34. *Supra*, § 36.

35. *Supra*, § 36.

36. Gilbreath v. State, (Tex. Civ. App. 1904) 82 S. W. 807.

37. 1 Chamberlayne, Evidence, § 391.

38. *Supra*, § 133.

39. School Furniture Co. v. Warsaw School Dist., 122 Pa. St. 494 (1888).

40. 1 Chamberlayne, Evidence, § 392.

41. *Supra*, § 133.

42. *Infra*, § 36.

43. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833 (1906).

44. Chicago Hardware Co. v. Matthews, 124 Ill. App. 89 (1905); Anderson v. Cumberland Telephone & Telegraph Co., (Miss. 1905) 38 So. 786; Cobb v. Glenn Boom & Lumber Co., (W. Va. 1905) 49 S. E. 1005.

45. *Supra*, § 133.

them, as a matter of reason, in finding otherwise; although the court fully intends, the weight of the evidence being determined in his mind, that if the jury return any other verdict than the one he is asked to order he will set it aside.⁴⁶

§ 187. [Right to the Use of Reason]; Relation to Motion in Arrest of Judgment.⁴⁷—Where a defect exists in the declaration or similar pleading which is of such a character as to be ground for a motion in arrest of judgment, it is proper to move to withdraw the case from the jury on the same ground.⁴⁸ On such a motion based on a defect in the declaration, matters of evidence and facts proved cannot be considered.⁴⁹

§ 188. [Right to the Use of Reason]; A Matter of Law.⁵⁰—As the duty of the jury is to reason correctly, and as it is the substantive right of the party to insist that this reasoning be exercised,⁵¹ a ruling as to what is or is not rationally possible for the jury to do is, in reality, ruling on a matter of law.⁵² In other words, whether there is any evidence upon which the jury could reasonably determine as to the truth of a matter in issue is a question of law for the court;⁵³ if there is, it must be left to them.⁵⁴ But, in general, a matter about which there is no controversy in the evidence should not be left to the jury.⁵⁵

The question is however complicated by the fact that the jury is not bound to believe uncontradicted evidence admitted without objection.⁵⁶

§ 189. [Right to the Use of Reason]; General Rules.⁵⁷—It is not necessary to submit a cause to a jury, unless there is evidence which will warrant a verdict in favor of the party producing it.⁵⁸ As a rule, where the evidence

46. —Marshall v. City of Buffalo, 176 N. Y. 545, 68 N. E. 1119 (1903). Lebew v. Hewitt, 138 N. C. 6, 50 S. E. 459 (1905). Weir v. Seattle Electric Co., 41 Wash. 657, 84 Pac. 597 (1906).

47. 1 Chamberlayne. Evidence, § 393.

48. Grace & Hyde Co. v. Sanborn, 124 Ill. App. 472 (1906) [affirmed in 225 Ill. 238, 80 N. E. 88].

49. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784 (1907) [affirming 128 Ill. App. 176 (1906)]. See Rasco v. Jefferson, (Ala. 1905) 38 So. 246. Owens v. Lehigh Valley Coal Co., 115 Ill. App. 142 (1904).

50. 1 Chamberlayne, Evidence, § 394.

51. *Infra*, §§ 179 et seq.

52. Illinois.—Libby, McNeil & Libby v. Banks, 209 Ill. 109, 70 N. E. 599 (1904) [affirming 110 Ill. App. 330 (1903)].

Maryland.—Baltimore & O. R. Co. v. Belinski, 67 Atl. 249 (1907).

North Carolina.—Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201 (1905).

Tennessee.—Norman v. Southern Ry. Co., 104 S. W. 1088 (1907).

United States.—Minnesota & D. Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 463, 77 C. C. A. 607 (1906).

53. Universal Metal Co. v. Durham & C. R. Co., 145 N. C. 293, 59 S. E. 50 (1907); Boswell v. First Nat. Bank, (Wyo. 1907) 92 Pac. 624 [rehearing denied 93 Pac. 661].

54. Pigeon v. Lane, 80 Conn. 237, 67 Atl. 886 (1907).

—Clark v. Chicago R., etc., Ry. Co., 231 Ill. 548, 83 N. E. 286 (1907). Paine v. Kelley, 83 N. E. 8 (1907). Powers v. Miller, 107 N. Y. S. 960, 123 App. Div. 396 (1908).

55. Keene v. Newark Watch Case, etc. Co., 188 N. Y. 598, 81 N. E. 1167 (1907) [affirming judgment, 98 N. Y. S. 68, 112 App. Div. 7 (1906)].

56. Collins v. Casualty Co., Mass. 112 N. E. 634, L. R. A. 1916 E 1203 (1916).

57. 1 Chamberlayne. Evidence, § 395.

58. Lynch v. Englehardt, Winning, Davison

on material points is conflicting, a verdict cannot be ordered;⁵⁹ unless, indeed, although there is technically a conflict, the evidence on one side is of so conclusive a character that the court would set aside a verdict rendered in opposition to it.⁶⁰

§ 190. [Right to the Use of Reason]; Scintilla of Evidence Not Sufficient.⁶¹—

It is not at the present day sufficient to prevent ordering a verdict that the party against whom the ruling is asked may have been able to furnish some little evidence in support of his contention.⁶² The earlier law allowed the jury to act if a *scintilla*⁶³ of proof were furnished; and the same proposition is still occasionally announced.⁶⁴ In general, however, it is well settled that a *scintilla* is no longer sufficient.⁶⁵ It is, indeed, quite frequently said that a verdict cannot be ordered if there is *any* evidence.⁶⁶ But this is not the real meaning of those who announce the rule. It should be completed by adding to the words "any evidence" the phrase "from which the jury might *reasonably* find in its favor."⁶⁷

§ 191. [Right to the Use of Reason]; Motion Equivalent to a Demurrer to Evidence.⁶⁸— A motion to direct a verdict is in effect a demurrer to the evidence of the opposing party; and in passing on the same the court should consider as established all the facts proved and all inferences which can be logically and reasonably drawn from the evidence submitted by the party against whom the order is asked.⁶⁹

Mercantile Co., 1 Neb. (Unof.) 528, 96 N. W. 524 (1901).

^{59.} *Wilcox v. Evans & Pennington*, 127 Ga. 580, 56 S. E. 635 (1907); *City of Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079 (1907). *Hummer v. Lehigh Valley R. Co.*, 65 Atl. 126 (1906). *Reilly v. Troy Brick Co.*, 184 N. Y. 399, 77 N. E. 385 (1906).

Pennsylvania.—*Raymer v. Standard Steel Works*, 216 Pa. St. 101, 64 Atl. 902 (1906). It is not within the province of the judge, on a motion to withdraw a case from the jury, to weigh the evidence, and ascertain where the preponderance is, but his duty is limited strictly to determining whether there is or is not evidence legally tending to prove the fact affirmed. *Woodman v. Illinois Trust & Savings Bank*, 211 Ill. 578, 71 N. E. 1099 (1904).

^{60.} *Harriss v. Howard*, 126 Ga. 325, 55 S. E. 59 (1906). *Dederick v. Central R. Co.*, 65 Atl. 833 (1907). *Clark v. Slaughter*, 129 Wis. 642, 109 N. W. 556 (1906).

^{61.} 1 Chamberlayne, Evidence, § 396.

^{62.} *Offutt v. Columbian Exposition*, 175 Ill. 472, 51 N. E. 651 (1898).

^{63.} A spark; a remaining particle; the

least particle. The doctrine that where there is *any* evidence, however slight, tending to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. Black., Law Dict.

^{64.} *Louisville, H. & St. L. Ry. Co. v. Hall*, 29 Ky. Law Rep. 584, 94 S. W. 26 (1906).

^{65.} *Gipe v. Pittsburgh, etc., Ry. Co.*, 82 N. E. 471 (1907). *Cromley v. Pennsylvania R. Co.*, 211 Pa. 429, 60 Atl. 1007 (1905).

West Virginia.—*Dye v. Corbin*, 53 S. E. 147 (1906).

United States.—*New York Cent. & H. R. R. Co. v. Difendaff*, (Ill. 1903) 125 Fed. 893.

^{66.} *Frank Parmelee Co. v. Wheelock*, 224 Ill. 104, 79 N. E. 652 (1906). *Scofield's Adm'x v. Metropolitan L. Ins. Co.*, 79 Vt. 161, 64 Atl. 1107 (1906).

^{67.} *Hillshorough Grocery Co. v. Leman*, (Fla. 1906) 40 So. 680.

^{68.} 1 Chamberlayne, Evidence, § 397.

^{69.} *Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49, 83 N. E. 539 (1908).

§ 192. [Right to the Use of Reason]; Direction Against the Actor.⁷⁰— Frequently this power of the court is employed against the party having the burden of proof on the issue, the actor. As was said in *Ryder v. Wombwell*,⁷¹ and cited with approval in later cases,⁷² “There is, in every case . . . a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw from the jury and direct a nonsuit,⁷³ or verdict for the defendant, if the onus is on the plaintiff,⁷⁴ or on the contrary direct a verdict for the plaintiff if the onus is on the defendant.”⁷⁵ The simplest situation which can be presented is where the actor produces no evidence in support of his contention⁷⁶ or of a material portion of it,⁷⁷ evidence so slight that no reasonable man could act in accordance with it;⁷⁸ or it appears without contradiction that a conclusive defense to it exists.⁷⁹

§ 193. [Right to the Use of Reason]; Direction in Favor of Actor.⁸⁰— By a parity of reasoning, where the party having the burden of proof produces to the tribunal a case so completely proved, established by such credible witnesses, and beyond the range of controversy to such an extent⁸¹ that the only rational course for the jury to pursue would be to render a verdict in favor of it, or where the actor proves a *prima facie* case and the nonactor introduces no evi-

Hansen v. Kline, 113 N. W. 504 (1907); *Avery v. Union Pac. R. Co.*, 85 Pac. 600 (1906); *Acker, Merrall & Condit Co. v. McGaw*, 106 Md. 536, 68 Atl. 17 (1907); *Underfeed Stoker Co. v. Hudson, etc., Brewing Co.*, 70 N. J. L. 649, 58 Atl. 296 (1904); *Hirsch v. American Dist. Tel. Co.*, 90 N. Y. Suppl. 464 (1904).

Wisconsin.— *McCune v. Badger*, 105 N. W. 667 (1905).

70. 1 Chamberlayne, Evidence, § 398.

71. L. R. 4 Ex. 32 (necessaries for an infant) (1868).

72. *Bridges v. North London Ry. Co.*, L. R. 7 H. L. 218 (1874).

73. See also *Brooker v. Scott*, 11 M. & W. 67 (1843) (necessaries for an infant).

74. *Illinois*.— *Bartlett v. Wabash R. Co.*, 220 Ill. 163, 77 N. E. 96 (1906).

Maine.— *Young v. Chandler*, 102 Me. 231, 66 Atl. 539 (1906); *Romaine v. New York, N. H. & H. R. Co.*, 86 N. Y. Suppl. 248, 91 App. Div. 1 (1904); *Comm'rs. of Marion Co. v. Clark*, 94 U. S. 278, 284 (1876).

Certain States forbid the court to exercise this function. The ruling is based upon a misconception of the province of the jury. *Dalton v. Poplar Bluff*, 173 Mo. 39, 72 S. W. 1068 (1902).

75. *Baxley Tie Co. v. Simpson & Harper*, 1 Ga. App. 670, 57 S. E. 1090 (1907); *McCall v. Herring*, 118 Ga. 522, 45 S. E. 442 (1903); *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295 (1907).

76. *Jennings v. Ingle*, 73 N. E. 945 (1905); *La Rue v. Lee*, 60 S. E. 388 (1908).

Where one of several counts of a declaration is unsustained by the evidence, the jury may be instructed to disregard that count. *Portsmouth St. R. Co. v. Peed's Adm'r*, 102 Va. 662, 47 S. E. 850 (1904).

77. *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. 820.)

78. *Illinois*.— *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455 (1903).

79. *Peckinpaugh v. Lamb*, (Kan. 1905) 79 Pac. 673 (modification).

80. 1 Chamberlayne, Evidence, § 399.

81. *McKnight v. Parsons*, (Iowa 1907) 113 N. W. 858.

Evidence which a party cannot dispute because it is supplied by his own witnesses has for many purposes, the same effect as evidence which cannot be disputed because it is true. *American, etc., Bank v. New York, etc., Co.*, 148 N. Y. 698, 43 N. E. 168 (1896).

dence whatever⁸² the court may direct the jury to find in accordance with the evidence submitted to them.⁸³

In a criminal case the court is not at liberty to order a verdict for the prosecution.⁸⁴

§ 194. [Right to the Use of Reason]; Time for Making Motion.⁸⁵—When the original case of the actor is closed, the nonactor may test its sufficiency by a request to direct a verdict in his own favor.⁸⁶ On the other hand, the court may postpone the decision of the motion until all the evidence is introduced by both sides.⁸⁷ The matter is one of administration;⁸⁸—largely concerned at all times, with the expediting of trials.⁸⁹ It is too late to move for a verdict after the stage of argument and among the requests for rulings and instructions by the court to the jury.⁹⁰

§ 195. [Right to the Use of Reason]; Direction on Opening.⁹¹—An administrative device of occasional value in expediting causes is for the presiding judge to rule, *sua sponte*, or on request, at the close of the opening to the jury made by the actor's counsel, that the jury could not, on these facts, find in his favor. Great care must, however, be exercised by the court in seeing that the course does not foreclose the party from the use of any probative fact or argument. If, after all suitable administrative precautions against injustice have been taken, the court still feels that the jury could not rationally find in favor of the actor's contention, the judge may properly order a verdict against the actor on his own statement of it. But it must affirmatively be made plain that the actor has no case.⁹²

⁸². Village of Franklin Park v. Franklin, 231 Ill. 380, 83 N. E. 214 (1907).

New Jersey.—United States Fidelity & Guaranty Co. v. Donnelly, 61 Atl. 445 (1905.)

New York.—Harding v. Roman Catholic Church of St. Peter, 188 N. Y. 631, 81 N. E. 1165 (1907) [judgment affirmed, 99 N. Y. Suppl. 945, 113 App Div. 685 (1906)].

⁸³. Georgia.—Williams Mfg. Co. v. Warner Sugar Refining Co., 125 Ga. 408, 54 S. E. 95 (1906).

Illinois.—Marshall v. Gross, etc., Co., 184 Ill. 421, 56 N. E. 807 (1900).

New York.—Harding v. Roman Catholic Church of St. Peter, 99 N. Y. Suppl. 945, 113 App Div. 685 (1906).

United States.—Leach v. Burr, 188 U. S. 510, 23 Sup. 393 (1902). See *contra*, Anniston, etc., Bank v. Committee, 121 N. C. 106, 109, 28 S. E. 134 (1897).

⁸⁴. People v. Warren, 122 Mich. 541, 81 N. W. 360 (and cases cited) (1899); Sparf v. U. S., 156 U. S. 51, 177, 15 Sup. 273 (1894). But see *contra*, Com. v. Magee, 12 Cox Cr. 549 (1873).

⁸⁵. 1 Chamberlayne, Evidence, § 400.

⁸⁶. Grooms v. Neff Harness Co., (Ark. 1906) 96 S. W. 135. See also Crean v. McMahon, 106 Md. 507, 68 Atl. 265 (1907).

⁸⁷. White v. Wilmington City Ry. Co., (Del. Super 1906) 63 Atl. 931.

⁸⁸. Oates v. Union R. Co., 27 R. I. 499, 63 Atl. 675 (1906).

⁸⁹. *Infra*, §§ 544 et seq.

⁹⁰. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575 (1904) [affirming 99 Ill. App. 132 (1901)]; Foy v. City of Winston, 135 N. C. 439, 47 S. E. 466 (1904).

Suggestion by Court. The judge may perceive that, assuming everything the party asking relief alleges in his pleadings to be true, there is no aspect of the matter in which he is entitled to recover. If so, the court may suggest the difficulty, *sua sponte* and entertain a motion to direct a verdict. Robinson Humphreys Co. v. Wilcox County, 129 Ga. 104, 58 S. E. 644 (1907).

⁹¹. 1 Chamberlayne, Evidence, § 401.

⁹². Brown v. District of Columbia, 29 App. D. C. 273 (1907). Where in an action for

§ 196. [Right to the Use of Reason]; Party Moving May Be Required to Rest.⁹³

— By an analogy to the rule employed by the court in dealing with demurrers to evidence,⁹⁴ a party moving that the action be withdrawn from the jury should rest his case, introducing no evidence. It was early contended that by introducing evidence on his own behalf a party waived the right to make a motion to withdraw.⁹⁵ While this has not prevailed generally,⁹⁶ time of passing upon a motion to withdraw from the jury is clearly a question of administration, and the presiding judge may decline to act on such a motion until after the entire evidence has been introduced,⁹⁷ unless the party moving shall be willing to rest his case, foregoing the privilege of introducing evidence on his own behalf.⁹⁸

§ 197. [Right to the Use of Reason]; Nominal or Actual Verdicts.⁹⁹— If the reason for directing a verdict against the actor be the weakness of his case, the proper verdict is one of nonsuit¹ or default; especially where the nonactor produces no sufficient evidence in support of his own contention.² On the other hand, should the result be due to the affirmative strength of the nonactor's case, he is entitled to a verdict in his own favor.

§ 198. [Right to the Use of Reason]; Effect of Waiver.³— Failure to raise a question as to the sufficiency of the evidence to warrant a verdict for a particular party before the evidence is closed amounts to a waiver of the objection.⁴ A previous request to direct a verdict does not preclude a party from requesting to have the case submitted to the jury;⁵ but such a course may constitute a waiver of the motion to withdraw.⁶ A motion to direct a verdict

wrongful death, the opening statement of plaintiff's case by her counsel was defective only in that it fell short of stating facts sufficient to warrant plaintiff's recovery, but no fact indicating a complete defense, or showing affirmatively that there was no cause of action, was stated, it was error to direct a final judgment on the merits for defendant on such statement. *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642, 79 Pac. 308 (1905).

93. 1 Chamberlayne, Evidence, § 402.

94. *Supra*, §§ 59 et seq.

95. *Barabask v. Kabat*, 91 Md. 53, 46 Atl. 337 (1900); *State v. Groves*, 119 N. C. 822, 824, 25 S. E. 819 (1896); *Purnell v. Ry. Co.*, 122 N. C. 832, 835, 29 S. E. 953 (1898). But see *North Carolina Stat.* 1899, c. 131.

96. *Stephen v. Scott*, 43 Kan. 285 (1890). "The defendant, by putting in its evidence took the chance of aiding the plaintiff's case; but it is not thereby deprived of the right to ask the court to direct a verdict on all of the evidence." *Weber v. Kansas City, etc., Co.*, 100 Mo. 194 (1899).

97. *Kaley v. Van Ostrand*, (Wis. 1908) 114 N. W. 817; *Robertson v. Perkins*, 129 U. S. 233 (1888).

98. *Columbia, etc., Ry. Co. v. Hawthorne*, 144 U. S. 202 (1891).

99. 1 Chamberlayne, Evidence, § 403.

1. *Equitable Mfg. Co. v. J. B. Davis Co.*, 130 Ga. 67, 60 S. E. 262 (1908).

2. *Rothenberg v. Rosenberg*, 108 N. Y. Suppl. 678, 57 Misc. 653 (1908).

3. 1 Chamberlayne, Evidence, § 404.

4. *Elwell v. Roper*, 71 N. H. 585, 58 Atl. 507 (1904). This has been put into the somewhat misleading form of saying that a failure to move to dismiss the complaint at the close of plaintiff's case, or of the whole case, is an admission that there is a question of fact. *Rapp v. Hutchinson Stair Elevator Co.*, 87 N. Y. Suppl. 459 (1904).

5. *Seddon v. Tagliabue*, 98 N. Y. Suppl. 236, 50 Misc. 156 (1906).

6. *Chicago Union Traction Co. v. O'Donnell*, 113 Ill. App. 259 (1904) [*affirmed* in 211 Ill. 349, 71 N. E. 1015].

in favor of the moving party may, until acted upon, be itself withdrawn.⁷ Where the judge has acted on the motion, it is then too late to withdraw it and ask for a jury trial.⁸

§ 199. [Right to the Use of Reason]; Action of Appellate Courts.⁹— The order directing a verdict being a ruling on matter of law¹⁰ the appellate court may pass upon it as upon other questions of a legal nature.¹¹ Where it has been ruled by the trial court that there is no sufficient evidence to support a verdict for the actor and the appellate court differs in opinion, error may be declared.

§ 200. [Right to the Use of Reason]; Effect of Rulings on Evidence.¹²— The irrationality of finding in favor of a given contention may have been caused by the fact that the presiding judge has made rulings which have had the effect of excluding important portions of the party's proof. But in an appellate court these rulings on the admissibility of evidence are themselves open, in most cases, to review. An order, holding erroneous a rejection of important evidence, may involve in it the ruling of the trial court directing a verdict against a contention which was rendered irrational, i.e., illegal of adoption, as the basis of the court's action by reason of the rejection. The trial judge may anticipate the action of the appellate court by refusing to consider in ordering a verdict any evidence already improperly admitted.¹³

§ 201. [Right of the Use of Reason]; Judge Sitting as a Jury.¹⁴— Where a judge sits as a jury for the determination of issues of fact, a party is as clearly entitled to the use by him of the reasoning faculty as he would be entitled to insist upon its exercise by a jury. It is not, for example, reasonable that a judge so sitting should reject evidence upon a material issue on the ground that it is cumulative,¹⁵ and then deciding that issue in favor of the other side. Where but one rational conclusion can be drawn from the evidence a party may properly move that a verdict be directed by the judge in favor of that result, as he might do in a jury case.¹⁶ If there be such evidence that a finding

7. *Cravath v. Baylis*, 99 N. Y. Suppl. 973, 113 App. Div. 666 (1906).

8. *Solomon v. Levine*, 54 Misc. (N. Y.) 270, 104 N. Y. Suppl. 443 (1907). *Counterclaim*.— Where defendant pleaded a counterclaim, and on the conclusion of plaintiff's evidence procured an order directing a verdict for defendant on plaintiff's cause of action, he is not entitled thereafter to introduce evidence of his counterclaim, as the order concluded the trial, and defendant by moving for a directed verdict waived a hearing on his counterclaim. *Miller v. McGannon*, (Neb. 1907) 113 N. W. 170.

9. 1 Chamberlayne, Evidence, § 405.

10. *Supra*, § 188.

11. *Sunderland v. Cowan*, (Md. 1907) 67 Atl. 141.

12. 1 Chamberlayne, Evidence, § 406.

13. *Townsend v. Greenwich Ins. Co.*, 178 N. Y. 634, 71 N. E. 1140 (1904) [*affirming* 86 N. Y. App. Div. 323, 83 N. Y. Suppl. 909 (1903)].

14. 1 Chamberlayne, Evidence, § 407.

15. *Brown v. Cohen*, 96 N. Y. Suppl. 116 (1905).

16. *Foskett, etc., Co. v. Swayne*, 70 Conn. 74, 38 Atl. 893 (1897); *Lee v. Callahan*, 84 N. Y. Suppl. 167 (1903).

of fact might rationally have been made in either way, it is error to dismiss, summarily, the action.¹⁷ Where there is a conflict in the testimony, the court must judge, of necessity, as to the credibility of the witnesses.¹⁸

§ 202. Right to Judgment of Court or Jury.¹⁹—A party has a right under the substantive law to insist not only that each branch of the mixed tribunal of judge and jury shall exercise correct reasoning in connection with his case—that all their acts shall be reasonable or reasoned acts;²⁰ his right extends to a demand that the reasoning faculty shall be applied to any particular portion of his case by that part of the tribunal to which the law has assigned its consideration. In the enjoyment and exercise of this right it is the administrative duty of the presiding judge to protect the litigant.

§ 203. [Right to Judgment of Court or Jury]; Performance of Functions by Judge.²¹—A party is entitled to insist upon a discharge by the presiding justice of his customary judicial functions. It is the litigant's right to ask that the court pass upon the competency of evidence.²² The judge, therefore, will exercise his duty of making preliminary findings of fact; he will not delegate this power to the jury. Nor will he, in general, so discharge his administrative duties as to leave questions of law to them.²³ So the construction of a written contract cannot properly be left to the jury.²⁴ Still, where no difference of opinion can well arise as to the meaning of the rule of law, no serious administrative error has been committed where the jury are referred to the law rather than directed as to it. It is not error, therefore, when an ordinance has been duly proved, and its terms are plain, for the court to charge the jury that they are to determine what the ordinance is, and whether it has been violated.²⁵

§ 204. [Right to Judgment of Court or Jury]; Waiver.²⁶—The right of insistence upon discharge of functions by the appropriate branch of the tribunal may be waived, either expressly, or by conduct.²⁷

17. *Ness v. March*, (Minn. 1905) 104 N. W. 242; *Weisberger v. Martin*, 86 N. Y. Suppl. 115 (1904). Such a ruling does not amount to a withdrawal by the judge from himself as a jury of any portion of the evidence in the case. *Kansas City ex rel. Neill v. Askew*, 105 Mo. App. 84, 79 S. W. 483 (1904). In an action tried to the court, it has no right to dismiss the same without findings on the ground that plaintiff has failed to establish a cause of action, except where the evidence for plaintiff would not have justified findings in his favor. *Ness v. March*, (Minn. 1905) 104 N. W. 242.

18. *Miller v. Piatt*, 33 Pa. Super. Ct. 547 (1907).

19. 1 Chamberlayne, Evidence, § 408.

20. *Supra*, §§ 179 *et seq.*

21. 1 Chamberlayne, Evidence, § 409.

22. *Com. v. Culver*, 126 Mass. 464, 466 (1879); *Bartlett v. Smith*, 11 M. & W., 483 (1843).

23. *Chicago, etc., Ry. Co. v. Walker*, 127 Ill. App. 212 (1906); *Outhouse v. Baird*, 106 N. Y. S. 246, 121 App. Div. 556 (1907); *Tracewell v. Wood*, County Court, — — —, 52 S. E. 185 (1905).

24. *Standard Mfg. Co. v. Slaughter*, 122 Ill. App. 479 (1905).

25. *Thomasson v. Southern Ry.*, 72 S. C. 1, 51 S. E. 443 (1905).

26. 1 Chamberlayne, Evidence, § 410.

27. Thus, for example, the right to treat the question of contributory negligence as one

§ 205. [Right to Judgment of Court or Jury]; General Right to Jury Trial; Witnesses not Permitted to Reason.²⁸—It is an essential part of this right to insist upon performance of judicial function by the appropriate branch of the mixed tribunal that the judge should not only protect his own province of judging from invasion by the jury and himself refrain from interfering, by an extension of his own province, from invading the field of the jury's judicial action; he is also required to protect his own reasoning function and that of the jury from invasion by the exercise on the part of witnesses of their reasoning faculties — their "opinions," so-called. It is, therefore, within the scope of the present principle of administration that, except in case of reasonable necessity, the province of the jury in drawing the final inferences of fact should not be invaded by the inference, conclusions or judgment of witnesses.²⁹

§ 206. [Right to Judgment of Court or Jury]; A Strongly Entrenched Right.³⁰—Entirely apart from this principle of administration, which forbids witnesses to reason, except so far as is necessary, and, in a sense, behind and above it, stands the substantive right of a litigant to a trial by jury. Within its appropriate scope, few of the rights of a litigant are so strongly entrenched in the substantive law. The original conception of the right to a trial by jury is of ancient date and a matter of gradual evolution, in which no distinct steps are traceable.³¹ The right was claimed and conceded prior to Magna Charta,³² and it was confirmed, as is commonly supposed, by that famous historical document.³³ The American colonists took it from England as the palladium of the liberties of Englishmen.³⁴

§ 207. [Right to Judgment of Court or Jury]; Federal Constitution.³⁵—The provisions of the Constitution of the United States relating to the right of trial by jury, extend only to common law actions in the federal courts.³⁶ The constitutional guaranty does not apply to causes in equity or admiralty;³⁷ or affect proceedings in the state courts.³⁸ The interpretation limiting the right

of law is waived where the defendant has caused such question to be submitted to the jury as one of fact. *Chicago City Ry. Co. v. Nelson*, 116 Ill. App. 609 (1904)

28. 1 Chamberlayne, Evidence, § 411.

29. *Infra*, §§ 672 *et seq.*

30. 1 Chamberlayne, Evidence, § 412.

31. *Michigan*.—*McRae v. Grand Rapids*, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750 (1892).

New Jersey.—*Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (1899).

32. *People v. Harding*, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95 (1884)

33. *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (1899); *Proffatt Jury Tr.* § 24; 4 Blackstone Comm. 349.

34. *Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 463 (1900); *McRae v. Grand Rapids*, etc., R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750 (1892).

35. 1 Chamberlayne, Evidence, §§ 413-418.

36. The courts of the United States include, however, as the term is used in this connection, those of the District of Columbia. *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. St. 580, 43 L. ed. 873 (1898).

37. *Home Ins. Co. v. Virginia-Carolina, etc., Co.*, 109 Fed. 681 (1901); *Motte v. Bennett*, 17 Fed. Cas. No. 9,884, 2 Fish. Pat. Cas. 642 (1849).

38. *Foster v. Jackson*, 57 Ga. 206 (1876).

New York.—*In re Newcomb*, 18 N. Y. Suppl. 16 (1891); *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366 (1893);

so guaranteed as confined to cases where a jury might have been claimed at common law, has been adopted in the federal as well as in the state courts.³⁹ Such provisions do not, in the least, abridge the right of the states to deal with the question of trial by jury as they may see fit.⁴⁰

The term "jury," as used in the Federal Constitution, is the common law petit jury of twelve. Providing a jury of a smaller number, e.g., six,⁴¹ is not a compliance with this provision.

§ 208. [Right to Judgment of Court or Jury]; State Constitutions.⁴²— In all state constitutions the right to a trial by jury is regarded as existing and the constitution purports only to forbid making change. The fundamental rule is that where the right existed to a trial by jury at the time of the adoption of the constitution, it exists at the present time,⁴³ and not otherwise.⁴⁴

§ 209. [Right to Judgment of Court or Jury]; Scope at Common Law.⁴⁵— At common law the function of the jury is confined to an issue.⁴⁶ The right to a trial by jury was, as a rule, restricted to actions at law in which there was an issue of fact raised by means of pleadings.⁴⁷ In actions at law in contract, tort, replevin, real actions,⁴⁸ and the like, where the use of a jury was customary at common law, the right is, as a rule, secured to litigants by American constitutions or other statutes, state or federal.

Venue.— Trial by jury means trial by jury in the county where the alleged offense was committed.⁴⁹

Court May Allow Jury Trial.— That the judge may, in exercise of his

Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436 (1877).

39. The right to trial by jury does not extend to consular courts, *In re Ross*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. ed. 581 [*affirming* 44 Fed. 185 (1890) (1891)]; but does apply to criminal cases, *Bettge v. Terr.*, 17 Okl. 85, 87 Pac. 897 (1906); and to cases removed from the State courts to the Federal courts, *Phillips v. Moore*, 100 U. S. 208, 25 L. ed. 603 (1879). It does not apply however to special proceedings which did not exist at common law as the exportation of Chinamen, *U. S. v. Ngum Lun May*, 153 Fed. 209 (1907).

40. *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. 692 (1898); *Shaw v. Silverstein*, 21 R. I. 500, 44 Atl. 931 (1899).

United States.— *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436 (1877).

41. *Gius v. United States*, (Alaska 1905) 141 Fed. 956, 73 C. C. A. 272.

42. 1 Chamberlayne, Evidence, §§ 419, 420.

43. *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174 (1868).

Pennsylvania.— *Rhines v. Clark*, 51 Pa. St. 96 (1865).

44. *People v. City of Alton*, 233 Ill. 542, 84 N. E. 664 (1908).

45. 1 Chamberlayne, Evidence, §§ 421, 423.

46. *Supra*, § 121.

47. *Pennsylvania.*— *Glone v. Arleth*, 162 Pa. St. 550, 29 Atl. 862 (1894).

South Carolina.— *Gregory v. Ducker*, 31 S. C. 141, 9 S. E. 780 (1889).

48. *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151 (1908) (alluvial deposits.)

Compulsory References.— The judicial machinery at the time of the adoption of various state constitutions included a provision for the ordering of a compulsory reference where there is a long and complicated account. Such an order, therefore, does not violate the right to trial by jury. *Roughton v. Sawyer*, (N. C. 1907) 56 S. E. 480; *Smith v. Kunert*, (N. D. 1908) 115 N. W. 76.

49. *People v. Brock*, 149 Mich. 464, 112 N. W. 1116, 14 Detroit Leg. N. 506 (1907).

administrative powers, employ a jury in cases where such a trial cannot be claimed as of right, is undoubted.⁵⁰

§ 210. [Right to Judgment of Court or Jury]; Judicial Powers Reserved.⁵¹—The power of the presiding judge to set aside verdicts,⁵² order nonsuits⁵³ or other verdicts,⁵⁴ award sentence⁵⁵ and perform the other functions of his judicial office, are not, in the absence of express provisions,⁵⁶ affected by these enactments regarding jury trial.

The power of the court to perform its ordinary common law judicial functions, e.g., receive pleas of guilty,⁵⁷ determine the nature of the offense thus admitted,⁵⁸ instruct jury as to grades of crime,⁵⁹ and the like,⁶⁰ is not affected by the constitutional guaranty of a jury trial. Such a right is not violated because few of the same race as the accused were put on the jury.⁶¹ No right to a jury trial is infringed by permitting the judge, rather than the jury, to determine on the punishment for crime.⁶²

The right of an appellate court to order a lower court to impose a lesser sentence than that of which the accused stands convicted is not inconsistent with a right to trial by jury. Such a court may lawfully, for example, reduce a conviction of murder in the second degree to one of manslaughter.⁶³

§ 211. [Right to Judgment of Court or Jury]; Criminal Cases.⁶⁴—A person cannot be punished either by fine, imprisonment or committal to an institution for reformatory purposes,⁶⁵ without a trial by jury—in any case where, at common law, a person so accused would have had a right to claim a jury.⁶⁶

50. *McLean v. Tompkins*, 18 Abb. Pr. 24 (1857).

51. 1 Chamberlayne, Evidence, §§ 424-428.

52. *Supra*, §§ 133 et seq.

53. *Bohn v. Pacific Electric Ry. Co.*, (Cal. App. 1907) 91 Pac. 115; *New England Trust Co. v. Boston Elevated Ry. Co.*, 181 Mass. 223, 77 N. E. 769 (1906).

54. *Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219 (1904); *Gunn v. Union R. Co.*, 27 R. I. 320, 62 A. 118 (1905).

55. *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552 (1905).

56. *Reed & McCormick v. Gold* (Va. 1903), 45 S. E. 868 (hear demurrers to evidence).

57. *Hollibaugh v. Hehn*, (Wyo. 1905) 79 Pac. 1044.

58. *People v. Chew Lan Ong*, 141 Cal. 550, 75 Pac. 186 (1904).

59. *State v. McPhail*, 39 Wash. 199, 81 Pac. 683 (1905).

60. *Barry v. Truax*, (N. D. 1904) 65 L. R. A. 762, 99 N. W. 769 (order change of venue).

61. *Miera v. Territory*, (N. M. 1905) 81 Pac. 586.

62. *State v. Eubanks*, 199 Mo. 122, 97 S. W. 876 (1906).

63. *Darden v. State*, 80 Ark. 295, 97 S. W. 449 (1906).

64. 1 Chamberlayne, Evidence, §§ 426-428.

65. *Pugh v. Bowden*, 54 Fla. 302, 45 So. 499 (1907). The power to commit an infant to a reformatory institution has, however, been held to be not so much in the nature of a criminal as of an equitable nature. Accordingly the accused has no right to a jury trial. *Dinson v. Drosta*, (Ind. App. 1907) 80 N. E. 32. Such a proceeding is not so much a trial as an effort to prevent the necessity for one. Accordingly, a jury is not required. *Com v. Fisher*, 213 Pa. 48, 62 A. 198 (1905); *State v. Pakenham*, 40 Wash. 403, 82 Pac. 597 (1905).

66. *Hughes v. State*, 29 Ohio Cir. Ct. R. 237 (1907). It has been held that any statute, which subjects an individual to a greater punishment for crime without the verdict of a jury than it was understood at the time of the adoption of the state constitution could be thus inflicted, is void. *Wilmarth v. King*, 74 N. H. 512, 60 Atl. 889 (1906).

As may be seen elsewhere,⁶⁷ the legislature may provide otherwise in case of misdemeanors and minor offenses.⁶⁸ But unless it has seen fit to do so, the right attaches in all such instances.⁶⁹

§ 212. [Right to Judgment of Court or Jury]; Waiver Forbidden.⁷⁰—The defendant is not at liberty to waive such a right.⁷¹ So strong a course is, however, intended only for the protection of the accused in cases of serious felony. He may effectively make such waiver in cases of misdemeanors, minor offenses,⁷² or the like.⁷³

§ 213. [Right to Judgment of Court or Jury]; Incidental Hearings.⁷⁴—The jury are not concerned with hearings prior, incidental or subsequent to the trial of the issue, as in case of motions⁷⁵ or of proceedings following the judgment.⁷⁶

§ 214. [Right to Judgment of Court or Jury]; Special Proceedings.⁷⁷—Where, at common law, a party was entitled to a trial by jury, as in case of *quo warranto*,⁷⁸ contempt,⁷⁹ writ of mandate,⁸⁰ or proceedings of a similar nature, he will be regarded as having the same right under the statutory or constitutional provisions.

§ 215. [Right to Judgment of Court or Jury]; Statutory Proceedings.⁸¹—Novel and special modes of trial such as the assessment of damages on condemnation proceedings,⁸² the ascertainment of extra lateral mining rights,⁸³ de-

67. *Infra*, § 219.

68. *Bray v. State*, (Ala. 1904) 37 So. 250; *Bowles v. District of Columbia*, 22 App. D. C. 321 (1903); *Kubach v. State*, 25 Ohio Cir. Ct. R. 488 (1904).

69. *City of Vineland v. Denofio*, (N. J. 1907) 65 Atl. 837.

70. 1 Chamberlayne, Evidence, § 427.

71. *State v. Rea*, 101 N. W. 507 (1904); *Jennings v. State*, 114 N. W. 492 (1908).

72. *Georgia*.—*Moore v. State*, 124 Ga. 30, 52 S. E. 81 (1905); *Jacobs v. People*, 218 Ill. 500, 75 N. E. 1034 (1905). *Simmons v. State*, 75 Ohio St. 346, 79 N. E. 555 (1906).

73. *Otto v. State* (Tex. Cr. App. 1905) 87 S. W. 698 (Local Option Law). See U. S. *Praeger*, 149 Fed. 474 (1907), court martial; *Broadwell v. United States*, 195 U. S. 65, Adv. S. U. S. 826, 24 S. Ct. 49 L. ed. (1904), sale of oleomargarine; *Kanorowski v. People*, 113 Ill. App. 468 (1904), bastardy.

74. 1 Chamberlayne, Evidence, §§ 429-431.

75. *Logansport, etc., R. Co. v. Patton*, 51 Ind. 487 (1875); *Pasour v. Lineberger*, 90 N. C. 159 (1884); *Banning v. Taylor*, 24 Pa. St. 289 (1855). Where, however, a motion raises the same issue of fact as would, if stated upon

pleadings, be triable by a jury, one has been allowed. *Drea v. Carrington*, 32 Or. St. 595 (1877).

76. *Banning v. Taylor*, 24 Pa. St. 289 (1855); *McGehee v. Brown*, 3 La. Ann. 272 (1848), settling exceptions; *Richardson v. City of Centerville*, (Iowa 1908) 114 N. W. 1071 (attorney's fee); *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 397, 74 Pac. 1088 (1904).

77. 1 Chamberlayne, Evidence, § 432.

78. *Metz v. Maddox*, 189 N. Y. 460, 82 N. E. 507 (1907) [order reversed, 105 N. Y. S. 702]. A right to a jury may be claimed on an issue of fact. *Louisiana & Northwest R. Co. v. State* (Ark. 1905), 88 S. W. 539.

79. *O'Neil v. People*, 113 Ill. App. 195 (1904); *Drady v. District Court of Polk County*, 102 N. W. 115 (1905).

80. *Nelson v. Steele* (Idaho 1906), 88 Pac. 95.

81. 1 Chamberlayne, Evidence, § 433.

82. *Ingram v. Maine Water Co.*, 98 Me 566, 57 Atl. 893 (1904); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

83. *Hickey v. Anaconda Copper Min. Co.* (Mont 1905), 81 Pac. 806.

struction of intoxicating liquor intended for illegal sale,⁸⁴ and the like⁸⁵ may or may not have the incident of a right to a jury trial, as the legislature may determine.

§ 216. [Right to Judgment of Court or Jury]; In what Courts Right can be Claimed.⁸⁶— Only in a "court" as that term was commonly understood at the common law, when the provisions regarding jury trials were adopted, can such a trial be lawfully demanded at the present time. The fact that a body of men as arbitrators⁸⁷ are exercising judicial powers confers no right to a trial by jury. A right to trial by jury, as usually limited, extends to all courts of general jurisdiction and record which proceed according to the course of the common law.⁸⁸ Thus in courts of admiralty,⁸⁹ courts martial,⁹⁰ divorce courts,⁹¹ equity⁹² or probate⁹³ as no jury was employed at common law, so no just claim to one on the part of a litigant exists under the constitutional guaranties.

§ 217. [Right to Judgment of Court or Jury]; Who May Claim Right.⁹⁴— The condition of the scope of the right to a trial by jury, as it existed at the time of the adoption of the constitution, limits not only the classes of actions in which, in the absence of express regulation, the right may be claimed, and the court in which such right may be exercised, but also the classes of legal persons who may properly claim to exercise it.⁹⁵ For instance, where the state had, at common law, no right to claim a jury trial in certain proceedings, none may be properly demanded by it under the constitution.⁹⁶ Parties subsequently joined to a pending suit have the same right to a jury trial as was enjoyed by the primary parties. Such was the original rule.⁹⁷

Cities, town and other municipal corporations are not entitled to claim a jury trial, as they possessed no right to one at the time of the adoption of the constitution.⁹⁸

⁸⁴. *Kirkland v. State* (Ark. 1904), 78 S. W. 770.

⁸⁵. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725 (1904) (liability of stock-holder); *Ingram v. Maine Water Co.*, 98 Me. 566, 57 Atl. 893 (1904) (mills and mill dams).

⁸⁶. 1 Chamberlayne, Evidence, §§ 434-446

⁸⁷. *Barker v. Jackson*, 2 Fed. Cas. No. 989, 1 Paine 559 (1826).

⁸⁸. *Vaughn v. Scade*, 30 Mo. 600 (1860).

⁸⁹. *Gillet v. Pierce*, Brown Adm. 553, 10 Fed. Cas. No. 5,437 (1875); *Clark v. U. S.*, 2 Wash. (U. S.) 519, 5 Fed. Cas. No. 2837 (1811).

⁹⁰. *Merriman v. Bryant*, 14 Conn. 200 (1841); *Rawson v. Brown*, 18 Me. 216 (1841); *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749 (1898).

⁹¹. *Tietzel v. Tietzel*, 107 N. Y. Suppl. 878, 122 App. Div. 873 (1907).

⁹². *Ross v. New England Mut. Ins. Co.*, 120 Mass. 113 (1876); *Tucker v. Edison Electric Illuminating Co. of New York*, 184 N. Y. 548, 76 N. E. 1110 (1906); *Frank's Appeal*, 59 Pa. St. 190 (1868).

⁹³. *Fay v. Vanderford*, 154 Mass. 498, 28 N. E. 681 (1891); *Frierson v. Jenkins*, 75 S. C. 471, 55 S. E. 890 (1906); *In re Welch*, 69 Vt. 127, 37 Atl. 250 (1896).

⁹⁴. 1 Chamberlayne, Evidence, §§ 447-449.

⁹⁵. *Harris v. Wood*, 6 T. B. Mon. 641 (1828); *Dowell v. Boyd*, 3 Smedes & M. 592 (1844).

⁹⁶. *In re New State House*, 19 R. I. 326, 33 Atl. 448 (1895).

⁹⁷. *Lacroix v. Menard*, 3 Mart (N. S.) 339, 15 Am. Dec. 161 (1825).

⁹⁸. *Stone v. Charlestown*, 114 Mass. 214 (1873); *Kimball v. Bridgewater*, 62 N. H. 694 (1882); *State v. Jersey City*, 38 N. J. L.

*The power of the legislature to extend the right to new classes of legal persons cannot be doubted.*⁹⁹

§ 218. [Right to Judgment of Court or Jury]; Reasonable Limitations Permitted; Demand.¹—The legislature may, with entire propriety, require a litigant to avail himself of a right to jury trial under reasonable conditions. It may, for example, properly be provided that one entitled to a jury trial should specifically demand it,² within a limited reasonable time. Unless application for a jury is made within the time specified, the right will be deemed to have been waived.³ A similar result may be prescribed by statute.⁴ Failure to claim in time as to certain of several defendants is not cured, as to them, by a seasonable claim made by the others.⁵

*When one party seasonably claims a jury trial he preserves the rights of both parties and cannot later, by withdrawing his claim or waiving it, prevent a jury trial, unless his opponent also consents.*⁶

§ 219. [Right to Judgment of Court or Jury]; Minor Criminal Offenses.⁷—Misdemeanors may, in the discretion of the legislature, be tried without a jury.⁸

§ 220. [Right to Judgment of Court or Jury]; Payment of Jury Fees.⁹—It is not unreasonable that a party who claims a jury should be required to deposit a reasonable sum, not exceeding the amounts actually paid the jury, as a condition precedent to the allowance of his right to a jury trial in a municipal¹⁰ or other inferior court. The same requirement may be made on each continuance of such a jury trial granted at the request of a party.¹¹

§ 221. [Right to Judgment of Court or Jury]; Restricted Appeals.¹²—It is a reasonable regulation upon the right to a jury trial that a court of first instance

259 (1876); *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248, 28 How.

99. *In re New State House*, 19 R. I. 326, 33 Atl. 448 (1895).

1. 1 Chamberlayne, Evidence, §§ 450, 451.

2. *Maddux v. Walthall*, 141 Cal. 412, 74 Pac. 1026 (1903); *Miller v. Georgia R. Bank*, 120 Ga. 17, 47 S. E. 525 (1904); *People v. Halwig*, 84 N. Y. Suppl. 221, 41 Misc. Rep. 227 (1903).

3. *Hammond v. State* (Ala. 1908), 45 So. 654; *Stafford v. State* (Ala. 1908), 45 So. 673; *Mills & Williams v. Ivey*, 3 Ga. App. 557, 60 S. E. 299 (1908).

4. *Ross v. McCaldin*, (107 N. Y. S. 381, 123 App. Div. 13 (1907); *Ettlinger v. Trustees of Sailors' Snug Harbor, etc.*, 107 N. Y. S. 779, 122 App. Div. 681 (1907).

5. *Spencer v. Adams Dry Goods Co.*, 54

Misc. (N. Y.) 614, 104 N. Y. Suppl. 867 (1907).

6. *Elmore v. New York City Ry. Co.*, 51 Misc. (N. Y.) 675, 100 N. Y. Suppl. 1019 (1906); *Allworth v. Interstate Consol. Ry. Co.*, 27 R. I. 106, 60 Atl. 834 (1905).

7. 1 Chamberlayne, Evidence, §§ 452, 453.

8. *People v. Flaherty*, 110 N. Y. App. Div. 462, 104 N. Y. Suppl. 173 (1907).

9. 1 Chamberlayne, Evidence, § 454.

10. *Williams v. Gottschalk*, 231 Ill. 175, 83 N. E. 141 (1907) (§6); *Humphrey v. Eakley*, 72 N. J. L. 424, 60 Atl. 1097 (1905) [*affirmed* in 65 Atl. 1118 (1907)]; *Cohen v. New York City Ry. Co.*, 106 N. Y. Suppl. 561, 121 App. Div. 803 (1907) (\$4.50 per day).

11. *Cohen v. New York City Ry. Co.*, 106 N. Y. Suppl. 561, 121 App. Div. 803 (1907).

12. 1 Chamberlayne, Evidence, § 455.

should hear and determine issues of fact, in civil actions involving a limited amount, in *quasi criminal* actions, as those for forfeiture of liquor kept contrary to law,¹³ and, in criminal cases, on misdemeanors or minor crimes;¹⁴—*provided* that the party is given, as of right, an appeal to a higher court in which a trial by jury is preserved to him. Under both the state and federal¹⁵ constitutions, such an appeal does not satisfy the right under consideration in a case of treason, felony or other serious crime. While this appeal must be as of right, it need not be *unconditioned* or unlimited. The legislature may provide certain reasonable restrictions. For example, the appellant may be required to content himself with a hearing upon the matters which he specifies on his appeal.¹⁶

§ 222. [Right to Judgment of Court or Jury]; Unreasonable Limitations Unconstitutional.¹⁷—The constitutional provision is violated by any monetary qualification likely to prove an unreasonable impediment upon the right to a jury trial; e.g., that the claim must amount to at least \$50.¹⁸

§ 223. [Right to Judgment of Court or Jury]; Waiver and Estoppel.¹⁹—A waiver may be created not only by express agreement,²⁰ but by failure to claim a jury at a proper time, neglecting to appear at the trial,²¹ or otherwise evidencing an intention not to claim a jury.²²

§ 224. Right to Confrontation.²³—Prominent among rights with which the substantive law has endowed a litigant is that of *confrontation*;—the privilege of meeting the witnesses against him face to face. In other words, the object to be secured is that the *witness* should give his evidence in presence²⁴

13. *Stahl v. Lee* (Kan. 1905), 80 Pac. 983.

14. *Little v. State*, 123 Ga. 503, 51 S. E. 501 (1905); *Stone v. City of Paducah*, 27 Ky. L. Rep. 717, 86 S. W. 531 (1905); *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905); *Bettge v. Terr.*, 17 Okl. 85, 87 Pac. 897 (1906).

15. *Bettge v. Territory*, 17 Okl. 85, 87 Pac. 897 (1906).

16. *Mead v. Cutler* (Mass. 1907), 80 N. E. 496.

17. 1 Chamberlayne, Evidence, § 456.

18. *De Lamar v. Dollar*, 128 Ga. 57, 57 S. E. 85 (1907).

19. 1 Chamberlayne, Evidence, § 457.

20. *Lindstrom v. Hope Lumber Co.* (Idaho 1906), 88 Pac. 92; *Maass v. Rosenthal*, 109 N. Y. Suppl. 917, 125 App. Div. 452 (1908).

Implied agreement as a consent to a reference may have the same effect. *Reynolds v. Wynne*, 111 N. Y. Suppl. 248, 127 App. Div. 69 (1908); *Bruce v. Carolina Queen Consol. Min. Co.* (N. C. 1908), 61 S. E. 579; *Wil-*

liams v. Weeks, 70 S. C. 1, 48 S. E. 619 (1904).

21. *Cerussite Min. Co. v. Anderson* (Colo. App. 1903), 75 Pac. 158.

22. *Juvinall v. Jamesburg Drainage Dist.*, 204 Ill. 106, 68 N. E. 440 (1903); *Albemarle Steam Nav. Co. v. Worrell*, 133 N. C. 93, 45 S. E. 466 (1903).

23. 1 Chamberlayne, Evidence, §§ 456-461.

24. The meaning of "presence," or "face to face" in this connection has received a common sense construction. It does not require that the witness should look at the party. He may look in another direction, as to the Court, while giving his testimony. As was said to Earl Stafford, who complained that a witness had averted his face from him: "My lord, do you see the witness; that is enough for face to face." *Earl of Stafford's Trial*, 7 How. St. Tr. 1293, 1341 (1680). A mere temporary absence from the court room of the witness while testifying should not be deemed an infraction of the

of the adverse party.²⁵ The rule was not, however, intended to change any existing rule of law and does not prevent the use of evidence of a kind where there can from its nature be no confrontation, as in case of depositions or exceptions to the hearsay rule.

§ 225. [Right to Confrontation]; Waiver.²⁶— The constitutional protection may be waived by a party,²⁷ as where he fails to object to evidence offered in contravention of it;²⁸ or, even more clearly, where a party, who would otherwise be aggrieved expressly consents to its reception.²⁹

Constitution. *Skaggs v. State*, 108 Ind. 571 644 (1898); *State v. Mitchell*, 119 N. C. 784, N. E. 695 (1886). 25 S. E. 783 (1869).

25. *Woodside v. State*, 2 How. (Miss.) 665 28. *State v. Rogers*, 119 N. C. 793, 26 S. E. (1837); *State v. Houser*, 26 Mo 487 (1858). 142.

26. 1 Chamberlayne, Evidence, § 462.

29. *Ruiz v. Terr.*, 10 N. M. 120, 61 Pac.

27. *State v. Olds*, 106 Iowa 110, 76 N. W. 126 (1900).

CHAPTER VII.

PRINCIPLES OF ADMINISTRATION: B. FURTHERANCE OF JUSTICE.

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§ 226. **Principles of Administration; Furtherance of Justice.**¹—*Boni judicis est ampliare justitiam.* It is in furtherance of justice which constitutes the characteristic and essential quality of the ideal judge. Only in proportion as a magistrate manifests, effectuates or embodies justice does he become ideal. In this way alone is the highest obligation of the judiciary to the nation, state or the community fulfilled. The administrative power of the court extends not only to protecting the dignity and due regularity of judicial proceedings and so determining the course of the trial as to protect the substantive legal rights of the parties. It will go further and provide that litigation, as it affects the parties, shall result in the attainment of substantial justice and in as speedy a manner as is consistent with a careful attempt to gain it.

To secure substantial justice to the parties is avowedly the object of the procedure under consideration and the motive or object with which the court exercises its wide administrative powers. In addition to its function of regulating the orderly course of the trial itself, the judge may, in pursuance of these administrative powers, intervene directly to secure the ends of justice. Certain of the more prominent canons under which the presiding judge exercises his powers may be stated. (1) He will insist that the primary evidence of any probative or constituent fact in the possession or control of the proponent shall be produced to the tribunal. (2) He will demand for himself, or permit a party to obtain on request, a *complete* presentation of the case as a whole, or in respect to any particular branch of it. (3) He will protect a party from surprise or other unfair advantage, and witnesses from annoyance. (4) He may insist on bringing out any fact deemed by him essential to a just decision; either by suggesting its existence to counsel or by personally asking questions designed to elicit the truth. (5) In certain jurisdictions, he will comment if necessary on the evidence for the guidance of the jury; and may, in most cases,

1. 1 Chamberlayne, Evidence, § 463.

Evidence illegally obtained.—Evidence may be admissible though obtained by unlawful search or by an illegal entry. Courts

cannot stop to try the collateral issue as to how evidence was obtained. *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. (N. S.) 399 (1912).

call additional witnesses to the same end. (6) He will hold the balance of indulgence even between the parties;—according to both any privilege conferred upon either. (7) So far as not restrained by substantive or procedural law, he will require that a party or witness make a full disclosure of all material facts. (8) He will suggest amendments of pleadings or changes in method of presentation calculated to bring the truth into a clearer light.

§ 227. [Furtherance of Justice]; Primary Evidence Required.²—A fundamental and far-reaching canon of administration is to the effect that primary evidence will be preferred to secondary.³ As will appear later,⁴ this canon of administration was, in its inception, treated as a rule of procedure;—which, to a limited extent, it still continues to be. As commonly phrased, the rule is stated by saying that the best evidence must be produced which the nature of the case admits.⁵

§ 228. [Primary Evidence Required]; Grading of Primary Evidence.⁶—1. As between *direct* evidence of any fact and *circumstantial* proof of that fact, the direct evidence is deemed primary. This is the basis of the preference for direct as compared with circumstantial evidence. It is also the foundation, in part, upon which the rules as to *res inter alios actae*⁷ have been formulated.

2. As between the judicial evidence of one who knows or has observed a fact, and proof of an extrajudicial statement by the knower or observer, the judicial evidence is primary. This is the administrative principle underlying the exceptions to the rule against hearsay⁸ and which ought, in principle, to apply to the entire operation of the hearsay rule.⁹

2. 1 Chamberlayne, Evidence, §§ 464, 465.

3. The distinction between primary and secondary evidence is one in degree of closeness, in logical relation, to the fact to be proved. The distinction is necessarily in large measure arbitrary; and, as commonly drawn, indicates a relation to the fact which is the immediate subject of the evidence the *factum probans* rather than to its effect on the truth of the ultimate proposition. In other words, the evidence to establish a probative fact may be primary, while that to prove a constituent one may be secondary.

Speaking generally, it may be said that evidence which a presiding judge is required to admit as a matter of course, without calling on the producer to explain the absence of any other method of proving the fact, is primary. Other evidence is secondary.

4. *Infra*, §§ 237 et seq.

5. *Illinois*.—*Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778 (1886 [reversing 19 Ill. App. 241]); *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105 (1892) [reversing 17 N. Y. Suppl. 223].

6. 1 Chamberlayne, Evidence, § 466.

7. *Infra*, §§ 1008 et seq.

8. *Infra*, §§ 880 et seq.

9. The "hearsay rule" sustains an anomalous relation to that requiring the "best" evidence. Like that requiring production of an original constituent instrument (*infra*, § 482), the rule excluding hearsay is a regulation of substantive law relating to procedure, or, if the phrase be preferred, a rule of procedure. Unlike the procedural rule as to documents, however, the hearsay rule presents the unusual feature that, so far as given full operation, it absolutely and arbitrarily excludes the unsworn statements covered by it. No secondary evidence is permitted, however great the proponent's necessity. On the other hand, the established exceptions to the hearsay rule, pedigree, declarations against interest, and the like, present the administrative feature of furnishing secondary evidence in the absence of the primary. (*Infra*, § 895.) The hearsay rule becomes harmonious with the rest of the law of

3. In proving the contents of a constituent document, the production of the original writing for the inspection of the court is deemed primary evidence as compared with proof by copy or any verbal testimony as to its contents. This application of the principle is apparently best regarded as part of the substantive law relating to documents and will be considered in connection with that important medium of proof. As is said elsewhere,¹⁰ the present scope of the "best evidence rule," viewed as one of procedure, is practically limited to proof of the contents or execution of constituent documents.

4. As between evidence of the physical phenomena covered by actual observation and the inference of an observer as to the existence of a fact which these phenomena appear to him to establish, the phenomena themselves are the primary evidence. This administrative principle is at the basis of the so-called "opinion evidence" rule, excluding the unnecessary use by a witness of the reasoning faculty,¹¹ and will be considered more fully in that connection.

§ 229. [Primary Evidence Required]; Evidence by Perception.¹²—As has been said,¹³ the establishment of a grade of primary evidence is more or less arbitrary. It has been suggested, for example, that the evidence gained by the direct perception of the tribunal is more cogent than any other method of showing the same facts; that, therefore, so long as the person or object in question can be brought before the court, no other inferior evidence should be received.¹⁴ This has been repudiated.¹⁵

§ 230. [Primary Evidence Required]; Written and Oral Evidence.¹⁶—It is probable that no distinct administrative principle regards written evidence as primary, and oral evidence as secondary. As a question of probative weight, it is not doubtful that the document is much to be preferred. But it will, in most instances, probably be found that the requirement of written evidence of a given fact is due rather to the substantive law than to that of administration.

*But as between two alternative methods of proving a fact, neither being forbidden by any act of law, there seems no principle of administration to the effect that the one embodying the use of writing must be regarded as primary.*¹⁷

evidence by treating it as a requirement of primary evidence—analogous to that regulating proof of the contents of a constituent document—and, when so regarded, is essentially sane and beneficial; while, as a bar to the introduction of relevant testimony, it has no adequate justification in reason.

10. *Infra*, § 239.

11. *Infra*, §§ 672 *et seq*

12. 1 Chamberlayne, Evidence, § 467.

13. *Supra*, § 228.

14. Greenleaf on Evid.

15. *Q. v. Francis*, L. R. 2, C. C. R. 128 (1874); *Lucas v. Williams*, 66 L. T. R. 706 (1892).

16. 1 Chamberlayne, Evidence, §§ 468–470.

17. For example, while the original agreement of the parties must by rule of substantive law be produced in proof of any fact asserted, as primary evidence of its contents, in any litigation between the parties on the document, no such requirement is made in an action between a party and a stranger. See Documentary Evidence, *infra*, § 1048 *et seq*. So while ownership of a chattel may be established by exhibition of a document, it may also be shown by oral testimony. *Fay v. Davidson*, 13 Minn. 523 (1868) (steamboat); *McMahon v. Davidson*, 12 Minn. 357 (1867). The lading of goods

§ 231. [Primary Evidence Required]; Not a Question of Probative Force.¹⁸—The fact that other primary evidence is more probative than the primary evidence offered, is no ground for excluding that actually produced. The “best evidence.” rule relates rather to admissibility than to weight.¹⁹ In other words, the rule of administration does not attempt to distinguish, in point of admissibility, between different classes of relevant facts;—provided it regard them as primary.²⁰

§ 232. [Primary Evidence Required]; Extent of Administrative Action.²¹—That the court is justified, unless a suitable necessity for receiving it is shown, in rejecting the secondary evidence tendered, in refusing a continuance for the purpose of securing the primary, seems clear. That the judge may further properly call the attention of the jury to any unfavorable inferences which arise from the fact of suppressing the truth, is equally unquestioned. Here it would seem that the court must stop. It cannot dismiss the case itself without hearing on the merits and as unprejudiced a consideration of the substantial equities of the party's case as is possible to persons upon whom an imposition has been attempted.

§ 233. [Primary Evidence Required]; Necessity for Using Secondary Evidence.²²—Unless a litigant is able to show, to the reasonable satisfaction of the judge, that it is necessary for him to use secondary evidence, he will be required to produce the primary. Wherever such a necessity is shown, he will be permitted to use the secondary,²³ if otherwise competent.²⁴ Hearsay, nevertheless, will not be received as secondary evidence;²⁵—the most startling anomaly in the English law of evidence.

may be proved by oral testimony though a bill of lading exist. *Giraudel v. Mendiburne*, 3 Mart. N. S. (La.) 509 (1825).

18. 1 Chamberlayne, Evidence, § 471.

19. *Indiana*.—*Hewitt v. State*, 121 Ind. 245, 23 N. E. 83 (1889).

New Hampshire.—*Roberts v. Dover*, 72 N. H., 147 55 Atl. 895 (1903); *Canfield v. Johnson*, 144 Pa. St. 61, 22 Atl. 974 (1891).

20. *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895 (1903).

For example, an admission, by a rule of procedure, is made primary evidence. *Infra*, §§ 1232 *et seq.* It follows, so far as this canon is concerned, that such a statement is equally admissible, though often not so probative, as the direct evidence of a percipient witness to the fact stated by the admission. Thus, the book of deposits kept by a bank, though made from slips kept by another clerk is quite as much primary evidence as to the state of a depositor's account, as is the depositor's pass book kept by the

bank's officers receiving his money. The evidence, therefore, is equally admissible. *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145 (1898). One who saw an occurrence from a distance though but little of it, is equally competent, if not quite as credible, as a witness who with excellent powers of observation and a retentive memory, is able to state, with absolute indifference between the litigants, the entire set of happenings in his immediate proximity.

21. 1 Chamberlayne, Evidence, § 472.

22. 1 Chamberlayne, Evidence, § 473.

23. *Binney v. Russell*, 109 Mass. 55 (1871); *Langdon v. New York*, 133 N. Y. 628, 31 N. E. 98 (1892) [*affirming* 59 Hun 434, 13 N. Y. Suppl. 864]; *Inman v. Potter*, 18 R. I. 111, 25 Atl. 912 (1892).

24. *Prince v. Smith*, 4 Mass. 455 (1808); *Niles v. Totman*, 3 Barb. (N. Y.) 594 (1848).

25. *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618 (1874). See also *Domschke v. Metropolitan El. R. Co.*, 148 N. Y. 337, 42 N. E. 804

This necessity may arise at either of two stages of the proponent's case: (1) that of establishing a *prima facie* case, or, if the proponent is not also the actor,²⁶ in creating an equilibrium in a civil or a reasonable doubt in a criminal case; or (2) at the stage when it is necessary for the proponent to maintain the situation, either of proof or doubt which he has succeeded in establishing. The necessity arising at the former stage may properly be designated as the necessity for establishing; that arising at the latter stage seems more properly called the necessity for corroboration.

§ 234. [Primary Evidence Required]; Grounds of Necessity; Witnesses or Documents.²⁷—Reasons for resorting to secondary evidence are numerous.

A witness may be dead, sick, insane, he may be a resident of parts unknown beyond the reach of legal process. In case of a document the primary evidence may have been lost, destroyed or be beyond the reach of process.

Difficulty of Proof, Subject-Matter.—Other reasons may justify the court in employing secondary evidence. The necessity for using it may be inherent in the nature of the subject-matter; — as where the facts are ancient.²⁸

§ 235. [Primary Evidence Required]; Degrees of Secondary Evidence.—Though the rule seems to be laid down broadly in England that there are no degrees in secondary evidence the current of authority is otherwise in this country.²⁹

§ 236. [Primary Evidence Required]; How Objection is Taken.³⁰—The party objecting that the evidence offered is not primary, must affirmatively show that the evidence produced by the proponent is secondary, that there is primary evidence in existence and that it is within the power of the proponent to produce it.³¹ The objecting party is bound to show not only the existence of primary evidence within the control of the proponent of the secondary, but also that this primary evidence is material and relevant to the truth of the proposition in issue;³² and that the exclusion sought will assist in the just determination of the cause.³³ For the administrative or procedural requirement of the best evidence applies only to probative or constituent facts. It does not cover those that are deliberative³⁴ or what may be called collaterally relevant facts,³⁵

(1896) [*reversing* 74 Hun 442, 26 N. Y. Suppl. 840]

26. *Infra.* § 159.

27. 1 Chamberlayne, Evidence, §§ 474-478.

28. *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633 (1847).

29. *Cummings v. Pennsylvania Fire Ins. Co.*, 153 Iowa 579, 134 N. W. 79, 37 L. R. A. (N. S.) 1169 (1912).

30. 1 Chamberlayne, Evidence, § 479.

31. *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895 (1903).

32. *Ware v. Morgan*, 67 Ala. 461 (1880);

Lamb v. Moberly, 3 T. B. Mon. (Ky.) 179 (1826); *Clifton v. Litchfield*, 106 Mass. 34 (1870); *Doe v. Morris*, 12 East 237 (1810).

33. *Donahue v. McCosh*, 70 Iowa 733, 30 N. W. 14 (1886); *Den v. Hamilton*, 12 N. J. L. 109 (1830); *Simmons Hardware Co. v. Greenwood Bank*, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700 (1893).

34. *Supra.* § 34.

35. *New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896); *McFadden v. Kingsbury*, 11 Wend. (N. Y.) 667 (1834).

i.e., circumstances which are not in the direct line of proof of the constituent facts.

§ 237. [Primary Evidence Required]; “Best Evidence” as a Rule of Procedure.³⁶—The insistence upon the primary grade of evidence in proving probative or constituent facts is by no means a universal procedural rule applicable as a general test to all questions as to the admissibility of evidence. A rule of this nature was much favored during the formative period of the law of evidence.

*But the attempt of English judges*³⁷ and text-writers,³⁸ in the eighteenth century to formulate a scientific procedural rule, that the best evidence of which a case was capable was in all instances to be required, and, if produced, received as sufficient, necessarily failed and was abandoned;³⁹—for reasons which, in part, appear hereafter.⁴⁰

§ 238. [Primary Evidence Required]; “Best Evidence Rule” at the Present Time.⁴¹—It is not difficult to understand why the “best evidence rule” as a rule of evidence, failed to attain the vogue which its advocates hoped and apparently anticipated. As qualified by the words “within his power” a requirement that the proponent of evidence produce the most probative proof, is really a precept of caution, a canon of administration. Regarded as a rule of procedure, it is unworkable. As each case arises, what shall be deemed the most probative evidence in proponent’s power must be decreed upon the special facts, effect must be accorded to certain considerations which is denied to others, the wealth of the parties, their opportunities for securing information, the seriousness of the matter in controversy, all should be examined. No procedural rule could adjust such details. Only a precept of administration could be effective, under these circumstances.

It is by no means invariably required, as a rule of procedure, that a party should not suppress testimony of a higher probative force than that which he presents;—that he should conceal nothing of help to the tribunal in its search for truth. Except in the limited cases, shortly to be mentioned,⁴² he may do as he pleases about keeping back from the tribunal, not only the best evidence he has but the best possible evidence, if he is content to pay the penalty established for doing so. The judge does not, as he well might under his adminis-

36. 1 Chamberlayne, Evidence, § 481.

37. Villiers v. Villiers, 2 Atk. 71 (1740), per Lord Hardwicke. “That all common-law courts ought to proceed upon the general rule, namely, the best evidence that the nature of the case will admit, I perfectly agree.”

38. “The one general rule, that runs through all the doctrine of trials is this, that the best evidence the nature of the case will

admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed.” 3 Black Comm. 368.

39. Queen v. Francis, L. R. 2 C. C. R. 128 (1874); Lucas v. Williams, 66 L. T. Rep. 706.

40. *Infra*, § 238.

41. 1 Chamberlayne, Evidence, § 481.

42. *Infra*, § 239.

trative powers, block his way in so doing. The "rules of the game" of litigation in general permit concealment, both in civil and criminal cases, if the litigant prefers to pay the price for doing so. In many cases the only penalty is a logical one; — the *presumptio contra spoliatores*, as it is occasionally called.⁴³ An inference arises, as a matter of logical necessity, that he who thus refuses to produce the decisive evidence undertakes to defraud justice because the more conclusive testimony, if produced, would operate less favorably upon his contention than does the less probative proof on which he prefers to rely.⁴⁴

§ 239. [Primary Evidence Required]; Present Scope of Rule.⁴⁵— As a rule of procedure the requirement of the best evidence never was enforced to its full extent as stated by its formulators; nor, for the reasons just given, could it have been thus applied with any advantage to the cause of justice. As a rule definitely regulating the admissibility of a class or species of evidence, the present scope of the mandatory portion of the "best evidence rule" is limited to proof of the *contents* of constituent documents in actions between the parties thereto.

§ 240. [Primary Evidence Required]; A Sole Survival.⁴⁶— He who is to prove the contents of a writing must produce the writing itself or account satisfactorily to the court for his failure to do so; — as a condition precedent to permission to use any less probative form of proof.

It is probable that the survival of this solitary application of the best evidence rule as a *rule*, is due to a controlling influence entirely extrinsic to itself; — the existence of a substantive conventional right in each party to a constituent document of insisting not only that its ascertained purport should not be varied by outside evidence (which is the nucleus of the "parol evidence rule"), but also that in ascertaining this purport the actual document should be the sole evidence of its contents; — which is the present form of the "best evidence" rule viewed as one of procedure rather than as a principle of administration.

§ 241. [Primary Evidence Required]; A Vanishing Rule.⁴⁷— While, therefore, the broad principle of the "best evidence rule," in the sense that primary evidence will be required wherever attainable, is operative and gaining force and extension, the line of operation of the "best evidence rule" as a rule of procedure, has dwindled to very narrow proportions. As the sole survival of the procedural rule is this moribund requirement that in proving the contents of a written instrument between the parties to it, the original must be produced or

43. *Infra*, §§ 430 et seq.

Omnia præsumuntur contra spoliatores. — as is the common adage, Broom's Legal Maxims (7th ed.), p. 717.

44. *Fitzgerald v. Adams*, 9 Ga. 471 (1851);

U. S. v. Reyburn, 6 Pet. (U. S.) 352, 8 L. ed. 424 (1832).

45. 1 Chamberlayne, Evidence, § 482.

46. 1 Chamberlayne, Evidence, § 483.

47. 1 Chamberlayne, Evidence, §§ 484, 485.

its absence accounted for, the requirement itself may well be regarded from the standpoint of the modern law of evidence, as is elsewhere suggested, as but an instance of the general administrative canon that primary evidence is to be preferred to secondary.

§ 242. [Primary Evidence Required]; "Best Evidence Rule" at the Present Time.⁴⁸— The rule against hearsay, in its inception at least, constituted a prohibition attaching to a witness rather than to the derivative character of what he said. Under the early procedure a person who could not state something to the jury which he had seen or heard simply did not come within the class of persons designated as witnesses. Two branches of the law of evidence come from this single root — the rule against hearsay⁴⁹ and that excluding "opinion" evidence.⁵⁰ Neither he who could state only what some one had told him nor the person who could say merely what he inferred were *witnesses*, as the term was then understood.

§ 243. [Primary Evidence Required]; Attesting Witnesses.⁵¹— For reasons similar to those affecting proof of the contents of documents, it may fairly be assumed that the rule of procedure which requires that where the execution of an instrument is attested by the signature of a subscribing witness in any proceedings based on the instrument, its execution must be proved by the evidence of such subscribing witness, is not so much an example of the best evidence rule as an independent regulation of substantive law, ratifying the assumed convention of the parties.

§ 244. [Furtherance of Justice]; Completeness Demanded.⁵²— Fairness may mean *completeness*. The preservation of good faith by the parties frequently assumes the form of a requirement by the court that the *complete* meaning of an oral statement or the entire purport of a document should be placed before the jury.

§ 245. [Completeness Demanded]; Oral Statements; Proponent.⁵³— From the standpoint of the proponent of the evidence, the party taking the initiative, this canon of administration is simple. Whatever he shall offer to the tribunal must be presented with sufficient fulness to place it in a true light. He is left free to choose his evidence and limit the purpose of it. But he must not arbitrarily select isolated portions of an entire statement which produce, when divorced from their context and qualifications, a false impression, unduly favorable to himself. He must, if he produces anything on a given subject, present so much of it as will represent it fairly and as it is. It is the clear right of the tribunal to have for its consideration an entire oral utterance where any part

48. 1 Chamberlayne, Evidence, § 486.

49. *Infra*, §§ 857 et seq.

50. *Infra*, §§ 672 et seq.

51. 1 Chamberlayne, Evidence, § 487.

52. 1 Chamberlayne, Evidence, § 488.

53. 1 Chamberlayne, Evidence, § 489.

of such statement has been offered in evidence. This fundamental prerequisite to the ability to adjudicate justly is not in dispute.

§ 246. [Completeness Demanded]; Admissions and Confessions.⁵⁴— In the majority of instances, the question as to completeness arises with regard to admissions or confessions, including statements made by a third person in the presence of the party. The special reason for the truth of this fact is, that a party whose statements are relied upon as admissions frequently seeks, under the guise of completing his statement to introduce in evidence his self-serving and otherwise incompetent declarations.

§ 247. [Completeness Demanded]; Oral.⁵⁵— Oral admissions should be proved in their entirety,⁵⁶ the complete declaration made at one time being taken as a whole.⁵⁷ This includes all conversations upon a relevant topic in which a party participates,⁵⁸ or which takes place in his presence⁵⁹ under conditions conferring relevancy upon his conduct with regard to it.⁶⁰

§ 248. [Completeness Demanded]; Confessions.⁶¹— A confession must be proved as a whole. In case of such a statement, the whole declaration must, as the phrase is, "be taken together,"⁶² as well for as against the accused,⁶³ it being obviously impossible to ascertain what the accused has admitted without knowing what qualifications, if any, he has placed upon the *prima facie* meaning of the inculpatory phrases. Should the confession have been reduced to writing the practice applicable to other documents may well be extended to it, and the written confession introduced, as a whole, without being read, each party being at liberty to use such portions as may be deemed material.⁶⁴ This practice is especially commendable for the protection of the interests of third persons whom the statement may tend to incriminate. As the confession, in the absence of conspiracy or other agency, is competent against no one but the declarant, there is danger lest third persons mentioned in the statement may be prejudiced by it, if the entire document were read.

The American practice allows the confession to be read as a whole, caution-

54. 1 Chamberlayne, Evidence, § 490.

55. 1 Chamberlayne, Evidence, § 491.

56. Wilson v. Calvert, 8 Ala. 757 (1845); Johnson v. Powers, 40 Vt. 611 (1868). *Infra*, § 1296.

57. Johnson v. Powers, 40 Vt. 611 (1868).

58. Barnum v. Barnum, 9 Conn. 242, 247 (1832).

59. Gillam v. Sigman, 29 Cal. 637, 641 (1866).

60. *Infra*, § 566.

61. 1 Chamberlayne, Evidence, § 492.

62. Com. v. Russell, 160 Mass. 8, 10, 35 N. E. 84 (1893).

63. Eiland v. State, 52 Ala. 322 (1875).

64. Webb v. State, 100 Ala. 47, 52, 14 So. 865 (1893). "The practice has been, in reading confessions, to omit the names of other accused parties, and, where they are used, to say 'another person,' 'a third person,' etc., where more than one other prisoner was named; and some judges have even directed witnesses, who came to prove verbal declarations to omit the names of those persons in like manner." R. v. Clewes, 4 C. & P. 221, 224 (1830), *note*. R. v. Hearne, 4 C. & P. 215 (1830); R. v. Fletcher, 4 C. & P. 250 (1829). See also R. v. Walkley, 6 C. & P. 175 (1833).

ing the jury that it is not evidence as against third persons mentioned in it.⁶⁵

§ 249. [Completeness Demanded]; Independent Relevancy.⁶⁶—Where, as in case of admissions, contradictory declarations⁶⁷ or statements independently relevant⁶⁸ for some other reason,⁶⁹ the object is merely to show that a given statement was made, it will, in general, be sufficient for the proponent of the evidence to prove the statement itself in its fullness,⁷⁰ leaving any modification of its effect to his opponent.⁷¹

§ 250. [Completeness Demanded]; Res Gestæ an Exception.⁷²—There is, however, one important qualification of this rule. Where the independently relevant statements constitute or assist to constitute the *res gestæ* of a transaction, the entire matter must be stated by the proponent in the first instance. The reason is plain;—that the statements cannot be divorced from their context.

The practice is the same where it is neither the *fact* of a statement, nor its legal effect, but its logical and probative meaning which is involved in the inquiry.

§ 251. [Completeness Demanded]; Opponent.⁷³—From the standpoint of the party who does not offer the evidence in the first instance, the canon of completeness operates to permit a reasonable amount of *supplementing* on his part of the evidence after his opponent has presented it to the court with the required degree of fairness and fullness. When once he has opened the door, it is open for his antagonist as well.

The party may claim, in the first place that, on the whole, the oral statements on the occasion referred to or the declarations of a particular document on a given subject have not been fully and correctly stated.

In the second place, the opposing party may claim and exercise the right to insist, not only that the extracts offered by his antagonist do not, when the proper contemporaneous qualifications are made, support the latter's contention, but that, when taken as a whole, they actually sustain his own inconsistent claim.

§ 252. [Completeness Demanded]; Probative Effect.⁷⁴—All that is said concerning any given topic at any one time should be received, if any portion of it

65. *Massachusetts*.—Com. v. Bishop, 165 Mass. 148, 42 N. E. 560 (1896).

North Carolina.—State v. Collins, 121 N. C. 667, 28 S. E. 520 (1897).

66. 1 Chamberlayne, Evidence, § 493.

67. *Infra*, § 671.

68. *Infra*, §§ 837 *et seq.*; Drake v. State, 110 Ala. 9, 20 So. 450 (1895) (threats).

69. Admissions and confessions, though, in a sense, independently relevant (*infra*, §§ 837 *et seq.*), are considered as constituting

evidence of the facts asserted. *Infra*, §§ 857 *et seq.*

70. Sylvester v. State (Fla. 1903), 35 So. 142; State v. Lawhorn, 88 N. C. 634, 637 (1883); Davis v. Smith, 75 N. C. 115 (1876).

71. Hudson v. State, 137 Ala. 60, 34 So. 854 (1902); Halifax Banking Co. v. Smith, 29 N. Brunsw. 462, 465, 18 Can. Suppl. 710 (1890) (admissions).

72. 1 Chamberlayne, Evidence, § 494.

73. 1 Chamberlayne, Evidence, § 495.

74. 1 Chamberlayne, Evidence, § 496.

is admitted.⁷⁵ The tribunal is entitled to receive the whole of what was said at the same time on the same subject.⁷⁶ But what was said at the same time on a different subject, as to which the judge will determine,⁷⁷ cannot be added by way of supplementation, unless, indeed, the matter is still pending.⁷⁸

§ 253. [Completeness Demanded]; Right of Initiative.⁷⁹—It will be observed also that the part added, by way of supplementation, is not independent evidence, but is a component part of the otherwise imperfect and fragmentary statement which it completes and is governed as to its purpose and effect in evidence by those of the main fact to which it is, in a way, ancillary. But the opponent has other rights than that of supplementing. He has also the right of *initiative* in offering evidence. This may be permitted for one of two purposes additional to the mere supplementing of the parts already in evidence. (a) He may put in other parts to sustain an independent theory of his own as to the effect of entire declaration, or (b) he may use such additional matter to establish a disconnected fact as to which he himself has the initiative. Having a right to introduce this evidence at some stage of the trial, whether it shall be done at one point or another, is a question of the order of evidence, and entirely within the administrative function of the judge—a matter of discretion.⁸⁰

§ 254. [Completeness Demanded]; Former Evidence.⁸¹—The requirement regarding former evidence,⁸² to the effect that the reporting witness should be able to state, in extension, the entire oral utterance,⁸³ is exceptional. The general practice is to receive the statements of a witness as to so much of the relevant parts of the conversation⁸⁴ or other utterance,⁸⁵ as he heard;—failure to hear the entire conversation being a consideration properly affecting the weight.⁸⁶

§ 255. [Completeness Demanded]; Independent Relevancy.⁸⁷—This considera-

75. *Cusick v. Whitcomb*, 173 Mass. 330, 53 N. E. 815 (1899).

76. *Bailey v. Carlton*, 95 Pac. 542 (1908); *Chicago City Ry. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28 (1904) [judgment affirmed, 109 Ill. App. 637 (1903)]; *Earley v. Winn*, 129 Wis. 291, 109 N. W. 633 (1906).

77. *Robinson v. Ferry*, 11 Conn. 460, 463 (1836).

78. "The question is merely this, whether a particular conversation is part of a preceding conversation because a negotiation begun was still pursued." *Stewart v. Sherman*, 5 Conn. 244, 245 (1824).

79. 1 Chamberlayne, Evidence, § 497.

80. See WITNESSES. §§ 1171 *et seq.*

81. 1 Chamberlayne, Evidence, § 498.

82. *Infra*, § 633.

83. If part of the former testimony of a witness is admitted the whole is competent. *Aulger v. Smith*, 34 Ill. 534 (1864). Such additional evidence may, however, be properly limited to statements which may fairly be said to *qualify* the evidence already received. *Siberry v. State*, 149 Ind. 684, 39 N. E. 937 (1895); *Re Chamberlain*, 140 N. Y. 390, 393, 35 N. E. 602 (1893).

84. *State v. Elliott*, 15 Iowa 72, 74 (1863); *State v. Daniels*, 49 La. Ann. 954, 22 So. 415 (1897).

85. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720 (1894).

North Carolina.—*State v. Robertson*, 121 N. C. 551, 28 S. E. 59 (1897).

86. *Mays v. Deaver*, 1 Iowa 216, 222 (1855).

87. 1 Chamberlayne, Evidence, § 499.

tion would be, for obvious reasons, of less importance in dealing with statements independently relevant,⁸⁸ than where the statement shown is relied upon as proof of the facts asserted in it. In either case, however, the weight may be reduced below the point of relevancy.⁸⁹ It is no ground for excluding a statement that the declarant made other disconnected statements at another time which are in conflict with it.⁹⁰

Rules relating to incorporation by reference apply equally to oral statements as to documents. Where an oral declaration is made with such reference to a document, by whomever made,⁹¹ or a verbal statement,⁹² by whomever uttered, as to be unintelligible, or otherwise incomplete without it, the document or statement will be received or required, according to its obvious necessity to the case of the proponent. If the part admitted is reasonably intelligible in the first instance, without the document or statement to which reference is made, the opponent will be allowed to supply it at a stage where he has the initiative.

§ 256. [Completeness Demanded]; Independent Relevancy.⁹³—In case of a document used, not to the end of proving a proposition but of establishing the existence of the document, or some statement contained in it, all that need be proved is the existence of such a document or statement.

§ 257. [Completeness Demanded]; Judgment.⁹⁴—Thus, in case of a judgment, all that need at times be proved is that, in point of fact, such a judgment was rendered. Evidence of preliminary, subsequent or subordinate matters need be produced only so far as is necessary to show that the judgment was rendered and specialize as to what it covers.⁹⁵

§ 258. [Completeness Demanded]; General Practice.⁹⁶—Documents, viewed in their probative capacity, i.e., as evidence of facts which their statements assert, invite from their very nature, to an administrative practice fair to both parties and also to the court, while avoiding unnecessary loss of time. The practice is to require the proponent to produce, in evidence, the entire document and then, the document being in evidence as having been offered by the proponent, to

88. *People v. Dice*, 120 Cal. 189, 52 Pac. 477 (1898) (threats); *State v. Moelchen*, 53 Iowa 310, 314, 5 N. W. 186 (1880) (foreign language: one word—"knife"—recognized); *Shifflet's Case*, 14 Gratt. (Va.) 652, 657 (1858) (confession).

89. *William v. State*, 39 Ala. 532 (1865) (confession interrupted before completion: excluded); *People v. Gelabert*, 39 Cal. 663 (1870) (confession partly in Spanish which the witness did not understand: excluded); *State v. Gilcrease*, 26 La. Ann. 622 (1874).

90. *Com. v. Chance*, 174 Mass. 245, 54 N. E.

551 (1899); *State v. Gossett*, 9 Rich. L. (S. C.) 437 (1856).

91. *Buffum v. New York Mfg. Co.*, 175 Mass. 471, 56 N. E. 599 (1900); *Trischet v. Ins. Co.*, 14 Gray 457 (1860).

92. *Judd v. Brentwood*, 46 N. H. 430 (1866); *Insurance Co. v. Newton*, 22 Wall. (U. S.) 32, 35 (1874).

93. 1 Chamberlayne, Evidence, § 500.

94. 1 Chamberlayne, Evidence, §§ 501, 502.

95. *Little Rock C. Co. v. Hodge*, 112 Ga. 521, 37 S. E. 743 (1900); *Rainey v. Hines*, 121 N. C. 318, 28 S. E. 410 (1897).

96. 1 Chamberlayne, Evidence, § 503.

permit each party to read, at any appropriate stage, such portions of the document as may be deemed material.

General Considerations.— In general the proponent of a document produced in evidence cannot, it is said, be *required* to read the entire instrument on its presentation.⁹⁷ There is, however, as in case of depositions, authority to the contrary effect, that the proponent may be compelled to read the entire document before proceeding with other evidence.⁹⁸

§ 259. [Completeness Demanded]; Depositions.⁹⁹— The party who has taken a deposition or given his own,¹ need, in the first instance, read only the direct examination,² or such portion of it as he deems material,³ subject to immediate correction by the judge, in case of obvious unfairness,⁴ or for other cause.

§ 260. [Completeness Demanded]; Admissions.⁵— Where an admission is in writing it is particularly appropriate, as in case of oral admissions, that the self-serving portion go to the jury at the same time as the portion more favorable to the proponent, providing the two are needed to give the effect of the statement as a whole. This is the practice not only where the statements are made at or about the same time, e.g., were parts of a single transaction; but where, as in case of an account,⁶ the entries, both of charge and discharge are made at different times.

§ 261. [Completeness Demanded]; Public Records.⁷— Public record as a rule is afforded to instruments constituent of legal results. The interdependence of parts being especially marked in instruments of this nature, a full copy of the original record, which itself, is usually irremovable, alone demonstrates whether a particular conclusion is justified by the instrument; or whether, on the contrary, some minor and perhaps disconnected clause may modify and indeed control the alleged meaning and effect. Such a full copy being as

97. *Lester v. Ins. Co.* 55 Ga. 475, 479 (1875) (letter); *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772 (1898).

98. *Milne v. Leisler*, 7 H. & N. 786, 795 (1862). If one party reads a portion of a written document in evidence in his behalf, the other party is entitled to the reading of the remaining portions thereof, before the intervention of other testimony. *Spanagel v. Dellinger*, 38 Cal. 279, 283 (1869) (former pleadings).

99. 1 Chamberlayne, Evidence, § 504.

1. *Thomas v. Miller*, 151 Pa. 482, 486, 25 Atl. 127 (1892).

2. The practice, which seems a convenient one, has not been adopted in England. *Temperley v. Scott*, 5 C. & P. 341 (1832). Nor is it accepted in a majority of American jurisdictions.

California.— *Orland v. Finnell*, 65 Pac. 976 (1901).

3. *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568 (1897).

The entire direct examination must, it is said, be read in the original instance. *Southwark Ins. Co. v. Knight*, 6 Whart. (Pa.) 327, 330 (1841).

4. The whole of any particular answer must be read. *Perkins v. Adams*, 5 Metc. (Mass.) 44, 48 (1842).

5. 1 Chamberlayne, Evidence, § 505.

6. *Bridges v. State*, 110 Ga. 246, 34 S. E. 1037 (1900) (entire book introduced); *State v. Powers*, 72 Vt. 168, 47 Atl. 830 (1900); *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544 (1901).

7. 1 Chamberlayne, Evidence, § 506.

readily obtained as a partial one, the court is justified in so discharging its administrative function as to require that it be done. The litigant offering any part of a public record puts in evidence a copy of the whole of that record,⁸ and, thereupon, reads or otherwise states the portion on which he actually relies.⁹

Deeds, Wills, etc.—Records, as those of deeds, wills, and the like which are customarily copied *in extenso* are proved by *verbatim* copies, duly certified by an official or proved, under oath, by an examining witness.

§ 262. [Completeness Demanded]; Executive.¹⁰—The executive department of government affords numerous instances of records to which the requirement of completeness is constantly being applied;—whether these public documents are those made *in extenso*, or consist of what may be called “single entry” records. Of this latter class are parish registers of births, marriages and death,¹¹ and municipal official records covering the same data,¹² plats of lots,¹³ tax lists.¹⁴

§ 263. [Completeness Demanded]; Legislative.¹⁵—Where proof is required of a statute, only such portions need be introduced in evidence as are material,¹⁶ and relate to the proposition in issue,¹⁷ whether the proof is by deposition¹⁸ or otherwise, and whether the statute be domestic¹⁹ or foreign.²⁰

§ 264. [Completeness Demanded]; Judicial.²¹—In no connection is the application of the principle of completeness at once so difficult and so important as in regard to judicial records. The requirement is strongly insisted upon by the presiding judge, in the interest of public justice.²²

Irrelevancy, if Separable, Rejected.—Where an entire record cannot, by any possibility, ever become material on an issue, but a line of clear demarca-

8. Smith v. Rich, 37 Mich. 549 (1877); State v. Clark, 41 N. J. L. 486 (1879); Wood v. Knapp, 100 N. Y. 109, 2 N. E. 632 (1885). See also Garrish v. Hyman, 20 La. Ann. 28 (1877).

9. Davis v. Mason, 4 Pick. (Mass.) 156 (1826).

10. 1 Chamberlayne, Evidence, § 507.

11. American Life Ins. Co. v. Rosenagle, 77 Pa. 507, 515 (1875).

12. State v. Potter, 52 Vt. 33, 38 (1879); Blair v. Sayre, 29 W. Va. 604, 606, 2 S. E. 97 (1887).

13. Farr v. Swan, 2 Pa. St. 245, 255 (1845).

14. Job v. Tebbetts, 10 Ill. 376, 380 (1848); State v. Howard, 91 Me. 396, 40 Atl. 65 (1898) (liquor tax payers).

15. 1 Chamberlayne, Evidence, § 508.

16. Swift v. Fitzhugh, 9 Port. (Ala.) 39, 54 (1839).

17. Chamberlain v. Maitland, 5 B. Monr. (Ky.) 448 (1845) (law as to holidays); Adle v. Sherwood, 3 Whart. (Pa.) 481, 483 (1838).

The title of a statute is not sufficient to establish its effect. State v. Welsh, 3 Hawks (N. C.) 404, 407 (1824) (incorporation).

18. Biesenthall v. Williams, 1 Duv. (Ky.) 329 (1864); Chamberlain v. Maitland, 5 B. Monr. (Ky.) 448 (1845) (foreign notary).

19. Grant's Succession, 14 La. Ann. 795 (1859).

20. Chamberlain v. Maitland, 5 B. Monr. (Ky.) 448 (1845); Grant v. Coal Co., 80 Pa. 208, 216 (1876).

21. 1 Chamberlayne, Evidence, § 509.

22. Illinois.—Vail v. Iglehart, 69 Ill. 332 (1873).

tion may be traced between relevant and irrelevant parts of the record, the proponent may rest content upon offering the former portions of the writing.

§ 265. [Completeness Demanded]; Pleadings at Law.²³— In connection with the pleadings themselves, whether in equity or at law, substantially the same canons of administration are adopted. Pleadings may be offered for either of two purposes. In the first place, as is shown elsewhere, the statement may be independently relevant, i.e., by reason of its own existence regardless of the truth of the facts asserted. Or, on the other hand, the pleading may, as where it contains an admission, be used as constituting evidence of something asserted by it, i.e., in what may be called its probative or assertive capacity.

§ 266. [Completeness Demanded]; Pleadings in Chancery.²⁴— In dealing with pleadings in chancery causes the bill, as a whole, should be produced by the opponent; and so much of it read by him, subject to supervision by the court and correction by his antagonist, as fairly covers, to a reasonable extent,²⁵ the particular aspect or portion of the bill which he deems relevant to the truth of a proposition in issue.²⁶ In equity causes where the answer is treated as a *pleading*, e.g., when used in the cause in which it was filed, the same rule as to completeness is applied.

§ 267. [Completeness Demanded]; Statutory Interrogatories.²⁷— The proponent may offer such portions of his adversary's statements in sworn answers as he deems material and helpful to himself²⁸ not being obviously unfair or misleading, and subject at all times to the power of the court to order that other portions of the adversary's statement, necessary to fairness²⁹ or essential to a complete understanding³⁰ should also be read. The rights of the proponent are subject also to the further qualification that, while he is at liberty to decide on what topic, if any, he will interrogate his opponent, he will be required, having selected his subject and asked his questions, to introduce in evidence *all* that his opponent has to answer as to it.³¹ The matter is one frequently regulated by a "rule of court."

§ 268. [Completeness Demanded]; Judgments.³²— It is not, in the absence of exceptional circumstances, as where the inquiry is as to the nature of a claim

23. 1 Chamberlayne, Evidence, § 510.

24. 1 Chamberlayne, Evidence, § 511.

25. To introduce in evidence part of a writing, such as a bill in equity, and withhold from the jury the balance of the instrument, is at least necessary to point out definitely the part offered, that is, the pages, paragraphs, sentences or words. When this is not done, the whole or none should go to the jury. *Jones v. Grantham*, 80 Ga. 472, 477, 5 S. E. 764 (1888).

26. *Jones v. Grantham*, 80 Ga. 472, 476, 5 S. E. 764 (1888).

27. 1 Chamberlayne, Evidence, § 512.

28. 2 Van Horn v. Smith, 59 Iowa 142, 148, 12 N. W. 789 (1882); *Lyon v. Marriott*, 5 Brit. Col. 157 (1896); *Wunderlich v. Ins. Co.*, 104 Wisc. 382, 80 N. W. 467 (1899).

29. *Hammatt v. Emerson*, 27 Me. 308, 335 (1847).

30. *Allend v. R. Co.*, 21 Wash. 324, 58 Pac. 244 (1899).

31. *Demelman v. Burton*, 176 Mass. 363, 57 N. E. 665 (1900).

32. 1 Chamberlayne, Evidence, § 513.

which has been placed in a judgment,³³ or the effort is made for the enforcement of the judgment itself,³⁴ the practice to require that the whole record, in all its extension, on whatsoever matter relating, should be produced. What is demanded, is the whole record relating to the particular proposition;³⁵—all that which establishes by judicial hearing the existence of the fact which it is sought to prove.

§ 269. [Completeness Demanded]; Verdicts.³⁶—The general rule is that a record of a verdict standing alone, i.e., without the judgment, is not admissible, because, otherwise, *non constat* but that the verdict may no longer be in force. It may have been set aside or for some other reason no judgment have issued on it.³⁷ Clearly, however, the production of a verdict is independently relevant to the effect that there was a suit which progressed so far as to reach a verdict.³⁸

§ 270. [Completeness Demanded]; Executions.³⁹—In its probative capacity as establishing the facts adjudicated, an execution is not complete without the judgment on which it was issued;⁴⁰ and, usually, other portions of the record. If the execution is independently relevant, e.g., where an officer in possession of goods under an execution proceeds against a third person acting without claim or right,⁴¹ or where the owner of the goods sues the officer for seizing them under his writ,⁴² mere production of the execution is sufficient.

§ 271. [Completeness Demanded]; Wills and Probate Papers.⁴³—It is essential that the copy of a will be full and complete. In several states of the American Union it is required, in order that a copy of a will should be admissible, that it be accompanied by a record of its probate.⁴⁴ Elsewhere, a certificate of the register of probate or other suitable official that the accompanying will has been duly proved will be accorded a *prima facie* effect.⁴⁵ Completeness is conditioned, however, in all cases, by the object of the offer.

Administration.—Appointment as administrator of the estate of a decedent should be proved, in the ordinary case, by production of the original papers, or record books, or else by a copy of them, sworn or certified.

33. Jones v. Hopkins, 32 Iowa 503, 504 (1871).

34. Willis v. Louderback, 5 Lea (Tenn.) 561 (1880).

35. People v. Pike, 197 Ill. 449, 64 N. E. 393 (1902) (county court records).

Indiana.—Brown v. Eaton, 98 Ind. 591, 595 (1884); Drosdowski v. Chosen Friends, 114 Mich. 178, 72 N. W. 169 (1897); Garner v. State, 5 Lea 213, 217 (1880).

36. 1 Chamberlayne, Evidence, § 514.

37. Comm. v. Minnich, 250 Pa. 363, 95 Atl. 565, L. R. A. 1916 B 950 (1915).

38. Waldo v. Long, 7 Johns. (N. Y.) 173

(1810). See also McLeod v. Crosby, 128 Mich. 641, 87 N. W. 883 (1901).

39. 1 Chamberlayne, Evidence, § 515.

40. Vassault v. Austin, 32 Cal. 597 (1867).

41. Spoor v. Holland, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37 (1832).

42. Deloach v. Myrick, 6 Ga. 410 (1849).

43. 1 Chamberlayne, Evidence, § 516.

44. Kentucky Land, etc., Co. v. Crabtree, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743 (1902).

45. Logan v. Watt, 5 Serg. & R. (Pa.) 212 (1810). See also Thursby v. Myers, 57 Ga. 155 (1876).

§ 272. [Completeness Demanded]; Private Records.⁴⁶— The records of a corporation in any suit in which they are relevant and competent may be proved by a certificate from the proper officer, an examined and sworn copy,⁴⁷ by production of the books properly authenticated,⁴⁸ or in any other legal manner, as an admission.⁴⁹

§ 273. [Completeness Demanded]; Independent Relevancy.⁵⁰— When proof of the independent relevancy of a document has been made, the opponent is at liberty to read so much of the remainder of its statements as pertains to the same subject and tends to qualify, limit or explain the portion already read.

This doctrine applies to pleadings,⁵¹ public records,⁵² and private writings.⁵³

§ 274. [Completeness Demanded]; Incorporation by Reference.⁵⁴— The administrative requirement of completeness calls for introduction in evidence of documents referred to in the writings already before the court. The greater the relative importance of the document in the case, the more its precise shades of meaning are significant, the more strenuously will the judge insist that all writings incorporated in it by reference should be produced for inspection.⁵⁵

If a letter is introduced that to which it is in reply is rendered competent;⁵⁶ and, indeed, will be required,⁵⁷ as in cases of oral conversation,⁵⁸ whenever available;⁵⁹— extracts from it not being deemed a sufficient compliance with the rule.⁶⁰ Where, however, the letter originally offered is intelligible⁶¹ and not obviously incomplete⁶² as it stands and it further appears that the letter

46. 1 Chamberlayne, Evidence, § 517.

47. "Proprietors' records" of common lands, etc., are treated in the same manner. Pike v. Dyke, 2 Greenl. (Me.) 213 (1823); Woods v. Banks, 14 N. H. 101, 109 (1843).

48. Banks v. Darden, 18 Ga. 318, 341 (1855).

49. Sinking Fund Com'rs v. Bank, 1 Metc. (Ky.) 174, 185 (1858) (recital of corporation's doings contained in a mortgage).

50. 1 Chamberlayne, Evidence, §§ 518-520.

51. Davies v. Flewellen, 29 Ga. 49 (1859); Sciple v. Northcutt, 62 Ga. 42, 45 (1878) (amendment to bill).

52. Rule v. State (Miss. 1898) 22 So. 872.

53. Stone v. Town of Tallalah Falls, 131 Ga. 452, 62 S. E. 592 (1908) (ordinance book); Page v. Hazelton, 74 N. H. 252, 66 Atl. 1049 (1907) (entries in a book of account).

54. 1 Chamberlayne, Evidence, §§ 521-523.

55. East Coast Lumber Co. v. Ellis-Young Co. (Fla. 1908), 45 So. 826 (deed); Stone v. Sanborn, 104 Mass. 319, 324 (1870) (contract).

56. Security Trust Co. v. Robb (N. J. 1906),

73 C. C. A. 302, 142 Fed. 78; Tilton v. Beecher, N. Y., Abbott's Rep. II, 270 (1875).

57. Walson v. Moore, 1 C. & K. 626 (1844). "We can perceive no just distinction between oral conversation and written correspondence in this respect." Trischet v. Ins. Co., 14 Gray (Mass.) 457 (1860).

58. Parts of a correspondence or conversation necessary to the complete understanding of such conversation or correspondence are, as a rule, admissible by way of supplementation, if any portion of the correspondence or conversation is received. Trischet v. Ins. Co., 14 Gray (Mass.) 457 (1860). "If we have the sermon, let us have the text." Tilton v. Beecher, N. Y., Abbott's Rep. II, 270 (1875).

59. Hayward R. Co. v. Duncklee, 30 Vt. 29, 39 (1856).

60. Coats v. Gregory, 10 Ind. 345, 346 (1858).

61. Brayley v. Ross, 33 Iowa 505 (1871); New Hampshire T. Co. v. Korsmeyer, etc., Co., 57 Neb. 784, 78 N. W. 703 (1899).

62. Stone v. Sanborn, 104 Mass. 319, 324 (1870).

to which it is in answer ⁶³ or the documents enclosed or referred to are in the possession of the adverse party, the balance of convenience may well be found in receiving the letter as offered, leaving the work of supplementing or amplifying it to the opposite side at a subsequent stage.

§ 275. [Completeness Demanded]; Obligation to Introduce into Evidence Resulting from Demand and Inspection.⁶⁴— Under a certain set of circumstances, the law of procedure itself overrides the option of the party to produce a document in his power and compels him to put it in evidence. This occurs where he who subsequently is obligated to become the proponent of the document has given notice to his adversary requiring the latter to produce the writing, and the latter has in fact produced it. The demanding party has now availed himself of the opportunity so secured of inspecting the document. He is no longer at liberty to decline to keep the examined document out of evidence; he must, by the rule originally laid down in England, offer the whole writing ⁶⁵ “if at all material to the issue.” ⁶⁶ The document is thereby made evidence for both parties.⁶⁷ The object which the court in so ordering had in view was to punish and thereby discourage “fishing” for the adversary’s evidence.

§ 267. Prevent Surprise.⁶⁸— It is the duty of the presiding judge to prevent surprise upon a litigant;— that his substantive rights shall not suffer by unforeseen developments in the case which could not have been anticipated and prevented by the exercise of ordinary prudence. The judge’s solicitude that there be no miscarriage of justice will be proportionate to the importance of the consequences of the untoward event to the party affected by it; and also to the degree of culpability of the respective parties for the existence of the situation which is presented. It may be the duty of the court to adjourn the hearing or continue the case, or even to award a new trial,⁶⁹ according to circumstances.

§ 277. [Prevent Surprise]; New Trial for Newly Discovered Evidence.— A new trial will not be granted on a mere showing that new evidence has been discovered. Such evidence must meet the following requirements: 1. It must

⁶³. Barnes v. Trust Co., 169 Ill. 112. 48 N. E. 31 (1897).

Stone v. Sanborn, 104 Mass. 319, 324 (1870).

“In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may, if he pleases, introduce the first also, and if he does not, the other party may. The actual custody of the papers does not affect the question which party shall introduce them, but only the steps to be taken to compel their production.” Stone v. San-

born, 104 Mass. 319, 324 (1870). The practice is the same even in criminal cases. U. S. v. Doebler, 1 Baldw. (U. S.) 519, 522 (1832) (forgery).

⁶⁴. 1 Chamberlayne, Evidence, §§ 524-526.

⁶⁵. Calvert v. Flower, 7 C. & P. 386 (1836); Wharam v. Routledge, 5 Esp. 235 (1805).

⁶⁶. Wilson v. Bowie, 1 C. & P. 8, 10 (1823).

⁶⁷. Com. v. Davidson, 1 Cush. (Mass.) 33, 44 (1848).

⁶⁸. 1 Chamberlayne, Evidence, § 527.

⁶⁹. Norfolk & W. Ry. Co. v. Coffey (Va. 1905), 51 S. E. 729.

be such that it will probably change the result if a new trial is granted. 2. It must have been discovered since the trial. 3. It must be such that it could not have been discovered before the trial by the exercise of due diligence. 4. It must be material to the issue. 5. It must be not merely cumulative to the former evidence. 6. It must not be to merely impeach or contradict the former evidence. Cumulative evidence is additional evidence of the same kind to the same point. Evidence to prove a distinct issue is not cumulative.⁷⁰

§ 278. [Prevent Surprise]; Action of Appellate Courts.⁷¹—Adjournment or continuance on the ground of surprise is a question of administration. When, therefore, reason has been employed, the exercise of the power will not be reviewed on appeal. Where, however, its action is unreasonable the ruling of the trial court may be reversed.⁷²

§ 279. [Prevent Surprise]; Amendment of Pleadings. A prominent among causes assigned for surprise warranting a stay of proceedings is in connection with a change in the pleadings. Where the allowance of an amendment to a pleading so alters the forensic position of the opposite party that he is not able to proceed without delay except by impairing the chances for a successful issue in his favor,⁷⁴ he will ordinarily be given the benefit of a continuance on the ground of surprise. The rule is enforced with particular strictness in criminal cases.⁷⁵

§ 280. [Prevent Surprise]; Decisions on Dilatory Pleas.⁷⁶—In case of decisions by the court upon dilatory pleas⁷⁷ or other formal matters,⁷⁸ the nature of which might reasonably have been anticipated, some proof of threatened prejudice other than the party's allegation or statement that he is surprised at the result, will be required to warrant a continuance. On the other hand, it may be equally clear that where the result of the court's action is to place a party in a situation different from what he could fairly have foreseen, the continuance is not only reasonable,⁷⁹ but may even be necessary to the ends of justice.

70. *Vickers v. Carey Co.* (Okla. 1915), 151 Pac. 1023, L. R. A. 1916 C 1155.

71. 1 Chamberlayne, Evidence, §§ 526-528.

72. *Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n*, 93 N. Y. S. 575, 104 App. Div. 571 (1905).

73. 1 Chamberlayne, Evidence, § 528a.

74. *Despatch Laundry Co. v. Employers' Liability Assur. Corp.*, 105 Minn. 384, 118 N. W. 152 (1908) (raising new issues) [rehearing granted, 105 Minn. 384, 117 N. W. 506]; *Horwitz v. La Roche* (Civ. App. 1908), 107 S. W. 1148; *Wright v. Northern Pac. Ry. Co.*, 38 Wash. 64, 80 Pac. 197 (1905).

75. *Foreman v. State* (Miss. 1909), 48 So.

611 (embezzlement from another society). The accused may, however, be required to show that he intends in good faith a defense to the amended complaint. *Williams v. State* (Tex. Cr. App. 1905), 87 S. W. 1155.

76. 1 Chamberlayne, Evidence, § 528b.

77. *St. Louis, I. M. & S. Ry. Co. v. Smith* (Ark. 1907), 100 S. W. 884 (plea in abatement).

78. *Vulcan Ironworks v. Burrell Const. Co.* (Wash. 1905), 81 Pac. 836 (motions for non-suit).

79. *Crotty v. City of Danbury*, 79 Conn. 379, 65 Atl. 147 (1906).

§ 281. [Prevent Surprise]; Testimony.⁸⁰—Where the testimony given at a trial is such that it could not reasonably have been anticipated by the party against whom it is offered, he will, if it is material to the decision of the case,⁸¹ be entitled to an opportunity of meeting it, by adjournment,⁸² or continuance,⁸³ if this be the only adequate means of facing the situation.⁸⁴ Such an order may be of especial importance in a criminal case.⁸⁵

Such surprise may consist in the failure of a party's own evidence⁸⁶ where he has used due diligence in procuring it⁸⁷ or in the change by a witness in his testimony from what was fairly to be expected⁸⁸ or from the absence of a witness whose testimony becomes suddenly and unexpectedly important.⁸⁹

§ 282. [Prevent Surprise]; Production of Documents.⁹⁰—The rule is the same with regard to the production of papers. The court has full power to protect a party from surprise due to the introduction of documents by the opposite party under circumstances not reasonably to have been anticipated by him.⁹¹ If necessary for doing justice, the judge may continue the case.⁹² Nor is the rejection of immaterial documents a suitable ground for claiming surprise.⁹³

§ 283. [Prevent Surprise]; Time and Place of Hearing.⁹⁴—Where a party, without his fault, is surprised as to the time or place of holding court, the trial judge will be justified in granting a continuance.⁹⁵ A rearrangement of cases on the court's docket may have this effect.⁹⁶

§ 284. [Prevent Surprise]; Surprise Must be Prejudicial.⁹⁷—The surprise against which the presiding judge is bound, so far as consistent with his other

80. 1 Chamberlayne, Evidence, §§ 528c-528g.

81. Dempsey v. Taylor, 4 Tex. Civ. App. 126, 23 S. W. 220 (1893).

82. Heyman v. Singer, 99 N. Y. Suppl. 942, 51 Misc. 18 (1906).

83. Louisville & N. R. Co. v. Bell (Ky. 1909), 119 S. W. 782; Johnson v. Com. 32 Ky. L. Rep. 1117, 107 S. W. 768 (1908).

84. Freeland v. Brooklyn Heights R. Co., 66 N. Y. Suppl. 321, 54 App. Div. 90 (1900).

85. Lindle v. Com., 23 Ky. L. Rep. 1307, 64 S. W. 986 (1901).

86. Threadgill v. Bickerstaff, 7 Tex. Civ. App. 406, 26 S. W. 739 (1894); Texas & P. Ry. Co. v. Boggs (Tex. Civ. App. 1895) 30 S. W. 1089 (failure of counsel to comply with stipulation); Shipp v. Suggett, 48 Ky. (9 B. Monr.) 5 (1848) (drunken witness).

87. Pinson v. Bass, 114 Ga. 575, 40 S. E. 747 (1902); Sheedy v. City of Chicago, 221 Ill. 111, 77 N. E. 539 (1906) (measuring a sewer); St. Louis, W. & W. R. Co. v. Ransom, 29 Kan. 298 (1883).

88. McDonald v. Holbrook, Cabot & Daly

Contracting Co., 93 N. Y. Suppl. 920, 105 App. Div. 90 (1905). A continuance on this ground may be refused where many witnesses are prepared to testify on the point. Blair v. State (Neb. 1904), 101 N. W. 17.

89. Schwarzschild & Sulzberger Co. v. New York City Ry. Co., 90 N. Y. Suppl. 374 (1904) (gone home at 6 p. m.).

90. 1 Chamberlayne, Evidence, § 528h.

91. Leverett v. Tift, 6 Ga. App. 90, 64 S. E. 317 (1909); Dare v. McNutt, 1 Ind. (1 Cart.) 148 (1848); Bronaugh v. Bowles, 3 La. 120 (1831).

92. Leverett v. Tift, 6 Ga. App. 90, 64 S. E. 317 (1909). A motion for a continuance should be promptly made. McLearn v. Hapgood, 85 Cal. 557, 24 Pac. 788 (1890).

93. Lyons & E. P. Toll Road Co. v. People, 29 Colo. 434, 68 Pac. 275 (1902).

94. 1 Chamberlayne, Evidence, § 528i.

95. Ross v. Austill, 2 Cal. 183 (1852).

96. Elliott v. Cadwallader, 14 Iowa 67 (1862).

97. 1 Chamberlayne, Evidence, § 528j.

administrative duties, to protect a litigant is one which clearly impairs the latter's chances of success, i.e., is prejudicial to him.⁹⁸

§ 285. [Prevent Surprise]; Protection against 'Unfair Treatment'.⁹⁹— A broad canon of administration, so inclusive that but occasional instances can, here and there, be given of its application, is that the court will, in furtherance of justice, protect each party from unfair treatment. This may be threatened either from the opposite party or from the judge himself. In whichever guise the danger may present itself, the administrative duty of the court to remove it is clear.

§ 286. [Prevent Surprise]; Unfair Comment.¹— The weight which the jury attach to the utterances of the judge, their anxiety to seek a clue from him which may, in a case of bewildering uncertainty, relieve them from their own duty will make him extremely cautious that his prejudice shall not supplant the orderly administration of law. The trial judge will, therefore, at all times, carefully refrain from interpolating remarks which indicate to the jury the opinion which he has formed on a material point in dispute,² or as to what facts are³ or are not⁴ proved.⁵ He may even refrain from stating as to what facts there is evidence.⁶

§ 287. [Prevent Surprise]; Incidental Comment Permitted.⁷— A certain incidental comment by the court is not unreasonable, especially where the jury are distinctly instructed that questions of fact in issue are to be decided by them. It is not, for example, unreasonable for the judge in discussing with counsel the admissibility of evidence,⁸ the propriety of a nonsuit,⁹ the direc-

98. The exclusion of inadmissible evidence furnishes no ground for surprise. *McCutchin v. Bankston*, 2 Ga. 244 (1847); *Simpson v. Johnson* (Tex. Civ. App. 1898), 44 S. W. 1076. The fact that the same evidence was admitted without objection at a former trial does not constitute the subsequent exclusion a surprise. *Turner v. Tubersing*, 67 Ga. 161 (1881). Nor does the fact that the opposing witnesses testify differently than they have told the objecting party they would, constitute such a threatened prejudice as will be deemed a surprise. *Brock v. Com.*, 33 Ky. L. Rep. 630, 110 S. W. 878 (1908). See also *Texas Cent. Ry. Co. v. Brock* (Tex. Civ. App. 1895), 30 S. W. 274.

Improper conduct on the part of the judge which takes place after verdict rendered can scarcely be deemed prejudicial. *Central of Georgia Ry. Co. v. Perkerson*, 115 Ga. 547, 41 S. E. 1018 (1902).

99. 1 Chamberlayne. Evidence, § 529.

1. 1 Chamberlayne, Evidence, § 529a.

2. *Georgia Ry. & Electric Co. v. Baker*, 1

a. App. 832, 58 S. E. 88 (1907); *Thomson v. Kelley* (Tex. Civ. App. 1906), 97 S. W. 326.

3. *Ficken v. City of Atlanta*, 114 Ga. 970, 41 S. E. 58 (1902); *In re Knox's Will* (Iowa 1904), 98 N. W. 468 (Tex. Civ. App. 1907), 103 S. W. 444.

4. *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 9 L. R. A. (N. S.) 769, 56 S. E. 1006 (1907).

5. The demeanor of a judge may be as unfair to a party as his verbal expressions. *City of Newkirk v. Dimmers*, 17 Okl. 525, 87 Pac. 603 (1906).

6. *Patten v. Town of Auburn* (Wash. 1906), 84 Pac. 594.

7. 1 Chamberlayne. Evidence, § 529b.

8. *Hampton v. City of Macon*, 113 Ga. 93, 38 S. E. 387 (1901) (view); *St. Louis & S. W. Ry. Co. v. Elgin Condensed Milk Co.* 175 Ill. 557, 51 N. E. 911 (1898) [judgment affirmed, 74 Ill. App. 619 (1898)]; *Herrstrom v. Newton & N. W. R. Co.*, 105 N. W. 436 (1905).

9. *Continental Ins. Co. v. Wickham*, 110

tion of a verdict, or other similar questions,¹⁰ to refer to the evidence.¹¹

§ 288. [Prevent Surprise]; Unreasonable Comment.¹²— On the other hand, to characterize the statement of a witness as "very fair and unbiased,"¹³ or to suggest that certain evidence, if believed, is or is not¹⁴ conclusive, that other facts are or are not very material,¹⁵ may well be regarded as objectionable.¹⁶

§ 289. [Prevent Surprise]; Comments on Law.¹⁷— Whatever may be thought of the good judgment of a trial court who shall undertake to criticize unfavorably the rule of law which he is announcing to the jury, such a course does not, in itself, constitute unfair treatment of the party for whom the rule operates.¹⁸

§ 290. [Prevent Surprise]; Influence of Spectators.¹⁹— Aware of the psychic influence of the dramatic features of a trial, to which reference is elsewhere made,²⁰ the presiding judge will seek to prevent the issue of the trial from being affected by applause,²¹ or other manifestation of feeling, on the part of the audience.

§ 291. [Prevent Surprise]; Misquoting Evidence.²²— To misquote the evidence of a witness upon a material point may be a form of unfair treatment against which a party is reasonably entitled to the protection of the judge. Against the action of a litigant so offending the court will promptly afford his assistance to the injured party. Naturally, moreover, he will be careful that his own quotations from the evidence shall be correct, or so modified by a reference to the power and duty of the jury to judge of the testimony²³ that any inexactness is calculated to do but little harm.

Ga. 129, 35 S. E. 287 (1900); *Cave v. Anderson*, 50 S. C. 293, 27 S. E. 693 (1897).

10. *Elgin, J. & E. Ry. Co. v. Lawlor*, 132 Ill. App. 280 (1907) [judgment affirmed, 229 Ill. 621, 82 N. E. 407]; *Stoebier v. St. Louis Transit Co.*, 203 Mo. 702, 102 S. W. 651 (1907) (motion to strike out evidence); *Fidelity Mut. Fire Ins. Co. v. Murphy* (Neb. 1903), 95 N. W. 702 (overruling dilatory motions).

11. Where a trial judge, on rejecting evidence, sees fit to comment upon its materiality or value, the action may well be justified. *In re City of Seattle*, 52 Wash. 226, 100 Pac. 330 (1909); *Manhattan Bldg. Co. v. City of Seattle*, 52 Wash. 226, 100 Pac. 330 (1909).

12. 1 Chamberlayne, Evidence, § 529c.

13. *Edwards v. City of Cedar Rapids* (Iowa 1908), 116 N. W. 323 (expert physician). A judge should not, in the hearing of a jury, compliment a witness. *Alexander v. State*,

114 Ga. 266, 40 S. E. 231 (1901). See also *McMinn v. Whelan*, 27 Cal. 300 (1865).

14. *Haynes v. City of Hillsdale* (Mich. 1897), 71 N. W. 466; *St. Louis & S. F. R. Co. v. Lane* (Tex. Civ. App. 1908), 110 S. W. 530.

15. *Howland v. Oakland Consol. St. Ry. Co.*, 115 Cal. 487, 47 Pac. 255 (1896).

16. *McKissick v. Oregon Short Line Ry. Co.*, 13 Idaho 195, 89 Pac. 629 (1907).

17. 1 Chamberlayne, Evidence, § 529d.

18. *Martin v. Peddy*, 120 Ga. 1079, 48 S. E. 420 (1904); *Lake Shore & M. S. Ry. Co. v. Ford*, 18 Ohio Cir. Ct. R. 239 (1899); *Kreuger v. Sylvester* (Iowa 1897), 69 N. W. 1059.

19. 1 Chamberlayne, Evidence, § 529e.

20. *Supra*, § 81.

21. *Central of Georgia Ry. Co. v. Mote*, 131 Ga. 166, 62 S. E. 164 (1908).

22. 1 Chamberlayne, Evidence, § 529f.

23. *Prescott v. Fletcher*, 133 Ga. 404, 35

§ 292. [Prevent Surprise]; Reprimanding Counsel.²⁴—The interests of parties may be injuriously affected at times, by reprimands addressed by the judge to their counsel.²⁵

§ 293. [Prevent Surprise]; Reprimanding a Party or His Witnesses.²⁶—Nothing unfair to a party is done where the judge, in reasonable discharge of his executive or police powers,²⁷ has occasion to reprimand one of his witnesses or even to commit him for contempt.²⁸

§ 294. [Prevent Surprise]; Effect of Waiver.²⁹—A party who might otherwise be prejudiced by the action of a judge may place himself in a position where he is not justly entitled to take advantage of it in an appellate court.³⁰ This may happen, for example, where the party claiming to be aggrieved declines to avail himself of a reasonable offer on the part of the judge to repair the consequences of the latter's erroneous action.³¹ Where, moreover, a litigant consents that the trial shall take a certain course,³² e.g., that questions of law shall be argued in presence of the jury³³ or that talesmen should be added to a jury without waiting for the arrival of the regular panel,³⁴ he cannot complain of the legitimate consequences flowing from the adoption of the procedure.

§ 295. [Prevent Surprise]; Protect Witnesses from Annoyance.³⁵—The furtherance of justice requires that its administration should be made to press with as little of hardship as possible upon witnesses. The judge may, therefore, reasonably so exercise his administrative powers as to protect the witness from all avoidable annoyance. The sacrifices of time and convenience usually exacted as the price of testifying at all, he cannot well control. But the insult, innuendo and gibes of counsel may, by a vigilant judge be, in large measure, averted from their victim.³⁶ In view of the administrative powers at his command, it would be impossible, even were it desirable, for the presiding justice to escape responsibility in this matter.

S. E. 877 (1909); *Lee v. Williams*, 30 Pa. Super. Ct. 349, 357 (1906).

24. 1 Chamberlayne, Evidence, § 529g.

25. *Woodson v. Holmes*, 117 Ga. 19, 43 S. E. 467 (1903). It is improper for the court to refer to expert testimony as "boughten testimony." *People v. Jennings* (Mich. 1903), 94 N. W. 216, 10 Detroit Leg. N. 39; *Adams v. Fisher*, 83 Neb. 686, 120 N. W. 194 (1909).

26. 1 Chamberlayne, Evidence, § 529h.

27. *Supra*, § 99.

28. *Marcum v. Hargis*, 31 Ky. L. Rep. 1117, 104 S. W. 693 (1907) (drunkenness in court) *Seawell v. Carolina Cent. R. Co.*, 132 N. C. 856, 44 S. E. 610 (1903) [rehearing denied, 45 S. E. 850] (laughing).

29. 1 Chamberlayne, Evidence, § 529i.

30. *Richardson v. State* (Tex. Cr. App. 1906), 94 S. W. 1016.

31. *Richards v. City of Ann Arbor*, 152 Mich. 15, 115 N. W. 1047, 15 Detroit Leg. N. 142 (1908).

32. *Farley v. Gate City Gaslight Co.* (Ga. 1898), 31 S. E. 193; *Spangehl v. Spangehl*, 57 N. Y. Suppl. 7, 39 App. Div. 5 (1899) (call but five witnesses).

33. *Moore v. Rose*, 130 Mo. App. 668, 108 S. W. 1105 (1908).

34. *Rice v. Dewberry* (Tex. Civ. App. 1906), 93 S. W. 715.

35. 1 Chamberlayne, Evidence, § 530.

§ 296. [Prevent Surprise]; Cross-examination.³⁷—The principal occasion for the objectionable and offensive treatment of witnesses is upon cross-examination. Here the zeal of counsel has been most frequently betrayed into excesses. If this enthusiasm is honest, an intimation from the court usually suffices for its control.³⁸ A cross-examination in any way abusive is improper, and can only, so far as the witness is concerned, be repressed by the presiding judge. In the same way, it may be proper for the court to intimate to counsel that the cross-examination of a particular witness is being unduly protracted.³⁹

§ 297. [Prevent Surprise]; A Reasonable Limitation.⁴⁰—It by no means follows that the course of a judge in allowing a witness to be intimidated or otherwise annoyed is, in all cases, bad administration. The object of this treatment may richly merit such an experience; the interests of justice may demand that he be so treated. In undertaking to limit the rights of counsel, as to tone, gesture, manner as well as substance of examination, the possible existence of fraud, bad faith, perjury must not be overlooked.

Innuendo.—Counsel should rarely be permitted to comment upon the evidence they are eliciting.⁴¹ An appropriate opportunity will be reserved for such observations at a later stage. At that of examination, the principal effect of such comment, and often, apparently, its exclusive object, is to embarrass the witness.

Intimidation.—Any question which tends to intimidate⁴² or embarrass a witness is objectionable.

§ 298. Judge May Interrogate Witnesses.⁴³—The judge may elicit evidence; he should not intimate his opinion as to the case, its merits or the credibility of witnesses. The right of a judge, for the promotion of justice, to interrogate a witness is not affected by the constitutional provision forbidding judges to comment upon the evidence in the case.⁴⁴ In any case, the court will not interrogate a party or witness in such a manner as to indicate to the jury the judgment which he may have formed regarding the truth of a disputed matter of fact, especially if such a fact be a material one.⁴⁵ On the other hand,

36. *Elliott v. Boyles*, 31 Pa. St. 66 (1837). Where a witness on the stand is wantonly attacked by the attorney of the opposite party without any provocation whatever, the act of the trial judge in reproving such attorney is proper. *Heffernan v. O'Neill* (Neb. 1901), 96 N. W. 244. In like manner, the judge upon being appealed to by a witness for further time in which to answer the questions of counsel, is justified in directing that sufficient time be allowed her for the purpose. *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276 (1903).

37. 1 Chamberlayne, Evidence, § 531.

38. "When the presiding judge is respected and prudent, a hint kindly given is gener-

ally all that is needed to restrain such ardor, when it does not arise in any degree from habitual want of respect for the rights of others and for the order of public business." *Elliott v. Boyles*, 31 Pa. 66 (1857).

39. *Crane Lumber Co. v. Bellows* (Mich. 1898), 74 N. W. 481.

40. 1 Chamberlayne, Evidence, §§ 532, 533.

41. *Ings' Trial*, 33 How. St. Tr. 957, 999 (1820).

42. *Haines v. Ins. Co.*, 52 N. H. 470 (1872).

43. 1 Chamberlayne, Evidence, §§ 534-536.

44. *Wilson v. Ohio River & C. Ry. Co.* (S. C. 1898), 30 S. E. 406. *Supra*, § 281.

45. *Bryant v. Anderson*, 5 Ga. App. 517, 63 S. E. 638 (1909).

he may not properly ask immaterial questions calculated to arouse the passions and prejudices of a jury.⁴⁶ In the same way, while the judge may question witnesses to bring the facts properly before the jury, he must so frame his questions as not to indicate his own opinion, and not to lay undue stress on particular features of the witness' testimony tending to impeach him.⁴⁷

§ 299. [Judge May Interrogate Witnesses]; In Order to Elicit Material Facts.⁴⁸— But the judge may interrogate a witness for a higher purpose than to enable him to give the jury full instructions. Beside his function of offering light to the jury, he has a duty to justice. He should therefore ask any question calculated to present new and material evidence.⁴⁹

§ 300. [Judge May Interrogate Witnesses]; Range of Inquiry.⁵⁰— The only limitation upon the range of the judge's interrogation is that the power should be reasonably exercised. The questions should be relevant, and so framed as not to prejudice either of the parties. As is said by the supreme court of Georgia,⁵¹ a judge may ask a witness "any legal question he pleases." He may ask leading questions.⁵²

§ 301. Judge May Call Additional Witnesses.⁵³— Where the social demands of justice are likely to suffer by an avoidable inadequacy of proof, the court may, of its own motion, seek to supply it. Thus, if a material witness, available to the parties, is not produced, the judge may cause him to be sworn and testify.⁵⁴ The judge may make the order equally whether he is⁵⁵ or is not

46. *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434 (1900).

47. *Barlow Bros. Co. v. Parsons*, 73 Conn. 696, 49 Atl. 205 (1901). Should the examination clearly show the judge's opinion on the question of credibility, it is matter for reversal. *City of Flint v. Stockdale's Estate*, 157 Mich. 593, 122 N. W. 279, 16 Detroit Leg. N. 493 (1900). This power and duty of interrogation is not limited to judges. It applies also to inferior magistrates or persons exercising temporary judicial functions, such as arbitrators. *Butler v. Boyles*, 10 Humph. 155 (1849).

48. 1 Chamberlayne, Evidence, § 537.

49. It may properly be said in any case as was said by Judge Bickwell in the supreme court of Indiana: "A circuit judge presiding at a trial is not a mere moderator between contending parties: he is a sworn officer charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice. . . . There is nothing wrong in the court's asking the witness any question the answer to which

would likely throw any light upon the testimony." *Huffman v. Cauble*, 86 Ind. 591, 596 (1882).

Suggestions to Counsel.— The trial judge is not required to ask the questions personally. He may suggest them to counsel. *State v. Noakes*, 70 Vt. 247, 40 Atl. 249 (1898).

50. 1 Chamberlayne, Evidence, §§ 538, 539.

51. *Epps v. State*, 19 Ga. 111 (1855). Where the judge is forbidden to comment on the evidence in charging the jury, for the judge to indicate by his question his opinion as to a material fact, would constitute prejudice. *Harris v. State*, 61 Ga. 359 (1878).

52. See WITNESSES, *infra*, § 1172; 25 Hansard Parl. Deb. 207 (1813).

53. 1 Chamberlayne, Evidence, § 540.

54. *Selph v. State*, 22 Fla. 537, 548 (1886); *Hoskins v. State*, 11 Ga. 92, 97 (1852); *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053 (1898); *Coulson v. Disborough*, L. R. 2 Q. B. D. 316 (1894).

55. *Badische A. & S. Fabrik v. Levinstein*, L. R. 24 Ch. D. 156, 167 (1883).

sitting as a jury. His right to ask questions of a witness is subject, however, to the qualification that his questions should be put in open court. It is highly improper for a judge to interrogate a witness privately and subsequently ask him questions upon the basis of the information so obtained.⁵⁶ In much the same way a witness may properly be recalled for further examination at the request of the presiding judge.⁵⁷

§ 302. Judge Should Hold Balance of Indulgence Even.⁵⁸—A presiding judge will not be permitted to grant an indulgence to one party which he denies to the other. This rule is one of wide range of application. So where one party has been permitted to offer evidence on a particular subject⁵⁹ or to use some special class of evidence,⁶⁰ his adversary will be conceded the privilege of meeting him upon the same ground⁶¹ or with the same weapons.⁶²

Use of Incompetent Testimony.—The principle has even been carried so far, in certain courts, as to permit a party against whom is introduced irrelevant evidence⁶³ or that which is incompetent,⁶⁴ hearsay, "opinion"⁶⁵ or the like,⁶⁶ to insist upon meeting it with equally incompetent evidence of the same nature.

In a criminal case, the same right has been conceded to the prosecution where the accused has introduced without objection, legally inadmissible testimony.⁶⁷

§ 303. Judge Should Require Full Disclosure.⁶⁸—A party is not entitled, as a matter of right, to withdraw legal and competent evidence, voluntarily in-

56. Littleton v. Clayton, 77 Ala. 571, 575 (1884). See also Sparks v. State, 59 Ala. 82, 87 (1877).

57. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709 (1906). For an interesting and instructive contribution to the learning of this subject see 57 L. R. A. 875.

58. 1 Chamberlayne, Evidence, § 541.

59. McElevaney v. McDiarmid, 131 Ga. 97, 62 S. E. 20 (1908); Alpena Tp. v. Mainville, 153 Mich. 732, 117 N. W. 338, 15 Detroit Leg. N. 605 (1908).

60. Bates v. Hall (Colo. 1908), 98 Pac. 3 (parol evidence); Missouri, K. & T. Ry. Co. of Texas v. Steele (Tex. Civ. App. 1908), 110 S. W. 171.

61. Jefferson Min. Co. v. Anchoria-Leland Min. & Mill Co., 75 Pac. 1070, 64 L. R. A. 925 (1904); Kuhn v. Eppstein, 239 Ill. 555, 88 N. E. 174 (1909); Kelly v. Chicago, R. I. & P. Ry. Co. (Iowa 1908), 114 N. W. 536; Jetter v. Zeller, 104 N. Y. S. 229, 119 App. Div. 179 (1907); Whitney v. Haskell, 216 Pa. 622, 66 Atl. 101 (1907) (construction of agreement).

62. Farmer's High Line Canal & Reservoir

Co. v. White (Colo. 1903), 75 Pac. 415; McIlwain v. Gaebe, 128 Ill. App. 209 (1906) (X-ray photographs).

63. Warren Live Stock Co. v. Farr, 142 Fed. 116, 73 C. C. A. 340 (1905).

64. German-Amer. Ins. Co. v. Brown (Ark. 1905), 87 S. W. 135.

65. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166 (1905) [affirming judgment, 117 Ill. App. 556] (conclusion); State v. Grubb, 201 Mo. 585, 99 S. W. 1093, (1906) (handwriting); Ahnert v. Union Ry. Co. of N. Y. City, 110 N. Y. Suppl. 376 (1908); Lefevre v. Silo, 98 N. Y. Suppl. 321, 112 App. Div. 464 (1906) (conclusion).

66. Aetna Ins. Co. v. Fitze (Tex. Civ. App. 1904), 78 S. W. 370 (compromise offer). Where plaintiff gave secondary evidence without objection, defendant should have been allowed to give similar contradictory evidence. McCormack v. Mandlebaum, 92 N. Y. S. 425, 162 App. Div. 302 (1905).

67. People v. Duncan (Cal. App. 1908), 96 Pac. 414 (hearsay).

68. 1 Chamberlayne, Evidence, §§ 542, 543.

troduced by him, which is favorable to his adversary.⁶⁹ While the interests of public justice may require a full disclosure on the part of a witness, the attempt to break down the testimony of one whom the judge regards as mistaken⁷⁰ may more properly be left to counsel.

§ 304. **Expedite Trials.**⁷¹— Beyond a certain point, to delay justice in any case, is to deny it. "Undue delay is a denial of justice."⁷² The expediting of trials is therefore in the direction of the furtherance of justice, and, therefore, is well within the administrative duty of the court. But no furtherance of justice, as a whole, can take place by declining to accord to a case all the time reasonably necessary to diagnose every material fact merely in order to advance a case standing later on the docket.⁷³ The present canon of administration prescribes economy in the use of time. It permits any expenditure which is reasonably necessary for the purpose of doing justice.⁷⁴ It cautions merely against time's waste; nothing is said against its useful employment.⁷⁵

Methods Employed.— In seeking this objective of administration — the attainment of substantial justice as speedily as is consistent with the adequacy of the result itself — courts proceed, in addition to minor and more incidental methods, by these principal ways: (1) Such a use of its judicial knowledge and power to rule as to the existence of *prima facie* states of evidence as will prevent diverting of attention from the facts really in dispute and keep the case as it were constantly turning on its hinge; (2) controlling the range of inquiry at any stage to the reasonable requirements of proof;⁷⁶ (3) eliminating evidence of slight, collateral, or remote logical bearing;⁷⁷ (4) regulating introduction of cumulative evidence;⁷⁸ (5) limiting number of witnesses;⁷⁹ (6) restricting repetition of question;⁸⁰ (7) restricting repetition of testimony;⁸¹ (8) restricting length of argument;⁸² (9) restricting length of examination;⁸³ number of counsel, etc.

69. *Zipperer v. City of Savannah*, 128 Ga. 135, 57 S. E. 311 (1907).

70. *Glover v. United States*, 147 Fed. 426, 77 C. C. A. 450 (1906).

71. 1 Chamberlayne, *Evidence*, §§ 544-555.

72. *Post v. Bklyn. Heights R. R. Co.*, 195 N. Y. 62 (1909).

73. *People v. Pease*, 27 N. Y. 45, 61 (1863).

74. *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332 (1879).

75. *Godard v. Gray*, L. R. 6 Q. B. 139, 152 (1870).

76. *Aurora v. Hillman*, 90 Ill. 61 (1878); *Stroh v. South Covington, etc., R. Co.* 78 S. W. 1120, 25 Ky. L. Rep. 1868 (1904); *Davis v. U. S.*, 165 U. S. 373, 17 S. Ct. 360, 41 L. ed 750 (1897).

77. *Com. v. Williams*, 105 Mass. 62 (1870).

78. *Georgia*.— *White v. Columbus Iron Works Co.*, 113 Ga. 577, 38 S. E. 944 (1901).

79. *White v. City of Boston*, 186 Mass. 65, 71 N. E. 75 (1904); *Swope v. City of Seattle*, 36 Wash. 113, 78 Pac. 607 (1904); *Austin v. Smith & Holliday* (Iowa 1906), 109 N. W. 289; *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231 (1906); *Taylor v. Security Life, etc., Co.*, 145 N. C. 383, 59 S. E. 139 (1907).

80. *Singer & T. S. Co. v. Hutchinson*, 184 Ill. 169, 56 N. E. 353 (1900); *Simon v. Home Ins. Co.*, 58 Mich. 278, 25 N. W. 190 (1885); *Ulrich v. People*, 39 Mich. 245, 251 (1878).

81. *Stern v. Bradner Smith & Co.*, 225 Ill. 430, 80 N. E. 307 (1907) [*affirming* 127 Ill. App. 640 (1906)]; *Griswold v. Nichols*, 126 Wis. 401, 105 N. W. 815 (1905).

82. *Munro v. Stowe*, 175 Mass. 169, 55 N. E. 992 (1900); *Reagan v. St. Louis Transit Co.*, 180 Mo. 117, 79 S. W. 435 (1904).

83. *Walker v. McMillan*, 21 N. Br. 31, 44,

§ 305. **Judge Should Aim to Give Certainty to Substantive Law.**⁸⁴— The final general canon of administration is that of legal certainty. Litigation should be so conducted as not only to (A) secure and enforce the substantive rights of the parties,⁸⁵ (B) further justice,⁸⁶ (C) do it in as speedy a manner as is consistent with the higher ends,⁸⁷ but also (D) to create and establish a more complete and perfect system of substantive law.

In seeking to secure to the community as a whole the benefit of the litigation between individuals, the judiciary as a body, having a continuous tradition and a constant object, endeavors to utilize the results of repeated jury trials for making the rules of law more precise and definite. Such action is evidently in the line of the public interest.

Where successive juries upon substantially similar facts evidence by their decisions a fairly uniform tendency to draw a particular inference from these facts, the judge may, in committing the decision of the same question to a jury call attention to this inference, if approved by him, as being a reasonable one, which the jury may properly consider, giving it such weight as they may think proper. The court has announced a "presumption of fact," so called.⁸⁸

§ 306. **Action of Appellate Court; Judicial Function of Trial Judge; Substantive Law.**⁸⁹— Any ruling as to substantive law, whether in open court or confused⁹⁰ connection with administrative or judicial rulings, is clearly subject to review. On ordinary principles, any ruling as to matter of substantive law or procedure, incidental to a subsidiary finding⁹¹ as that deciding a subordinate issue of fact in a particular way renders certain evidence admissible or inadmissible,⁹² or that the court has or has not a discretion in the matter, may constitute error.

§ 307. **[Action of Appellate Courts]; Findings of Fact.**⁹³— A finding by the trial judge as to a preliminary or subsidiary fact may be final or provisional, according as the ultimate determination as to the existence of the fact is or is not within the duty of the presiding judge. If it is within his province and is justified by the rules of reasoning,⁹⁴ it is "a finality as much as the verdict of a jury upon a question of fact"⁹⁵ and will not be reviewed in an appellate

⁸⁶ Can. Sup. 241, 245 (1882); *Mason v. Ditchbourne*, 1 M. & Rob. 460, 462 (1835).

⁸⁴ 1 Chamberlayne, Evidence, § 556.

⁸⁵ *Supra*, §§ 147 *et seq.*

⁸⁶ *Supra*, §§ 226 *et seq.*

⁸⁷ *Supra*, §§ 304 *et seq.*

⁸⁸ *Supra*, § 415.

⁸⁹ 1 Chamberlayne, Evidence, § 557.

⁹⁰ *Supra*, § 118.

⁹¹ *Com. v. Coe*, 115 Mass. 481, 505 (1874).

⁹² *Com. v. Gray*, 129 Mass. 474 (1880).

⁹³ 1 Chamberlayne, Evidence, § 558.

⁹⁴ **How far discretionary.**— The determination of a subsidiary question of fact is said necessarily to rest chiefly "in the discretion of the presiding judge." *Lane v. Moore*, 151 Mass. 87, 91 (1890). This may be doubted, if by discretion is implied irresponsible action. See *Com. v. Gray*, 129 Mass. 474 (1880).

⁹⁵ *Lane v. Moore*, 151 Mass. 87 (remoteness of declarations showing mental condition) (1890); *State v. Pike*, 49 N. H. 399 (1870).

court in a civil⁹⁶ or criminal⁹⁷ proceeding; — unless the judge sees fit to permit a revision.⁹⁸ But in respect to failure to exercise the faculty of reason in making an inference of fact the appellate court stands to the judge presiding at *nisi prius* in much the same position that the presiding justice himself occupies as regards the trial jury. To fail in exercising the reasoning faculties through ignorance, prejudice, lack of competent evidence upon which a finding could be based,⁹⁹ or for any other cause, is in violation of the rule of substantive law requiring the use of reason and is subject to correction on review at the hands of an appellate court.

§ 308. [Action of Appellate Courts]; Facts Conditioning Admissibility.¹— While the action of the presiding judge in submitting evidence to the jury is not reversible in an appellate tribunal, if the finding of a preliminary fact necessary to admissibility is logically permissible, the party may ask that the jury in discharging their function of weighing the evidence submitted, should reverse the finding of the judge as to the existence of the preliminary fact. The usual effect of the ruling that evidence, the admissibility of which is conditioned upon the existence of a preliminary fact, may be laid before the jury, is merely that sufficient facts have been made to appear to convince the judge that the jury may, within the bounds of reason, find that the preliminary fact exists.² The ruling merely places the matter before the jury. It fails to give, in any sense, to the existence of the conditioning fact the probative weight of the judge's unqualified endorsement.

§ 309. [Action of Appellate Courts]; Competency of Witnesses.³— For example, the finding as to the competency of a witness is not final;⁴ where the evidence is reported for the purpose, but will be revised though with hesitancy and caution.⁵

§ 310. [Action of Appellate Courts]; Administrative Function of Trial Judge.⁶— It is, as has been said,⁷ the essential characteristic of judicial administration that it is governed by the use of enlightened *reasoning*. The necessity for employing legal reason is the only limitation upon its exercise. Not the *result*, but the process of reaching it, is in the control of an appellate court. If the

96. Walker v. Curtis, 116 Mass. 98 (genuineness of papers) (1874); O'Connor v. Halinan, 103 Mass. 547 (competency of wife as a witness) (1870).

97. Com. v. Robinson, 146 Mass. 571 (general scheme or plan) (1888); Com. v. Gray, 129 Mass. 474 (1880); Com. v. Culver, 126 Mass. 464 (confession voluntary) (1879).

98. Com. v. Robinson, 146 Mass. 571 (1888)

99. Com. v. Williams, 105 Mass. 62, 68 (1870).

1. 1 Chamberlayne, Evidence, § 559.

2. Com v. Robinson, 146 Mass. 571 (1888).

3. 1 Chamberlayne, Evidence, § 560.

4. Udy v. Stewart, 10 Ont. Rep. 591 (1886). It has been properly held, however, that unless some rule of law has been wrongly applied, the finding is not a subject of exceptions. Com. v. Mullins, 2 Allen (Mass.) 295 (1861).

5. Peterson v. State, 47 Ga. 524 (1873).

6. 1 Chamberlayne, Evidence, § 561.

7. *Supra*, § 74.

8. Chicago, etc., Ry. Co. v. Shenk, 131 Ill. 283, 23 N. E. 436 (1890).

administrative act of the trial judge is defensible on grounds of legal reasoning, it will stand. If, on the contrary, it is not supportable on these grounds the discretion is said to be "abused" and the action is reversed.⁸

§ 311. [Action of Appellate Courts]; Executive Function of Trial Judge.⁹—The action of a presiding judge in enforcing obedience to his orders or in protecting the administration of justice is part of his function as judge, and, so long as his acts are done under the guidance of reason, their propriety is not reversible in an appellate court.¹⁰ It has even been held that if the trial judge had jurisdiction his action, reasonable or unreasonable, will not be reversed.¹¹

§ 312. [Action of Appellate Courts]; All Intendments Made in Favor of Trial Judge.¹²—No mere irregularities, not prejudicing the substantive rights of the person claiming relief against an order for contempt, will be permitted to affect the action of the trial judge.¹³ For a reversal, the difficulty with prior proceedings must be so radical that they are, in whole or in part, void.¹⁴ Every fact found by the trial judge will be assumed to be correct, all intendments being made in its favor.¹⁵ Indeed, it might fairly be said that questions of fact will not be deemed reviewable at all,¹⁶ so long as the rules of reason are observed,¹⁷ including, as seems proper, within the term "matter of law," any violation of the rule that in all judicial proceedings reason must be employed.¹⁸ Revision properly extends merely to matters of law.¹⁹

§ 313. [Action of Appellate Courts]; Powers of an Appellate Court.²⁰—In matters of contempt an appellate court has the same power as in other error in law.²¹ Regarding questions of fact wherever reason has been followed by the

9. 1 Chamberlayne, Evidence, § 562.

10. State v. Archer, 48 Iowa 310 (1878); Bagley v. Scudder, 66 Mich. 97, 33 N. W. 47 (1887); Watrous v. Kearney, 79 N. Y. 496 (1880) [affirming (N. Y.) 11 Hun 584]; Murray v. Berry, 113 N. C. 46, 18 S. E. 78 (1893); West v. State, 1 Wis. 209 (1853).

11. *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 [affirmed in 207 U. S. 541, 28 S. Ct. 178] (1907).

12. 1 Chamberlayne, Evidence, § 563.

13. *Indiana*.—Hawkins v. State, 126 Ind. 294, 26 N. E. 43 (1890).

14. Drady v. Dist. Court of Polk County (Iowa 1905), 102 N. W. 115; *Ex p.* Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678 (1895).

15. Gunn v. Calhoun, 51 Ga. 501 (1874); Park v. Park, 80 N. Y. 156 (1880).

16. Holly Mfg. Co. v. Venner, 143 N. Y. 639, 37 N. E. 648 (1894); Green v. Green, 130 N.

C. 578, 41 S. E. 784 (1902). But see *In re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890); State v. McKinnon, 8 Or. 487 (1880).

17. The facts found by the judge in contempt proceedings are not reviewable on appeal, except for the purpose of passing upon their sufficiency to warrant the judgment. Green v. Green, 130 N. C. 578, 41 S. E. 784 (1902).

18. Green v. Green, 130 N. C. 578, 41 S. E. 784 (1902).

19. State v. Seaton, 61 Iowa 563, 16 N. W. 736 (1883); Bradley v. Veazie, 47 Me. 85 (1860).

New York.—*In re Blumenthal*, 22 Misc. 704, 50 N. Y. Suppl. 49 (1898) [affirming 22 Misc. 764, 48 N. Y. Suppl. 1101 (1897)].

20. 1 Chamberlayne, Evidence, §§ 566, 567.

21. Questions finally determined by the appellate court are *res adjudicata*. Ryan v. Kingsbery, 89 Ga. 228, 15 S. E. 302 (1892).

trial judge there will be no reversal merely because the exercise of reason might have led the appellate court to a different conclusion.²²

§ 314. [Action of Appellate Courts]; Modification of Action.²³— Instead of reversing, the appellate court may modify the order of the trial judge,²⁴ as by reducing a fine imposed by him²⁵ to the statutory limit.²⁶ The appellate court may make any orders incidental to carrying out its decree; — e.g., provide for enforcing a modification.²⁷

22. *In re Chesseman*, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596 (1886).

23. 1 Chamberlayne, Evidence, §§ 568, 569.

24. *Turner v. Com.* (Ky.), 2 Metc. 619 (1859).

25. *Buffalo Loan, Trust, etc., Co. v. Medina Gas, etc., Co.*, 74 N. Y. Suppl. 486, 68 App. Div. 414 (1902).

26. *Luedeke v. Coursen*, 3 Misc. 559, 23

N. Y. Suppl. 314, 52 N. Y. St. Rep. 516 (1893).

As to costs in the appellate court, see *Tucker v. Gilman*, 37 N. Y. St. Rep. 958, 14 N. Y. Suppl. 392, 20 N. Y. Civ. Proc. 397 (1891).

27. *Gilman v. Byrnes*, 10 N. Y. Civ. Proc. 46 (1886).

CHAPTER VIII.

JUDICIAL KNOWLEDGE.

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§ 315. **Knowledge.**— Facts as to which no proof need be offered may be designated, respectively, as judicial knowledge and common knowledge. Judicial knowledge is that which the judge has, or is assumed to have by virtue of his office; — *virtute officii*. It covers, in main, propositions of law and, to a limited extent, facts established as the direct result of legal provisions. Com-

mon knowledge is the property of judge and jury alike, equally with any other well informed members of the community. It is confined to matters of fact.¹ Common knowledge may be divided into (a) that which is general among the community — to which the generic term “common” may be deemed appropriate, and (b) the technical knowledge which is general among members of a class, trade or profession. This class or species of knowledge may be designated as *special*.²

§ 316. **Knowledge of Law; In general.**³— To announce and enforce the provisions of a certain code of laws, substantive or procedural, is one of the judicial powers of the court; ⁴ knowledge of that code is therefore an essential attribute of the office. Cognizance of these rules of law is not, like that of facts in general,⁵ something which comes to the judge from without, i.e., *dehors* the judicial office. Knowledge of domestic law is intrinsic in the judge, whose action, in this respect, binds the jury and is, for the purposes of the case, final as to the rights of the parties.⁶

§ 317. **Common and Judicial Knowledge.**⁷— Essential differences exist between the knowledge which a judge has of the domestic law of the jurisdiction which he is set to enforce, and that general information which is fairly to be designated as common knowledge.⁸ Knowledge of notorious facts, i.e., common knowledge, the judge may be *assumed* to share with other intelligent men. But he may decline to notice the existence of such facts and may require that they be proved. Knowledge of domestic law the judge *must* have. He has no option or discretion as to whether he will have it or not. It is his elementary duty to know the rules, to state them for the guidance of the jury and fully to determine, for the purposes of the trial, the legal rights of the parties. He is not at liberty to decline to rule as to his judicial knowledge until the parties supply him with actual information,— as he might do in a matter of common knowledge; he *must* rule. *The parties have not only the right to insist that the judge should act, but to insist that he shall act right.*⁹ Should he fail to do so, it is error; — for which redress will be furnished on taking appropriate steps.¹⁰

§ 318. **Judicial vs. Personal Knowledge; Judge.**¹¹— Judicial knowledge is not

1. 1 Chamb., Ev., § 570.

2. 1 Chamb., Ev., §§ 570, 870 *et seq.*

3. 1 Chamberlayne, Evidence, § 571.

4. 1 Chamb., Ev., §§ 69, 165.

5. 1 Chamb., Ev., §§ 6, 7.

6. 1 Chamb., Ev., § 571.

7. 1 Chamberlayne, Evidence, § 572.

8. 1 Chamb., Ev., § 691 *et seq.*

9. 1 Chamb., Ev., §§ 385 *et seq.*

10. 1 Chamb., Ev., § 572.

“Judicial Notice.”—As usually employed, “judicial knowledge,” “judicial cognizance”

and “judicial notice” are used practically indiscriminately, to cover two very dissimilar set of facts—those which the judge knows *qua* judge and those facts which every one knows. It has been deemed advisable to disassociate these two classes of fact from under the common designation of “judicial knowledge,”—reserving the phrase exclusively for those which are part of the judicial office. 1 Chamb., Ev., § 573.

11. 1 Chamberlayne, Evidence, § 574.

the personal knowledge of the judge.¹² To a certain extent a presiding judge may use his knowledge of facts provided these are not part of the *res gestæ* of a case. He may properly cognize facts which are notorious in the community because arising out of celebrated or protracted litigation¹³ or known to him, because established in judicial proceedings before him in the same¹⁴ or another¹⁵ case. He may even remember that he has done something now on record in his court.¹⁶ In none of these cases, is, it, strictly speaking, the particular¹⁷ knowledge of the judge, as an individual. That a presiding justice cannot give judgment on his personal and private knowledge is well established.¹⁸ Where he possesses particular knowledge¹⁹ which is important to the cause of justice it is the duty of the judge to take the stand as a witness.²⁰ even when presiding at the trial.²¹

A judge may judicially know the law²² or procedure of an American state, the law²³ or procedure of a foreign country, or facts notorious in the limited professional community of which the judge is a member.²⁴ In a sense, this

12. *Steenerson v. R. Co.*, 69 Minn. 353, 72 N. W. 713 (1897).

13. *Davies v. Hunt*, 37 Ark. 574 (1881).

14. *Robertson v. Meyers*, 7 U. C. Q. B. 423 (1850).

15. *People v. Lon, Yeck*, 123 Cal. 246, 55 Pac. 984 (1899), Chinese perjury; *Bryan v. Beckley*, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276 (1809); *Graham v. Williams*, 21 La. Ann. 594 (1869), foreign statute; *Hatch v. Dunn*, 11 Tex. 708 (1854), colonization contract; *U. S. v. Teschmaker*, 22 How. (U. S.) 392, 16 L. Ed. 353 (1859), foreign statute, land office procedure.

16. *Secrist v. Petty*, 109 Ill. 188 (1883), signed paper; *Robertson v. Meyers*, *supra*.

17. 1 Chamb., Ev., § 570.

18. *Bank of British North America v. Sherwood*, 6 U. C. Q. B. 213 (1849); *Fox v. State*, 9 Ga. 373, 376 (1851), credibility; *Dines v. People*, 39 Ill. App. 565 (1890); *Stephenson v. State*, 28 Ind. 272 (1867), age from inspection; *State v. Edwards*, 19 Mo. 675 (1854), previous conviction; *Smith v. Moore*, 3 How. (Miss.) 40 (1833), person has a *mania a potu*; *State v. Chase County School Dist.* No. 24, 38 Neb. 237, 56 N. W. 791 (1893), false statements in pleadings; *Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669 (1900); *Cassidy v. McFarland*, 139 N. Y. 201, 34 N. E. 893 (1893), case suitable for a reference; *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 137 (1902), witness cannot be excluded because he proposes to testify contrary to the court's knowledge;

State v. Horn, 43 Vt. 20 (1870), law of another state; *Halaska v. Cotzhausen*, 52 Wis. 624, 9 N. W. 401 (1881), judge's knowledge of legal services rendered in a cause tried before him, considered.

19. *Brown v. Lincoln*, 47 N. H. 468 (1867), where a judge familiar with a signature admitted it a *prima facie* genuine; *Wisconsin Central Ry. Co. v. Cornell Univ.*, 49 Wis. 162 (1880), judge's personal knowledge of a portion of a state considered; *Griffing v. Gibbs*, 2 Black. (U. S.) 519, 17 L. ed. 353 (1862). "The justice cannot act from his own knowledge and call that knowledge proof." *Rosekrans v. Antwerp*, 4 Johns. 239 (1809), sickness of witness. For a magistrate to act precisely on his personal knowledge, as by excluding a witness because he proposes to testify to a fact, which, as the judge says, *Shafer v. Eau Claire*, 105 Wis. 239, 81 N. W. 409 (1900) is "contrary to what I know to be the fact from my own personal knowledge," constitutes error.

20. *Hoyt v. Russell*, 117 U. S. 401 (1886).

21. 1 Chamb., Ev., § 574.

22. *Herschfeld v. Dixel*, 12 Ga. 582 (1853); *Rush v. Landers*, 107 La. 549, 35 So. 95, 57 L. R. A. 353 (1901); *State v. Rood*, 12 Vt. 396 (1840).

23. *Arayo v. Currel*, 1 La. 528, 20 Am. Dec. 286 (1830).

24. *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161, value of unofficial publications (1891); *Day v. Decousse*, 12 E. C. Jur. 266 (1868), lawyer out of practice.

knowledge is *personal* to the judge. He cannot be required to know such facts, as would be the case were the law or procedure domestic. More properly, however, the knowledge is used, as a rule, to expedite the judicial business before the court,²⁵ and is a fair exercise of the function of administration.²⁶

§ 319. **Judicial vs. Personal Knowledge; Judge as Witness.**²⁷—The early English practice authorized a judge to testify as a witness even before a jury at a trial over which he was himself presiding or before a court of which he was a member.²⁸ Later, in England, doubts as to the propriety of such a course were expressed,²⁹ especially where the judge which testifies is sole judge presiding at the trial.³⁰ The courts of the United States receive the evidence of a judge, whether that of a single judge presiding at the trial,³¹ or one of a number of judges before whom a trial is being held.³² Grave doubts as to the propriety of the practice have, however, been entertained.³³

§ 320. **Judicial vs. Personal Knowledge; Jury.**³⁴—The law is now settled that a jurymen is not at liberty to use his individual knowledge, to act on his own knowledge as to probative or deliberative facts.³⁵ Such facts should be given in evidence by the jurymen as a witness.³⁶ The right of a party litigant to require the evidence of a member of the panel which is trying his case where the evidence is reasonably necessary to proof of the proponent's contention, may be regarded as undoubted, either in England³⁷ or in the United States;³⁸ although it has been held that a jurymen may refuse to testify if so minded.³⁹ After testifying, the witness may return to his place on the panel.⁴⁰

25. 1 Chamb., Ev., §§ 544 *et seq.*

26. 1 Chamb., Ev., § 574.

27. 1 Chamberlayne, Evidence, §§ 575–579.

28. Fenwick's Trial, 13 How. St. Tr. 537, 667 (1696). See 1 Chamb., Ev., § 575.

29. Duke of Buccleuch v. Metropolitan Board, L. R. 5 E. & I. App. 429, 433 (1872).

30. R. v. Petrie, 20 Ont. 317, 323 (1890).

31. State v. Barnes, 34 La. Ann. 395, 399 (1882).

32. State v. Duffy, 57 Conn. 525, 18 Atl. 791 (1889); People v. Dohring, 59 N. Y. 374, 379 (1874). See also cases cited 1 Chamb., Ev., § 576.

33. Dabney v. Mitchell, 68 Ala. 495, 503 (1880); Morss v. Morss, 11 Barb. (N. Y.) 510, 515 (1851). See 1 Chamb., Ev., § 576. For discussion of the objections to a judge's testifying as a witness, see 1 Chamb., Ev., §§ 577, 578, 579. A presiding judge in a jury trial cannot testify in a suit pending before him as such a practice would lead to various unseemly situations. The judge could not decide properly the admissibility of questions put to him and where there was a conflict in the testimony the jury would be em-

barrassed in deciding between the judge and other witnesses. Powers v. Cook (Okla. 1915), 149 Pac. 1121, L. R. A. 1915 F 766.

34. 1 Chamberlayne, Evidence, §§ 580–582.

35. Collins v. State, 94 Ga. 394, 19 S. E. 243 (1894); Carver v. Hornburg, 26 Kan. 94 (1881); Schmidt v. New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529 (1854); Wharton v. State, 45 Tex. 2 (1876); Johnson v. Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753 (1895).

36. 1 Chamb., Ev., § 580 and cases cited in preceding note.

37. Heath's Trial, 18 How. St. Tr. 1, 123 (1744).

38. People v. Dohring, 59 N. Y. 374 (1874); Chicago, etc., R. Co. v. Collier, 1 Neb. (Unof.) 278, 95 N. W. 472 (1903); and cases and statutes cited in notes to 1 Chamb., Ev., § 581.

39. Manley v. Shaw, Car. & M. 361 (1840).

40. Fitzjames v. Mors, 1 Sid. 133 (1663). See 1 Chamb., Ev., § 581. As to objections to such evidence, see Morss v. Morss, 11 Barb. (N. Y.) 510; 1 Chamb., Ev., § 582.

§ 321. **Scope of Judicial Knowledge of Law.**—Tribunals of general jurisdiction enforce and apply, and, therefore, judicially know, not only the general body of statutes enacted by the law-making body of the forum, but also any laws constitutionally promulgated and adopted by the paramount national authority under which the court exists. Tribunals of limited or local jurisdiction as county, circuit, police or city courts are required to know the local regulations, municipal ordinances, town by-laws and the like which it is their duty to administer. This is the extent or extension of the court's knowledge of law. Courts may be roughly classified, in this connection, as (a) national, (b) state or provincial, (c) local; and the laws as to which knowledge is predicated, into unwritten and written.⁴¹

§ 322. **Judicial Knowledge of Common Law; National Courts.**⁴²—Courts of any national jurisdiction using the English system of jurisprudence judicially know the unwritten common law of England. This rule applies to the courts of the United States, as the common law existed prior to the independent of the American States, legal doctrines adopted in England since that date not being judicially known.⁴³ Such a court knows the rules and principles of equity,⁴⁴ while courts sitting in equity know the propositions of civil⁴⁵ and criminal⁴⁶ law administered by the common law courts. National courts know the laws of states, colonies or provinces over which they exercise appellate jurisdiction. Thus, the supreme court of the United States, exercising appellate jurisdiction from the highest court of a state, knows the law of that state;⁴⁷ but judicially knows as to the law of states other than that whose action is under review, merely to the same extent that the court appealed from would have had such knowledge.⁴⁸ Every federal court, however, in its original jurisdiction knows the laws,⁴⁹ written,⁵⁰ or unwritten, of any state,⁵¹ or territory, including the District of Columbia, which it is called upon to administer,⁵² either as a matter of original jurisdiction or of jurisdiction acquired by removal from a state court.⁵³ And it necessarily follows from this rule that the Supreme Court of the United States when reviewing the judgment rendered in a federal court judicially knows the law of all the states and territories of the Union.⁵⁴

41. 1 Chamb., Ev., § 583.

42. 1 Chamberlayne, Evidence, §§ 584, 585.

43. Liverpool, etc., Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788 (1888).

44. Nimmo v. Davis, 7 Tex. 26 (1851). See Garzot v. Rios De Rubio (Porto Rico 1908), 209 U. S. 283, 28 Sup. Ct. 548, 52 L. ed. 794.

45. Southgate v. Montgomery, 1 Paige (N. Y.) 41 (1828).

46. 1 Chamb., Ev., § 584.

47. Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535 (1885).

48. Lloyd v. Matthews, 155 U. S. 222, 15 Sup. Ct. 70, 39 L. ed. 128 (1894).

49. U. S. v. Chaves, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. ed. 215 (1895).

50. Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. ed. 94 (1884).

51. Liverpool, etc., Steam Co. v. Phenix Ins. Co., *supra*.

52. See Wilson v. Owens, 30 C. C. A. 257, 86 Fed. 571 (1898).

53. 18 U. S. St. at L. 472, § 6 (U. S. Comp. St. 1901, p. 512).

54. Lamar v. Micou, *supra*. 1 Chamb., Ev.,

§ 323. Judicial Knowledge of Common Law; State and Provincial Courts.⁵⁵—

The state courts of the American Union know the common law of England,⁵⁶ including early English general statutes applicable to their condition, and the principles of equity jurisprudence,⁵⁷ which was in force at the time of the separation from the mother country. Rules of law adopted in England since that time are not judicially known by the American courts.⁵⁸ Common law courts know, when sitting at law, the rules and principles of equity jurisprudence⁵⁹ and know, when sitting in equity, the rules of ordinary civil and criminal law;⁶⁰ but common law courts do not know, in either capacity, the rules of the ecclesiastical law.⁶¹ A state court notices the unwritten law of the forum,⁶² including the unwritten laws of any country,⁶³ state,⁶⁴ or territory,⁶⁵ which have been operative in any portions of the domain which now constitutes the jurisdiction of the forum.⁶⁶ Unless required to do so by statute,⁶⁷ the courts of an American state do not judicially know the unwritten or non-statutory law of a sister state.⁶⁸ Neither the courts of England,⁶⁹ nor those of the United States,⁷⁰ judicially know the laws of any foreign country.⁷¹ Matters of notoriety among the legal profession may be treated by the courts as matters of *common knowledge*.⁷²

§ 585. What courts may take judicial notice.
See Note Bender Ed. 64 N. Y. 272.

55. 1 Chamberlayne, Evidence, §§ 586-590.

56. Eureka Springs R. Co. v. Timmons, 51 Ark. 459, 11 S. W. 459 (1888); Stokes v. Macken, 62 Barb. (N. Y.) 145 (1861).

57. Nimmo v. Davis, 7 Tex. 26 (1851).

58. Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118 (1894).

59. Nimmo v. Davis, *supra*.

60. Southgate v. Montgomery, 1 Paige (N. Y.) 41 (1828).

61. De Grandmont v. La Societe des Artisans, etc., 16 Quebec Super. Ct. 532 (1899).

62. Gaylod's Appeal, 43 Conn. 82 (1875).

63. Doe v. Enslava, 11 Ala. 1028 (1847); Wells v. Stout, 9 Cal. 480 (1858); Chouteau v. Pierre, 9 Mo. 3 (1845); Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Supp. 406 (1901).

64. State v. Sais, 47 Tex. 307 (1877); Northwestern Bank v. Machir, 18 W. Va. 271 (1881).

65. Crandall v. Sterling Gold Min. Co., 1 Colo. 106 (1868).

66. 1 Chamb., Ev., § 586.

67. Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398 (1843).

68. Cox v. Morrow, 14 Ark. 603 (1854); Hendryx v. Evans, 120 Iowa 310, 94 N. W. 853 (1903); Phenix Ins. Co. v. Church, 59 How. Pr. (N. Y.) 293 (1880); Bollinger v.

Gallagher, 170 Pa. St. 84, 32 Atl. 569 (1895); and cases cited 1 Chamb., Ev., § 587, note 2. The court will not take notice of the laws of another state but will presume that the common law prevails there and that it is the same as that in the state of the forum. Maloney v. Winston Brothers Co., 18 Idaho 740, 111 Pac. 1080, 47 L. R. A. (N. S.) 634 (1910).

69. Godard v. Gray, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62, 24 L. T. Rep. N. S. 89, 19 Wkly. Rep. 348 (1870).

70. Dianese v. Hale, 91 U. S. 13, 18 (1875).

71. Bowditch v. Soltyk, 99 Mass. 136 (1868); Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207 (1868); Liverpool, etc., Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788 (1888); and cases cited 1 Chamb., Ev., § 589.

72. 1 Chamb., Ev., § 590; Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Supp. 406 (1901). The court will not assume that in Cuba which inherited the Spanish system of law the law is that a promise to repair defective machinery throws the risk on the master until the time for repair has gone by as this is evidence of the great consideration with which a plaintiff is treated in this country but is not a necessary incident of all civilized codes. The court remarks that "It may be that in dealing with rudi-

§ 324. **Judicial Knowledge of International Law.**⁷³—The courts of a country know the principles of international law to which the executive department of the forum has assented.⁷⁴ Prize and admiralty courts judicially know international law.⁷⁵ They know the maritime regulations adopted by the commercial nations as the law of the sea.⁷⁶ A *notary public* is judicially known by the courts as existing under the law of nations,⁷⁷ and they will give effect to his seal,⁷⁸ or jurat taken before him without seal,⁷⁹ when attached to an official act shown to have been valid according to the law of the domicile of the notary.⁸⁰ The same effect will be given his act whether he is acting in a colony, foreign or domestic;⁸¹ or in a foreign country⁸² or in another state of the Union,⁸³ or within the jurisdiction of the court itself.⁸⁴

§ 325. **Judicial Knowledge of Law Merchant.**⁸⁵—The law merchant is part of the common law and, as such, is judicially known.⁸⁶ The basis of the law merchant is the civil law, prevalent on the Continent of Europe, and a general uniformity exists, with regard to mercantile affairs, between the common and the civil systems of law. Of this nature are laws relating to partnership,⁸⁷ negotiable instruments,⁸⁸ or banking.⁸⁹

mentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods courts would assume a liability to exist if nothing to the contrary appeared." *Cuba Railroad Co. v. Crosby*, 222 U. S. 473, 32 Sup. Ct. 132, 38 L. R. A. (N. S.) 40 (1912).

73. 1 Chamberlayne, Evidence, § 591.

74. *Ocean Ins. Co. v. Francis*, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549 (1828); *Strither v. Lucas*, 12 Pet. (U. S.) 410, 436, 9 L. ed. 1137 (1838); *The Scotia*, 14 Wall. (U. S.) 171 (1871). See also *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. ed. 320 (1899), 1 Chamb., Ev., § 591.

75. *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. ed. 126 (1899).

76. *The New York*, *supra*. See also *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, *supra*; *Sears v. The Scotia*, *supra*.

77. 1 Chamb., Ev., § 591. Recognition does not extend to the power to attest deeds. *Neese v. Farmers' Ins. Co.*, 55 Iowa 604 (1881).

78. *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. ed. 254 (1882).

79. *Thielmann v. Burg*, 73 Ill. 293 (1874).

80. *Neese v. Farmers' Ins. Co.*, *supra*; *Orr v. Lacy*, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10, 589 (1847).

81. *Brooke v. Brooke*, 17 Ch. D. 833, 50 L.

J. Ch. 528, 44 L. T. Rep. (N. S.) 512, 30 Wkly. Rep. 45 (1881).

82. *Pierce v. Indseth*, *supra*; *Orr v. Lacy*, *supra*.

83. *Denmead v. Mack*, 2 MacArthur (D. C.) 475 (1876); *Carter v. Burley*, 9 N. H. 558 (1838); *Halliday v. McDougall*, 20 Wend (N. Y.) 81 (1838).

84. *Porter v. Judson*, 1 Gray (Mass.) 175 (1854); *Brown v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463 (1821), 1 Chamb., Ev., § 591. Special powers conferred by domestic law, such as right to administer affidavits must be proved in the ordinary way. *Teutonia Loan, etc., Bldg. Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419 (1897). The validity of the acts of *foreign officials* discharging functions similar to those of a notary must be established by evidence. *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173 (1829).

85. 1 Chamberlayne, Evidence, § 592.

86. *Jewell v. Center*, 25 Ala. 498 (1854); *Davis v. Hanly*, 12 Ark. 645 (1852); *Munn v. Burch*, 25 Ill. 35, 38 (1860); *Reed v. Wilson*, 41 N. J. L. 29 (1879); *Edie v. East India Co.*, 1 W. Bl. 293, 2 Burr. 1216 (1761).

87. *Cameron v. Orleans, etc., R. Co.*, 108 La. 83, 32 So. 208 (1902).

88. *Sasscer v. Farmers' Bank*, 4 Md. 409 (1853); *Reed v. Wilson*, *supra*.

89. *Brandao v. Barnett*, 3 C. B. 519, 54

§ 326. **Judicial Knowledge of Written Law; Extension and Intension.**—Written laws may be conveniently divided into (a) constitutions, (b) public statutes, (c) private statutes and (d) municipal regulations. All tribunals in a jurisdiction, regardless of grade, judicially know the organic law, or constitution. Courts of national, provincial or state jurisdiction judicially know, in addition to the constitution, such statutes as legislation in the forum has directed them to know. Usually these are only public statutes. Occasionally knowledge is required also of private statutes. Judicial knowledge of local or municipal regulations is confined to the local tribunals of limited jurisdiction whose distinctive duty it is to enforce such minor enactments; but who are, at the same time, charged with judicial knowledge of the more general statutes known to the superior courts. Such is the judicial knowledge of written law in extension; — the breadth of its application.⁹⁰ In intension, or depth, this judicial knowledge of written law covers the following particulars: (a) The existence of the law in question, including the date at which it went into effect,⁹¹ was suspended⁹² or repealed;⁹³ — so far as these facts are ascertainable from the legislative records themselves or by a resort to customary sources of information regarding official proceedings. Judicial knowledge is not demanded when it can be acquired only by ascertaining a fact *in pais*.⁹⁴ The burden of establishing facts *in pais* rests on the party claiming their existence.⁹⁵ (b) A knowledge as to the direct results accomplished by the statute.⁹⁶ (c) Knowledge of facts recited or recognized in the written law will be judicially known to any court whose knowledge, in extension, covers the written law itself.⁹⁷

§ 327. **Judicial Knowledge of Written Law; Treaties.**⁹⁸—By constitutional provision, treaties legally made by the national executive are declared to be

E. C. L. 519, 12 Cl. & F. 787, 8 Eng. Reprint 1622 (1846). A judge is not required to hear evidence as to the law merchant to an effect contrary to his judicial knowledge. *Jewell v. Center, supra*.

90. 1 Chamb., Ev., § 593.

91. *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 806 (1903); *Ottman v. Hoffman*, 7 Misc. (N. Y.) 714, 28 N. Y. Supp. 28 (1894); 1 Chamb., Ev., § 594 and cases cited. The court may take judicial notice of the history of a statute and the circumstances surrounding it. *Industrial Commission v. Brown*, Ohio St. 110 N. E. 744, E. R. A. 1916 B 1277 (1915).

92. *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52 (1877); *Buckingham v. Walker*, 48 Miss. 609 (1873).

93. *State v. O'Conner*, 13 La. Ann. 486 (1858); *Springfield v. Worcester*, 2 Cush. (Mass.) 52 (1848).

94. *Stein v. Morrison*, 9 Idaho 426, 75 Pac. 246; *Shaw v. New York Cent., etc., R. Co.*, 85 N. Y. App. Div. 137, 83 N. Y. Supp. 91 (1903); *Doyle v. Village of Bradford*, 90 Ill. 416 (1878); *Whitman v. State*, 80 Md. 410, 31 Atl. 325 (1895); 1 Chamb., Ev., § 594 and cases cited.

95. *Miller v. Com.*, 13 Bush (Ky.) 731 (1878); *People v. State Land Office*, 23 Mich. 270 (1871).

96. *Calloway v. Cossart*, 45 Ark. 81 (1885); *La Salle Co. v. Milligan*, 143 Ill. 321 (1892); *Grant v. State*, 33 Tex. Cr. R. 527, 27 S. W. 127 (1894); 1 Chamb. Ev., § 595 and cases cited.

97. *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831 (1884); *Watkins v. Holman*, 16 Pet. (U. S.) 25, 55, 56, 10 L. ed. 873 (1842); 1 Chamb., Ev., § 596 and cases cited.

98. 1 Chamberlayne, Evidence, § 597.

the supreme law of the land. The judges of all American courts, state⁹⁹ or federal,¹ will, therefore, know of the existence and provisions² of treaties with foreign nations or Indian tribes.³ Protocols and schedules attached to a treaty,⁴ its date,⁵ the date of its ratification⁶ and all other facts necessary to its legal validity have been deemed part of the treaty itself.⁷

§ 328. **Judicial Knowledge of Written Law; National Courts.**⁸—Tribunals of national jurisdiction know judicially the written constitution which formulates the fundamental law of the sovereignty under which they are acting, and the constitution of each province or state within its jurisdiction. The federal courts judicially know the Constitution of the United States and its amendments.⁹

Public Statutes.—National tribunals know judicially the public statutes passed by the national legislature. As English courts know the acts of Parliament, so the federal courts of the United States judicially know the public statutes enacted by Congress.¹⁰ A national court will also know judicially the public statutes of every province or state, whose jurisdiction it administers by virtue of an appellate jurisdiction. This includes the then existing statutes of prior governments which at any time exercised sovereignty over the territory in question;—whether the control were colonial,¹¹ provincial, or in some other form.¹²

Private Statutes.—A court of national jurisdiction does not judicially know the private acts of the national legislature, nor the private acts of the state whose public statutes it knows,¹³ except where the statute expressly requires such knowledge.¹⁴

Foreign Statutes.—The national courts of a country do not judicially know

99. *La Rue v. Kansas Mut. L. Ins. Co.*, 68 Kan. 539, 75 Pac. 494.

1. *Knight v. United Land Assoc.*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. ed. 974 (1891); *Callsen v. Hope*, 75 Fed. 758 (1896).

2. *La Rue v. Kansas Mut. L. Ins. Co.*, *supra*.

3. *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. 505 (1880); *Dole v. Wilson*, 16 Minn. 525 (1871).

4. *Callsen v. Hope*, *supra*.

5. *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269 (1896).

6. *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539 (1860).

7. 1 Chamb., Ev., § 597 and cases cited.

Acts done under a treaty, foreign laws, usages, or other facts referred to therein, unless cognizable as matters of notoriety, i.e., of common knowledge, are secondary effects of law which will not be judicially known. *Dole v. Wilson*, *supra*; *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190 (1875); *U. S. v. Beebe*,

supra. A superseded treaty, being no longer law, is not judicially known. *Ryan v. Knorr*, 19 Hun (N. Y.) 540 (1880).

8. 1 Chamberlayne, Evidence, §§ 598–601.

9. *Young v. Montgomery, etc., R. Co.*, 30 Fed. Cas. No. 18, 166, 2 Woods (U. S.) 606 (1875); 1 Chamb., Ev., § 598 and cases cited.

10. *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 37 Fed. 129 (1888); 1 Chamb., Ev., § 599 and cases cited.

11. *Loree v. Abner*, 6 C. C. A. 302, 57 Fed. 159 (1893); *Municipality of Ponce v. Roman Cath. A. Church, etc.* (Porto Rico 1908), 210 U. S. 296, 28 Sup. Ct. 737, 52 L. ed. 1068.

12. 1 Chamb., Ev., § 599 and cases cited, in notes 3–7.

13. *Leland v. Wilkinson*, 6 Pet (U. S.) 317, 8 L. ed. 412 (1832).

14. *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513 (1889); *Junction Ry. Co. v. Ashland Bank*, 12 Wall. (U. S.) 226, 230, 20 L. ed. 385 (1870); 1 Chamb., Ev., § 600.

the public laws of another country,¹⁵ except such as may be known by them as part of general international law.¹⁶

§ 329. Judicial Knowledge of Written Law; State and Provincial Courts.¹⁷—

All courts of a state judicially know the written Constitution of the United States¹⁸ and amendments to it subsequently adopted.¹⁹ They also know the direct results accomplished by the instrument, as the division of the powers of the national government among the three great departments, the legislative, executive, and judicial.²⁰ State courts know the state constitutions and the adoption of amendments to it.²¹ They know judicially the effect of a state constitution not only as to its direct enactments, but as to any results in repealing statutes.²²

Constitutional Requirements for Statutory Enactments.—To know a statute, it is necessary that the judge should ascertain that the facts essential to its validity actually exist—that constitutional requirements have been complied with.²³

National Statutes.—The courts of a province or state know the public statutes passed by the national legislature. The domestic tribunals of the states of the American Union judicially know the public acts of Congress,²⁴ including those which relate to the District of Columbia,²⁵ and also the laws of sister states which are referred to in such an act.²⁶

State Statutes.—State courts know the public statutes of the state legislature, and any other statutes which the legislature or the constitution directs that they shall know.²⁷ Provincial courts know the public statutes of the legislature of the forum under which they are constituted.²⁸

15. *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 Sup. Ct. 130, 35 L. ed. 951 (1891); 1 Chamb., Ev., § 601 and cases cited.

16. *The New York*, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126 (reversing 82 Fed. 819, 27 C. C. A. 154, 86 Fed. 814, 30 C. C. A. 628) (1899); 1 Chamb., Ev., §§ 591, 601.

17. 1 Chamberlayne, Evidence, §§ 602–616.

18. *St. Louis, etc., R. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865 (1899); *State v. Bates*, 22 Utah 65, 61 Pac. 905, 83 Am. St. Rep. 768 (1900).

19. *Graves v. Keaton*, 3 Cold (Tenn.) 8 (1866).

20. *U. S. v. Williams*, 6 Mont. 379, 387, 12 Pac. 851 (1887).

21. *Carmody v. St. Louis Transit Co.*, 188 Mo. 572, 87 S. W. 913 (1905).

22. *Campbell v. Shelby County*, 147 Ala. 703, 41 So. 408 (1906); 1 Chamb., Ev., § 602 and cases cited.

23. *Gardner v. Collector*, 6 Wall. (U. S.) 499, 511 (1867); 1 Chamb., Ev., § 603.

24. *St. Louis, etc., R. Co. v. Brown*, *supra*; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448 (1895); *Gooding v. Morgan*, 70 Ill. 275 (1873); *Wheelock v. Lee*, 15 Abb. Pr. N. S. (N. Y.) 24 (1873); 1 Chamb., Ev., § 604 and cases cited.

25. *Milliken v. Dotson*, 117 N. Y. App. Div. 521, 102 N. Y. Supp. 564 (1907).

26. *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306 (1847); *Belt v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 231, 22 S. W. 1062 (1893); 1 Chamb., Ev., § 604.

27. *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922 (1901); *Schwerdtle v. Placer County*, *supra*; *Pittsburgh, etc., R. Co. v. Moore*, 110 Ill. App. 304 (1903); *Barnes v. Squier*, 193 Mass. 21, 78 N. E. 731 (1906); *Warner v. Beers*, 23 Wend. (N. Y.) 103 (1840); 1 Chamb., Ev., § 605 and cases cited.

28. *Darling v. Hitchcock*, 25 U. C. Q. B. 463 (1866).

Statutes of Former Sovereignities.—Equally domestic are the public statutes of a state or nation which exercised sovereignty over the territory in question, and which were in force at the time such sovereignty was exercised²⁹

Legislative Resolutions.—Legislative resolutions of a public character are classed with public acts and are accordingly judicially known to the state courts.³⁰

Special Acts.—Statutes specially limited by the legislature, though of a public nature, e.g., a statute forbidding the sale of intoxicating liquors in a particular county, are judicially known.³¹

Private Statutes.—In the absence of constitutional or statutory requirement to other effect, courts do not judicially know private statutes of a state,³² provincial or national³³ legislature, or legislative resolutions, affecting private interests.³⁴ This is the uniform rule though the purpose is, in a sense, public;—as where a private act incorporates an association for business purposes,³⁵ or affecting a municipal corporation.³⁶ The constitution or the legislature may, however, require that certain private statutes shall be deemed public, i.e., shall be judicially known to the court as would be the case with public statutes.³⁷ The private act may be recognized in the state constitution,³⁸ or in a public statute;³⁹ it may be amended by a public act.⁴⁰ Under any of these conditions the courts judicially know the private act to the same extent as if it were public,⁴¹ and also know judicially any subsequent amendment.⁴²

Local Regulations.—The power of passing ordinances or by-laws conferred on municipalities by a general act of incorporation or granted by special charter known to the court as a public act⁴³ is a direct result of the public stat-

29. *Henthorne v. Doe*, 1 Blackf. (Ind.) 157, 163 (1822); 1 Chamb., Ev., § 606

30. *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3 (1898); 1 Chamb., Ev., § 607 and cases cited.

31. *Ball v. Com.*, 30 Ky. L. Rep. 600, 99 S. W. 326 (1907); 1 Chamb., Ev., § 608 and cases cited.

32. *Mobile v. Louisville, etc., R. Co.*, 124 Ala. 132, 26 So. 902 (1899); *Minck v. People*, 6 Ill. App. 127 (1880); *Hall v. Brown*, 58 N. H. 93 (1877); *Pearl v. Allen*, 2 Tyler (Vt.) 311 (1803); 1 Chamb., Ev., § 609 and cases cited.

33. *Denver, etc., R. Co. v. U. S.*, 9 N. M. 389, 54 Pac. 336 (1898); *Wright v. Paton*, 10 Johns. (N. Y.) 300 (1813)

34. *Simmons v. Jacob*, 52 Me. 147 (1862).

35. *Mobile v. Louisville, etc., R. Co.*, *supra*; *Butler v. Robinson*, 75 Mo. 192 (1881); *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482 (1859); *Timlow v. Philadelphia, etc., R. Co.*, 99 Pa. St. 284 (1882); 1 Chamb., Ev., § 609 and cases cited.

36. *Loper v. St. Louis*, 1 Mo. 681 (1826); *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419 (1885). A private statute not known to the courts of the state by authority of which it is enacted will not be known to the courts of other states. *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371 (1903).

37. *Mullan v. State*, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262 (1896); *Junction R. Co. v. Ashland Bank*, 12 Wall. (U. S.) 226, 20 L. ed. 385 (1870).

38. *Vance v. Farmers', etc., Bank*, 1 Blackf. (Ind.) 80 (1820).

39. *Webb v. Bidwell*, 15 Minn. 479 (1870).

40. *Lavalle v. People*, 6 Ill. App. 157 (1880).

41. *Nimmo v. Jackman*, 21 Ill. App. 607 (1886); *Bowie v. Kansas*, 51 Mo. 454 (1873); *State v. Olinger* (Iowa), 72 N. W. 441 (1897); 1 Chamb., Ev., § 610 and cases cited.

42. *Stephens, etc., Transp. Co. v. New Jersey Cent. R. Co.*, 33 N. J. L. 229 (1869).

43. *Aliter*, where the power of legislating ordinances, etc., is not deemed a public act. *Butler v. Robinson*, 75 Mo. 192 (1881).

ute; and is, therefore, judicially known to the court.⁴⁴ The ordinances or other regulations passed in pursuance of the powers so conferred are themselves secondary results of the public statute and are, in effect, so far as regards state or provincial courts, matter *in pais*. Such a court, therefore, will not judicially know their enactment.⁴⁵ Within this rule fall the ordinances of a city,⁴⁶ or of a municipal department;⁴⁷ the regulations of county⁴⁸ or administrative boards, such as county commissioners;⁴⁹ the by-laws of a corporation, public or private.⁵⁰

Regulations of Voluntary Associations.—*A fortiori* judges do not judicially know the laws by which members of voluntary associations, e.g., labor unions,⁵¹ are bound. A state or provincial court does not take judicial notice of the by-laws of a private corporation; but will require proof on the subject.⁵²

Statutes of Sister State.—The courts of one state, or province, do not judicially know, that is, without proof,⁵³ the written law of another state, or of an Indian tribe.⁵⁴ If the foreign law is essential to a case, it must be pleaded,⁵⁵ proved⁵⁶ and found⁵⁷ like any other fact.

44. *Case v. Mobile*, 30 Ala. 538 (1857); *Green v. Indianapolis*, 22 Ind. 192 (1864).

45. *City of Greeley v. Hamman*, 12 Colo. 94, 20 Pac. 1 (1888); *Hill v. Atlanta*, 123 Ga. 697, 54 S. E. 354 (1906); *Weaver v. Snow*, 60 Ill. App. 624 (1895); *Wolf v. Keokuk*, 48 Iowa 129 (1878); *O'Brien v. Woburn*, 184 Mass. 598, 69 N. E. 350 (1904); *City of New York v. Knickerbocker Trust Co.*, 104 N. Y. App. Div. 223, 93 N. Y. Supp. 937 (1905); 1 Chamb., Ev., § 611, note 3, and cases cited.

46. *Case v. Mobile*, *supra*; *Watt v. Jones*, 60 Kan. 201, 56 Pac. 16 (1899); *Porter v. Waring*, 69 N. Y. 250, 254 (1877).

47. *State v. Inhabitants of Trenton*, 51 N. J. L. 495, 17 Atl. 1083 (1889); *Department of Health of City of New York v. City Real Property Investigating Co.*, 86 N. Y. Supp. 18 (1904).

48. *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397 (1857).

49. *Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217 (1885).

50. *Portage, etc., Benev. Society v. Phillips*, 36 Mich. 22 (1877); 1 Chamb., Ev., § 611. The repeal of any such regulations or ordinances stands in the same position. *Field v. Malster*, 88 Md. 691, 41 Atl. 1087 (1898). Such knowledge may be required by statute. *Moore v. Jonesboro*, 107 Ga. 704, 33 S. E. 275 (1899). *Statutory authority for using printed official copies as evidence*, without further proof, does not have the effect of requiring judicial knowledge of the regulations

themselves. *Winona v. Burke*, 23 Minn. 254 (1876); *Cox v. St. Louis*, 11 Mo. 431 (1848); *Harker v. New York*, (17 Wend. (N. Y.) 199 (1837)). As to judicial knowledge of local regulations on appeal or review of the decision of a local court, civil or criminal, see 1 Chamb., Ev., § 612 and cases cited.

51. *Birmingham Paint & Roofing Co. v. Crampton & Tharpe* (Ala. 1905), 39 So. 1020; 1 Chamb., Ev., § 613.

52. *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812 (1908).

53. *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752 (1906); *Crane v. Blackman*, 126 Ill. App. 631 (1906); *Washburn Crosby Co. v. Boston, etc., R. Co.*, 180 Mass. 252, 62 N. E. 590 (1902); *Harris v. White* 81 N. Y. 532 (1880); *Smith v. Bartram*, 11 Ohio St. 690 (1860); *Spellier Electric Time Co. v. Geiger*, 147 Pa. St. 399, 23 Atl. 547 (1892); 1 Chamb., Ev., § 614 and cases cited.

54. *Rowe v. Henderson* (Ind. T. 1903), 76 S. W. 250.

55. *Nenno v. St. Louis & S. F. R. Co.*, 105 Mo. App. 540, 80 S. W. 24 (1904). See also *Leigh v. Nat. Hollow Brake Beam Co.*, 131 Ill. App. 106 (1907); *Electro-Tint Engraving Co. v. American Handkerchief Co.*, 130 App. Div. (N. Y.) 561, 115 N. Y. Supp. 34 (1909).

56. *Baltimore & O. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923 (1903); *The Matterhorn*, 63 C. C. A. 331, 128 Fed. 863 (1904).

57. *Snuffer v. Karr*, 197 Mo. 182, 94 S. W.

Statutes of Foreign Country.— Courts of a state⁵⁸ or province⁵⁹ do not know the corporation⁶⁰ or other written laws, of a foreign country. The law of the foreign country must be pleaded and proved.⁶¹

§ 330. **Judicial Knowledge of Written Law; Local Courts.**⁶²— The judicial knowledge of unwritten law by the local or inferior courts is equally extensive with that of courts of general jurisdiction. The judicial knowledge of tribunals of local or limited jurisdiction is the same, in relation to the constitution and public statutes of the state, province or nation, as that of state or provincial courts.⁶³ A local court being distinctively charged with the duty of enforcing municipal regulations, judicially knows them.⁶⁴

§ 331. **Judicial Knowledge of Written; Amendment and Repeal.**⁶⁵— Any amendment of a public act is itself entitled to judicial knowledge;⁶⁶ and the same is true of an act repealing a public statute.⁶⁷

§ 332. **Judicial Knowledge of Written Law; What Statutes are Public.**⁶⁸— Public statutes, in connection with the law of judicial notice, may be defined as being those which affect, directly and equally, the inhabitants of a nation, state or province; or apply, in the same way, to the dwellers in any municipality or other territorial division of such nation, state or province. If the purpose be public, the act is not made private by the circumstance that the legislature has limited its operation to a particular territory.⁶⁹ Where special laws

983 (1906); 1 Chamb., Ev., § 614 and cases cited.

“Full faith and credit.”—The Supreme Court of the United States, on review of the judgment of a state court, will take only such knowledge of the law of a state other than the one under review as that court itself would have taken. *Lloyd v. Matthews*, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128 (1894). The majority of the state courts take no additional judicial knowledge of the laws of a sister state when they are asked to give “full faith and credit” to its judgments. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526 (1893); *Knapp v. Abell*, 10 Allen (Mass.) 485 (1865); 1 Chamb., Ev., § 615 and cases cited.

58. *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118 (1894); *McCurdy v. Alaska, etc., Commercial Co.*, 102 Ill. App. 120 (1902); *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74 (1881); *Monroe v. Douglass*, 5 N. Y. 447 (1851); 1 Chamb., Ev., § 616 and cases cited.

59. *Giles v. Gariepy*, 29 L. C. Jur. 207 (1885).

60. *Duke v. Taylor*, 37 Fla. 64, 19 So. 172 (1896); *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301 (1903).

61. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862 (1908); *Gordon v. Knott*, 199 Mass. 173, 85 N. E. 184 (1908); 1 Chamb., Ev., § 616 and cases cited.

62. 1 Chamberlayne, Evidence, § 617.

63. 1 Chamb., Ev., §§ 602, 604, 605, 617.

64. *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258 (1896); *Fears v. State*, 125 Ga. 740, 54 S. E. 661 (1906); 1 Chamb., Ev., § 617 and cases cited.

65. 1 Chamberlayne, Evidence, § 618.

66. *Parent v. Wamsley's Adm'rs.*, 20 Ind. 82, 86 (1863); *Belmont v. Morrill*, 69 Me. 314, 317 (1879); 1 Chamb., Ev., § 618 and cases cited.

67. *State v. O'Conner*, 13 La. Ann. 487 (1858).

68. 1 Chamberlayne, Evidence, §§ 619-634.

69. *Davis v. State*, 141 Ala. 84, 37 So. 454, 109 Am. St. Rep. 19 (1901); *Burnham v. Webster*, 5 Mass. 266, 269 (1800); *Bretz v. Mayor, etc., of New York*, 6 Robertson

apply to different sections of the state, a court will know the public laws locally limited which apply to each section.⁷⁰ In general, statutes allowing certain governmental agencies, counties, cities or the like, to *adopt* laws relating to given subjects at their option are themselves public statutes; but whether the necessary action, *in pais*, has in fact been taken in a given case must usually be established by evidence.⁷¹

Administration of Government.—Administration of government being a public purpose, statutes prescribing in what manner it shall be conducted are public though dealing with details. Within this class fall statutes creating a public office,⁷² determining the duties incumbent upon the individual holding it,⁷³ or establishing courts.⁷⁴

Local Option Laws.—Certain states do not take judicial notice that the general law has, by popular action, been made operative in a certain section of the state.⁷⁵ In other states, courts judicially know the result of local option elections;⁷⁶ and the length of time after its adoption during which a local option law persists.⁷⁷

Municipal Corporations.—The creation of municipalities are pre-eminently public statutes;⁷⁸ whether the incorporation be by general act,⁷⁹ or by special charter,⁸⁰ particularly where the courts are ordered to regard the latter as

(N. Y.) 325 (1868); *State v. Piner*, 141 N. C. 760, 53 S. E. 305 (1906); 1 Chamb., Ev., § 619 and cases cited.

70. *Lewis v. Rasp*, 14 Okl. 69, 76 Pac. 142 (1904). Thus, for example, the "local option" law, so-called, regulating the sale of intoxicating liquors in limited areas, according to the wishes of the voters in that section, will be judicially noticed; *Crigler v. Comm.*, 87 S. W. 281 (Ky. 1905);—and also the time when it goes into effect. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201 (1904).

71. *Johnson v. Scott*, 133 Mo. App. 689, 114 S. W. 45 (1908).

72. *State v. Jarrett*, 17 Md. 309 (1861).

73. *Lynn v. People*, 170 Ill. 527, 48 N. E. 964 (1897); *State v. Gut*, 13 Minn. 341 (1868); 1 Chamb., Ev., § 620 and cases cited.

74. *La Salle Co. v. Milligan*, 143 Ill. 321 (1892).

75. *Craddock v. State*, 48 Tex. Cr. R. 385, 88 S. W. 347 (1905); *State v. Scampini*, *supra* *Chicago & N. W. R. Co. v. Railroad Commission*, 156 Wis. 47, 145 N. W. 216, 1 Chamb., Ev., § 621. The same rule applies to laws conferring an option of using the highway contract system. *State v. Burkett*, 83 Miss. 301, 35 So. 690 (1904).

Acceptance of Liquor Law.—According to the weight of authority the courts will not take judicial notice of the acceptance at a

local election of a no-license liquor law. This is a matter of record to be proved like other matters of record. *People v. Mueller*, 168 Cal. 521, 143 Pac. 748, L. R. A. 1915 B 788 (1914).

76. *Oglesby v. State*, 121 Ga. 602, 49 S. E. 706 (1905); *Gue v. City of Eugene*, 53 Or. 282, 100 Pac. 254 (1909); 1 Chamb., Ev., § 622 and cases cited.

77. *State v. Hall*, 136 Mo. App. 170, 108 S. W. 1077 (1908). Where it is unlawful to manufacture or sell intoxicants anywhere within a county, the supreme court will take notice of that fact. *State v. Arnold*, 80 S. C. 383, 61 S. E. 891 (1908).

78. *Frost v. State*, 153 Ala. 654, 45 So. 307 (1908); *Agnew v. Pawnee City*, 79 Neb. 603, 113 N. W. 236 (1907); 1 Chamb., Ev., § 623 and cases cited.

79. *State v. Ricksecker*, 73 Kan. 495, 85 Pac. 547 (1906). Acts *in pais* must be proved. *Hard v. City of Decorah*, 43 Iowa 313 (1876); 1 Chamb., Ev., § 623 and cases cited.

80. *Payne v. Treadwell*, 16 Cal. 221, 232 (1860); *Beatty v. Sears & Bennett*, 132 Ga. 516, 64 S. E. 321 (1909); *Stone v. Auerbach*, 133 App. Div. (N. Y.) 75, 117 N. Y. Supp. 734 (1909); 1 Chamb., Ev., § 623 and cases cited.

public acts.⁸¹ *Acts prescribing the duties*, or establishing the powers of these public corporations⁸² are equally public.⁸³

Cities.—Particular facts concerning individual cities, established by⁸⁴ or recited in an act relating to such city will be judicially known. Acts providing for the erection of municipal buildings⁸⁵ and, occasionally, the adoption of a general municipal incorporation law by a particular city⁸⁶ need not be proved.

Mercantile Corporations; Acts of Incorporation.—General acts of incorporation for business or other private purposes, are public statutes,⁸⁷ especially where, as in case of railways⁸⁸ the purpose is one which concerns the general public.

Corporate Acts in Pais.—Unless required by law to do so courts will not notice acceptance by a corporation of its charter, as to what corporations are established by acts *in pais* under the provisions of a general statute of incorporation,⁸⁹ or, where there are several available statutes of incorporation, as to which was actually employed.⁹⁰

81. *City of Austin v. Forbis*, 99 Tex. 234, 85 S. W. 405 (1905).

82. *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173, reversing 95 Ill. App. 562 (1902); *Harris v. Quincy*, 171 Mass. 472, 50 N. W. 1042 (1898); *Shaw v. New York Cent., etc., R. Co.*, 85 App. Div. (N. Y.) 137, 83 N. Y. Supp. 91 (1903); *State v. Banfield*, 43 Or 287, 72 Pac. 1093 (1903); 1 Chamb., Ev., § 623 and cases cited.

83. *Foley v. Ray*, 27 R. I. 127, 61 Atl. 50 (1905). Statutes establishing or changing the name of a municipal corporation are public. *State v. Cooper*, 101 N. C. 684 (1888). The powers of municipal officers are judicially known by the judges. *Lynn v. People*, 170 Ill. 527, 48 N. E. 964 (1897). The repeal of acts incorporating a town are public. *Board of Tp. Com'rs for Sullivan's Island v. Buckley*, 82 S. C. 352, 64 S. E. 163 (1909).

84. *Harris v. Quincy*, *supra*; 1 Chamb., Ev., § 624.

85. *Burlington Mfg. Co. v. Board of Court-House, etc., Com'rs*, 67 Minn. 327, 69 N. W. 1091 (1897).

86. *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813 (1901). Statutes providing individual relief are, in their nature, private. *State v. H. & C. Turnpike Co.*, 65 N. J. L. 97, 46 Atl. 700 (1900).

87. *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346 (1893); *Nimmo v. Jackman*, 21 Ill. App. 607 (1886); *State v. Webb's River Imp. Co.*, 97 Me. 559, 55 Atl. 495 (1903); *Methodist Episcopal Union*,

Church v. Pickett, 19 N. Y. 482 (1859); *Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513 (1889); 1 Chamb., Ev., § 625 and cases cited.

88. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430 (1861). In case of the federal courts, this knowledge covers not only incorporation granted by public acts of Congress, *Central Bank v. Taylor*, 5 Fed. Cas. No. 2,548, 2 Cranch C. C. (U. S.) 427 (1823); but those created under the public statutes of a state, *Beatty v. Knowler*, 4 Pet (U. S.) 152, 7 L. ed. 813 (1830). They know also powers conferred by act of Congress on existing corporations, state or national. *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 37 Fed. 129 (1888).

89. *Danville, etc., Plank-Road Co. v. State*, 16 Ind. 456 (1861); *People v. De Mill*, 15 Mich. 164, 93 Am. Dec. 179 (1867); *Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669, affirming 33 App. Div. 643, 54 N. Y. Supp. 1114 (1900); *Trice v. State*, 2 Head (Tenn.) 591 (1859); 1 Chamb., Ev., § 625 and cases cited.

90. *Danville, etc., Plank-Road Co. v. State*, *supra*. Neither will a judge judicially know whether a given corporation has adopted the terms of a certain act. *Id.*; has in fact consolidated with another corporation as authorized by statute, *Southgate v. Atlantic, etc., R. Co.*, 61 Mo. 89 (1875); *Columbus, etc., R. Co. v. Skidmore*, 69 Ill. 566 (1873); whether it has lost or forfeited its charter. *Shea v. Knoxville, etc., R. Co.*, 6 Baxt. (Tenn.) 277 (1873); or has adopted by-laws,

Mercantile Corporations; Existence of Such Corporations.—As a result accomplished by the direct operation of a law which it is obliged to know the court judicially knows the existence of private corporations established by a domestic public statute,⁹¹ their names,⁹² and powers;⁹³ and the duties of its officers⁹⁴ and of a time limit upon its corporate existence,⁹⁵ so far as any has been imposed by law.⁹⁶ Except where the fact is a notorious one in the community or where required by law so to do, the court will not know the existence of domestic corporations existing under a *private* act,⁹⁷ or that of corporations established under the law of a foreign country or sister state.⁹⁸

Mercantile Corporations; Statutes Conferring Powers.—Statutes prescribing the powers and duties of all corporations of a public or semi-public nature, or of all corporations organized for certain purposes, e.g., operating a railroad,⁹⁹ and the like,¹ are judicially known. Minor facts relating to corporations as that all stockholders, residents of the state, are among its citizens² are not within the judicial knowledge of the court. Facts of this class may be known

and, if so, what these are. *Bushnell v. Hall*, 9 Ky. L. Rep. 684 (1887); *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18, 225 (1900). A court will not judicially know what officers a certain corporation has elected and what powers it has conferred on them, *Brown v. Missouri, etc., R. Co.*, 67 Mo. 122 (1877); or, whether any other act *in pais* whatever, has been done by the corporation, *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35 (1864); *People v. Tierney*, 57 Hun (N. Y.) 357, 589, 10 N. Y. Supp. 940, 948 (1890); *Topp v. Watson*, 12 Heisk. (Tenn.) 411 (1873); or its board of directors. *Crawford v. Mobile Branch State Bank*, 7 Ala. 205 (1844); *Topp v. Watson*, *supra*. Statutes of incorporation of private corporations will not be judicially known, *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 428 (1860); nor the seal of private corporations. *Griffing Bros. Co. v. Winfield*, 53 Fla. 589, 43 So. 687 (1907).

91. *State v. Briscoe*, 6 Pen. (Del.) 401, 67 Atl. 154 (1907).

92. *Jackson v. State*, 72 Ga. 28 (1883).

93. *Gordon v. Montgomery*, 19 Ind. 110 (1862); *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74 (1881); *Buell v. Warner*, 33 Vt. 570 (1861); 1 Chamb. Ev., § 626 and cases cited.

94. *Douglas v. Mobile Branch Bank*, 19 Ala. 659 (1851).

95. *Terry v. Merchants', etc., Bank*, 66 Ga. 177 (1890).

96. *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274 (1867). A federal court

will judicially know that a certain corporation is established under act of Congress. *Heffelfinger v. Choctaw, O. & G. R. Co.*, 140 Fed. 75 (1905).

97. *Mobile v. Louisville, etc., R. Co.*, 124 Ala. 132, 26 So. 902 (1899); *Kirby v. Wabash R. Co.*, 85 Mo. App. 345 (1900).

98. *Savage Mfg. Co. v. Armstrong*, 17 Me. 34, 35 Am. Dec. 227 (1840); *Brown v. Dibble*, 65 Mich. 520, 32 N. W. 656 (1887); *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453 (1902); 1 Chamb. Ev., § 627 and cases cited. A court may treat special charters incorporating persons to carry on certain business enterprises of a public or semi-public nature, as banking, *Davis v. Bank of Fulton*, 31 Ga. 69 (1860); *Buell v. Warner*, 33 Vt. 570, 578 (1861); operating a railroad, street railway, or an electric light, *Nelson v. Narragansett Electric Lighting Co.*, 26 R. I. 258, 58 Atl. 802 (1904), or power plant, as within the range of judicial knowledge.

99. *Caldwell v. Richmond Ry. Co.*, 89 Ga. 550 (1892); *Chicago, etc., R. Co. v. Liebel*, 27 Ky. L. Rep. 716, 86 S. W. 549 (1905); 1 Chamb. Ev., § 628 and cases cited.

1. *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176 (1898). It will be judicially known that a corporation, operating a canal in a navigable river can acquire a fee in such property only by a grant from the legislature. *State v. Portland General Electric Co.*, 52 Or. 502, 98 Pac. 160, 95 Pac. 722 (1908).

2. *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256 (1822).

wherever they are notorious in the community or historical, in some general sense.³

Mercantile Corporations; Railroads.— Direct results of legislation as that railroad companies are common carriers⁴ and, as such, have certain duties to perform,⁵ will be recognized by the court as a matter of law, i.e., judicially known. The creation of a railroad company either as an original corporation, by charter or by certificate under a general law,⁶ or as successor to another railroad,⁷ will be noticed judicially. A special charter incorporating a railroad will not be deemed a public statute.⁸

Mercantile Corporations; Street Railways.— The incorporation of a street railway by special charter is a direct result of a public statute of which the courts take judicial notice. It follows that the presiding judge will know that no special charter has been issued to a particular street railway company.⁹ Courts also judicially know the legal powers and duties conferred or imposed on such creations of law; — e.g., that they are common carriers of passengers.¹⁰

Mercantile Corporations; Telegraph Companies.— Particular facts relating to telegraph companies, neither of general importance, nor a direct result of legal enactment, as that there are only two telegraph companies in the state, will not be treated as a matter of judicial knowledge.¹¹

Private Acts Made Public.— The legislature may order that certain acts, otherwise private, shall be treated as being public.¹² This regulation may apply to private acts of a given class,¹³ or to all private acts whatever,¹⁴ or to

3. *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 416, 435, 14 L. ed. 997 (1853); *State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246, 52 Atl. 1069 (1902); 1 Chamb., Ev., § 629. In the case of certain well-known bodies notice will be taken that they are not organized for business purposes. *Burdine v. Grand Lodge*, 37 Ala. 478 (1861). Free Masons. Protection of workmen is a public purpose. Thus statutory regulations of the duties due a servant from his master are public in their nature. *Squillache v. Tidewater Coal & Coke Co.*, 64 W. Va. 337, 62 S. E. 446 (1908).

4. *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550, 15 S. E. 678 (1892); *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344 (1896); 1 Chamb., Ev., § 630, and cases cited.

5. *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441 (1867).

6. *Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co.*, 124 Ga. 125, 52 S. E. 320 (1905); *McArdle v. Chicago City Ry. Co.*, 141 Ill. App. 59 (1908); 1 Chamb., Ev., § 630 and cases cited.

7. *Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co.*, *supra*.

8. *Perry v. R. Co.*, 55 Ala. 413, 426 (1876). *Contra*: *Wright v. Hawkins*, 28 Tex. 452, 471 (1866). Where the legislature has provided a system of assessing railroad taxes, the fact that the railroads of the state have paid the taxes so assessed is judicially known. *Gulf & S. I. R. Co. v. Adams*, 85 Miss. 772, 38 So. 348 (1905).

9. *American Steel & Wire Co. v. Bearse*, 194 Mass. 506, 80 N. E. 623 (1907); 1 Chamb., Ev., § 631 and cases cited.

10. *Indianapolis St. Ry. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978 (1906).

11. *State v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 So. 875 (1906); 1 Chamb., Ev., § 632.

12. *Gormley v. Day*, 114 Ill. 185 (1885); *Beatty v. Lessee of Knowler*, 4 Peters (U. S.) 152 (1830); 1 Chamb., Ev., § 633 and cases cited.

13. *Doyle v. Village of Bradford*, 90 Ill. 416.

14. *Doyle v. Bradford*, *supra*; *Fel River D. Ass'n v. Topp*, 16 Ind. 242 (1861).

all statutes except those which expressly declare themselves to be of a private nature.¹⁵

Statutes of Sister State.—The law-making body of a jurisdiction may require that the courts organized within it should know judicially the written constitution of public statutes of another state;¹⁶ in which case the foreign law need not be introduced into evidence.¹⁷

§ 333. **How Judicial Knowledge of Law is Acquired.**¹⁸—Knowledge of domestic law, being a judicial function, is beyond the field of evidence and the judge is not called upon to receive it when tendered.¹⁹ Constructively, i.e., in intentment of law, the judge already knows the law. Any assistance from without which he may require, or accepts from a party, or even from an *amicus curiae*, is simply to refresh the judicial memory.²⁰ This is commonly expressed by saying that the judge is “presumed to know the law.”²¹ This is not a presumption or inference.²² It merely states a necessary principle of administration, viz.; — that trials must proceed upon the basis or assumption that the judge knows the law,²³ although, in point of fact, he frequently does not know it.²⁴ A statute may in reality have recently been passed and the court not know it.²⁵ In discharging his function of knowing the law, a judge need not make any investigation, or invite any assistance. If he sees fit to do so the judge may examine into what the law is, in his own way; or he may require the assistance of the parties, and adjourn or continue the case until he gets it.²⁶ If he decides to examine the matter for himself, he may resort to any source of information which he feels is calculated to aid him.²⁷

15. *Covington Drawbridge Co. v. Shepherd*, 20 How (U. S.) 227 (1857).

Amendments or recognition of a private act by a public one entail judicial knowledge of the private act. *Lavalle v. People*, 6 Ill. App. 157 (1880); 1 Chamb., Ev., §§ 600, 609, 633. The regulations of an administrative board, e.g., the board of healths (*Cohen v. Department of Health of the City of New York*, 61 Misc. 124, 113 N. Y. Supp. 88 (1908)), may, if adopted by a public statute, receive judicial notice.

16. *Bates v. McCully*, 27 Miss. 584 (1854); *Lockhead v. Berkeley Springs Waterworks, etc., Co.*, 40 W. Va. 553, 21 S. E. 1031 (1895); *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371 (1903).

17. *F. E. Creelman Lumber Co. v. J. A. Leeb & Co.*, 73 Ark. 16, 83 S. W. 320 (1904).

18. 1 Chamberlayne, Evidence, §§ 635, 636.

19. *In re Howard County*, 15 Kan. 194 (1875); 1 Chamb., Ev., § 635.

20. *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475 (1831); *Clegg v. Levy*, 3 Campb. 166 (1811).

21. *Lincoln v. Battelle*, *supra*.

22. 1 Chamb., Ev., §§ 635, 1027.

23. 1 Chamb., Ev., §§ 571, 635.

24. *Frost's Trial*, Gurney's Rep. 168 (1840).

25. *People v. Dowling*, 84 N. Y. 478 (1881).

26. *Richardson County School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.*, 101 U. S. 472, 25 L. ed. 868 (1879).

27. *Strauss v. Heiss*, 48 Md. 292 (1877); *State v. Stearns*, 72 Minn. 200, 75 N. W. 210 (1898); *Bowen v. Missouri Pac. R. Co.*, 118 Mo. 541, 24 S. W. 436 (1893); 1 Chamb., Ev., §§ 635 and cases cited. “The existence of a public act is determined by the judges themselves, who if there be any difficulty, are to make use of ancient copies, transcripts, books, pleadings or any other memorial, to inform themselves. *Bowen v. Missouri Pac. Ry.*, *supra*. The judge may resort to official documents in the executive or legislative departments. *Clare v. State*, 5 Iowa 509 (1857); *State v. Stearns*, *supra*; *Puckett v. State*, 71 Miss. 192, 14 So. 452 (1893); seeking the most conclusive, if available, *Gardner v. Barney*, 6 Wall.

Foreign Law.— Even in the absence of statutory requirement, judges frequently take or, perhaps, more properly, acquire judicial knowledge of such a law in the manner appropriate to a rule of domestic law.²⁸ He may consult text books,²⁹ or other authoritative printed or written statements,³⁰ official decisions,³¹ volumes of statutes and the like; or any other source of information he may deem reliable.³²

§ 334. **Judicial Knowledge of the Results of Law.**³³— The second and remaining branch of judicial knowledge properly so called, is a knowledge, cognizance, notice or whatever may be the term preferred, of facts which are the direct result of law. This knowledge may, under some circumstances, be actual; — as where a judge knows of the establishment of a county or other political division of the state. In most cases, however, the knowledge is one of the imputed, constructive kind characteristic of knowledge of the rules of law themselves; — the sort of knowledge which one may be said to have who is merely forbidden to say that he does not know. A judge judicially knows that which is “matter of law.” The phrase is sufficiently elastic to cover both the rules of law and such facts as laws directly establish.³⁴

Governmental Assumptions.— Perhaps as a relic of early days where the King, the source of all government, as well as the fountain of justice, personally sat in Court of King’s Bench and gave judgment, courts, to a certain extent, regard themselves as knowing what the other departments of government know. The courts recognize that they are parts of a system or scheme of governmental administration. As such, they assume, in a spirit of co-ordinate responsibility, the correctness of the official actions of other departments. Whether the process be called taking judicial knowledge, raising a presumption of regularity or otherwise, the real action is one of judicial administration proceeding by way of an assumption of the correctness of official proceedings in another branch of the domestic government.³⁵

(U. S.) 499, 18 L. ed. 890 (1867); unless the legislature has regulated the matter for him. *Puckett v. State, supra*

28. See *The Paquete Habana*, 175 U. S. 677, 20 S. Ct. 220 (1899); 1 Chamb., Ev., § 636).

29. *Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139, 162 (1894).

30. *De Sonora v. Bankers’ Mut. C. Co.* (Iowa 1903), 95 N. W. 232; *Devenbagh v. Devenbagh*, 5 Paige Ch. (N. Y.) 554 (1836); *The Paquete Habana, supra*.

31. *The Pawashick*, 2 Low. (U. S.) 148 (1872).

Foreign law.— The decisions of the Federal courts are not evidence as to the law of another state on a question of general law as the Federal courts declare the law on their own views and are not bound by the de-

cisions of State courts. *Old Dominion Copper Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314 (1909).

32. *The Pawashick, supra*; *Sussex Peerage Case*, 11 Cl. & F. 85 (1844); 1 Chamb., Ev., § 636.

33. 1 Chamberlayne. Evidence, §§ 637-641.

34. 1 Chamb., Ev., § 637.

35. 1 Chamb., Ev., § 638. Probably it is in this way that a court will assume that public officials keep within the sums appropriated by law for their use. *Stein v. Morrison*, 9 Idaho 426, 75 Pac. 246 (1904). Courts can take judicial notice of all questions relating to public policy. *Hall v. O’Neil Turpentine Co.*, 56 Fla. 324, 47 So. (609). The history of previous legislation upon a given subject, and the practical contemporaneous construc-

Official Position.—In determining judicial action the incumbency, past or present, of high public position in other departments of government may be an important fact. All the courts of a country know who is or at any time was the executive head of the state;—as president of the United States,³⁶ who are³⁷ or, at a given time, were cabinet officers,³⁸ foreign ministers,³⁹ or at the head of the great departments of government,⁴⁰ or of important bureaus in these departments.⁴¹ In minor official connections, they know as a rule who are deputies or acting substitutes, while the latter are exercising the functions of the office, in the absence of the chief,⁴² and, less frequently, in case of important officers, who are the deputies empowered to act for the chief.⁴³ The court knows who are the principal subordinate department officials,⁴⁴ receivers of public money,⁴⁵ as chief clerk,⁴⁶ and the like.

De Facto and De Jure Officers.—It has been reasonably held that only *de jure* officials could be judicially noticed.⁴⁷ Judicial knowledge is reserved for matters of law—law or its direct results or creations; and does not, properly, apply to *de facto* officers. The distinction, however, is not well established. *Time of holding elections* for national officers, including congressmen:⁴⁸ or for the governor and other high officials of a state, will, when established by law, be judicially known by all the courts of a state.

Tenure of Minor Offices.—Minor political details as to official tenure of state officers, as the appointment by the governor⁴⁹ or election by the legislature⁵⁰ or the voters, of inferior state officers,⁵¹ whether *de jure* or *de facto*,

tion placed upon statutes of that nature by officers charged with their enforcement will be known to the presiding judge. *State v. Rutland R. Co.*, 81 Vt. 508, 71 Atl. 97 (1908).

36. *Liddon v. Hodnett*, 22 Fla. 442, 450 (1886); 1 Chamb., Ev., § 639.

37. *Backus Portable Steam Heater Co. v. Simonds*, 2 App. Cas. (D. C.) 290 (1894).

38. *Walden v. Canfield*, 2 Rob. (La.) 466 (1842); *Perovich v. Perry*, 167 Fed. 789 (1909).

39. *Wetherbee v. Dunn*, 32 Cal. 106 (1867).

40. *State v. Board of State Canvassers*, 32 Mont. 13, 79 Pac. 402 (1905).

41. *Keyser v. Hitz*, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531 (1889).

42. *Barton v. Hemphkin*, 19 La. 510 (1841); *York, etc., R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. ed. 27 (1854).

43. *Wetherbee v. Dunn*, *supra*. Who are deputy United States marshals will not be known to state courts. *Ward v. Henry*, 19 Wis. 76, 98 Am. Dec. 672 (1865).

44. *Bullock v. Wilson*, 5 Port. (Ala.) 338 (1837).

45. *Herriot v. Broussard*, 4 Mart. N. S. (La.) 260 (1826).

46. *Barton v. Hemphkin*, *supra*; 1 Chamb., Ev., § 639.

47. *Williams v. Finch*, 148 Ala. 674, 41 So. 834 (1906).

48. *State v. Custer*, 28 R. I. 222, 66 Atl. 306 (1907); 1 Chamb., Ev., § 640.

49. *Bailey v. McAlpin*, 122 Ga. 616, 50 S. E. 386 (1905); *Louisville v. Board of Park Com'rs*, 112 Ky. 409, 24 Ky. L. Rep. 38, 65 S. W. 860 (1901); 1 Chamb., Ev., § 641 and cases cited. Who are notaries public in the state will be judicially noticed. *Hertig v. People*, 159 Ill. 237, 42 N. E. 879, 50 Am. St. Rep. 162 (1896); *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32, 96 N. W. 984 (1903).

50. *Colgin v. State Bank*, 11 Ala. 222 (1847); *Bennett v. State*, Mart. & Y. (Tenn.) 133.

51. *Fisk v. Hopping*, 169 Ill. 105, 48 N. E. 323 (1897); *People v. Johr*, 22 Mich. 461 (1871); *New York v. Vanderveer*, 91 N. Y. App. Div. 303, 86 N. Y. Supp. 659 (1904); 1 Chamb., Ev., § 641 and cases cited.

their tenure of office,⁵² and the date of their election or appointment⁵³ will be known to the courts. The appointee of a state official whose own tenure is itself judicially known is not, however, an official within the meaning of the rule.⁵⁴

Tenure Under Local Ordinances.— Courts do not take judicial notice of the primary results of statutes of which they do not take such cognizance. As they do not take such notice of local ordinances,⁵⁵ *a fortiori* they do not judicially know their results. For example, a state or provincial court will not notice the salary of a policeman⁵⁶ established by a municipal ordinance.

§ 335. **Judicial Knowledge of Results of Law; Official Proceedings.**⁵⁷— The reasons which control a court's action in dealing with official proceedings are several. Judicial knowledge in this connection is a function of three variables, (a) notoriety in the community; (b) directness of relation to a rule of law; (c) difficulty of making other proof as compared to the readiness with which the matter can be set at rest by inspection. In few cases does the court's actual knowledge extend to saying whether, in any particular instance, an official act has been properly done.⁵⁸ But the general manner in which officials in close touch with the public discharge the duties of their respective offices, as that in the collection of taxes property is not assessed by the owner,⁵⁹ but by public officers who customarily appraise it at less than its market value,⁶⁰ that taxes are not at all times collected until years after they are assessed,⁶¹ will be regarded as known.

Correspondence.— Official correspondence, letters and the like, proceeding with apparent regularity from the executive department of national government, will be assumed to be what they purport to be. Thus, the letter of the official head of the national land office relating to routine business is a public document which is said to be judicially known.⁶²

Publications.— Printed official copies are, as a rule, incompetent to establish facts of which judicial knowledge is taken.⁶³ Judicial cognizance of facts

52. *Cary v. State*, 76 Ala. 78 (1884); *McCarty v. Johnson*, 20 Tex. Civ. App. 184, 49 S. W. 1008 (1899).

53. *Lindsey v. Atty.-Gen.*, 33 Miss. 508, 528 (1857).

54. *Crawford v. State*, 155 Ind. 692, 57 N. E. 931 (1900).

55. 1 Chamb., Ev., §§ 611, 641.

56. *Gibbs v. City of Manchester*, 73 N. H. 265, 61 Atl. 128 (1905).

57. 1 Chamberlayne, Evidence, §§ 642-644.

58. *Roach v. Fletcher*, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895). Whether a patent has issued will not be judicially noticed. *Bottle Seal Co. v. Dela Vergne Bottle, etc., Co.*, 47 Fed. 59 (1891).

59. *Chicago, etc., R. Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241 (1892).

60. *State v. Savage*, 65 Neb. 714, 91 N. W. 716 (1902); *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903 (1879); 1 Chamb., Ev., § 642 and cases cited.

61. *Mullen v. Sackett*, 14 Wash. 100, 44 Pac. 136 (1896); 1 Chamb., Ev., § 642 and cases cited.

62. *Southern Pac. R. Co. v. Willard*, 148 Cal. xvii, 83 Pac. 452 (1906); 1 Chamb., Ev., § 643.

63. *Wellington First Nat. Bank v. Chapman*, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669 (1898); 1 Chamb., Ev., § 644 and cases cited.

stated in certain official publications such as the gazette,⁶⁴ may be required by law. Public documents, as the returns of railroad companies⁶⁵ to appropriate administrative boards, rendered in accordance with the requirements of law, are proper subjects of judicial knowledge. Reports of departments, or administrative boards, to the executive or legislative branches of the government, if ordered, recognized or sanctioned by law, stand in the same position.⁶⁶

§ 336. Judicial Knowledge of Results of Law; Executive Department; Nation.⁶⁷

— All courts recognize, without proof, who is, and at any time in the past, was the chief executive head of the nation; the incumbents of the principal departments into which the administration of national executive authority is divided, as the State, Treasury, War, Interior or Navy Departments; and of the principal bureau offices established in these departments;⁶⁸ whether the incumbent is regular and permanent or holds as a substitute, or *locum tenens*.⁶⁹ A state court will take judicial notice of the inferior federal officers located within the state.⁷⁰

Proclamations and Other Executive Acts.— Public proclamations,⁷¹ messages,⁷² orders⁷³ and other official acts of the national executive,⁷⁴ as in declaring a state of war⁷⁵ or peace,⁷⁶ the existence of martial law⁷⁷ in certain territory, are judicially known. Likewise, the granting of amnesty or pardon,⁷⁸ establishing the status of a foreign country,⁷⁹ of a set of its people, or of certain lands,⁸⁰ as related to the domestic government. The recognition by the national executive of who is the sovereign, *de jure* or *de facto* of a territory conclusively binds the judges of the government of the forum,⁸¹ as it binds all other citizens. A government so recognized,⁸² its official name and style,⁸³

64. *Simms v. Quebec, etc., R. Co.*, 22 L. C. Jur. 20 (1878).

65. *Staton v. Atlantic Coast Line R. Co.*, 144 N. C. 135, 56 S. E. 794 (1907).

66. *State v. Candland*, 36 Utah 406, 104 Pac. 285 (1909).

67. 1 Chamberlayne, Evidence, §§ 645, 646.

68. 1 Chamb., Ev., § 645; *R. v. Jones*, 2 Campb. 131 (1809). This rule applies to any nation which has exercised jurisdiction over any portion of the territory now constituting the sovereignty of the forum.

69. *York & M. R. Co. v. Winans*, 17 How. (U. S.) 30 (1854); 15 L. ed. 27.

70. *Kellogg v. Finn*, 22 S. D. 578, 119 N. W. 545 (1909).

71. *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896 (1903); *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684 (1870); 1 Chamb., Ev., § 646 and cases cited.

72. *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847 (1892).

73. *State v. Tully*, 31 Mont. 365, 78 Pac. 760 (1904).

74. *Woods v. Wilder*, *supra*; 1 Chamb., Ev., § 646 and cases cited.

75. *Woods v. Wilder*, *supra*; *Sutton v. Tiller*, 6 Cold. (Tenn.) 593, 98 Am. Dec. 471 (1869).

76. *U. S. v. Anderson*, 9 Wall. (U. S.) 56, 19 L. ed. 615 (1869).

77. *Jeffries v. State*, 39 Ala. 655 (1866).

78. *Jenkins v. Collard*, 145 U. S. 546, 12 S. Ct. 868, 36 L. ed. 812 (1891).

79. *Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691 (1890); 1 Chamb., Ev., § 646 and cases cited.

80. *Jones v. U. S.*, *supra*; *Armstrong v. U. S.*, 13 Wall. (U. S.) 154, 20 L. ed. 614 (1871).

81. *Jones v. U. S.*, *supra*.

82. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404 (1862); *Underhill v. Hernandez*, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456 (1897); 1 Chamb., Ev., § 646 and cases cited.

83. *U. S. v. Wagner*, L. J. 2 Ch. 624 (1866).

boundaries,⁸⁴ the existence of its colonial possessions,⁸⁵ its flag,⁸⁶ and other usual evidence of sovereignty will thereupon be judicially known. The existence of a state of peace⁸⁷ with such a government will be recognized.⁸⁸

§ 337. **Judicial Knowledge of Results of Law; State.**⁸⁹—Who, at any particular time, is the chief executive of the state⁹⁰ or, for any given series of years, was the chief magistrate of the state itself,⁹¹ or of any state or nation which at any time had jurisdiction over it⁹² need not be proved. Courts will also take judicial knowledge as to who are, or at any time in the past were, officers which the law requires should be commissioned by the governor,⁹³ at the head of the principal departments of state⁹⁴ and who were their deputies, appointed under authority of law.⁹⁵

Proclamations and Other Executive Acts.—A state court takes judicial cognizance of the proclamations⁹⁶ or official messages to the legislature by the chief executive of the jurisdiction, and of the general orders of military governors.⁹⁷ It is said that federal courts will not take cognizance of the facts stated in the messages of a state governor, civil or military.⁹⁸ *Other executive acts of the chief magistrate,*⁹⁹ or of his principal officer of state¹ or of prominent general officers,² may be noticed judicially. The rule is general that acts of any state functionary which nearly affect the public will be judicially noticed,³ while those of local importance or limited interest will require proof.⁴

84. *Foster v. Globe Venture Synd.*, 1 Ch. 811 (1900).

85. *Lazier v. Westcott*, *supra*; *Lumley v. Wabash R. Co.*, 71 Fed. 21 (1895).

86. *Watson v. Walker*, 23 N. H. 471 (1851).

87. *Trotta's Adm'r v. Johnson, Briggs & Pitts*, 28 Ky. L. Rep. 851, 90 S. W. 540 (1906).

88. *Schoerken v. Swift, etc., Co.*, 7 Fed. 469, 19 Blatchf. (U. S.) 209 (1881), but this judicial knowledge does not cover the question what are the departments of state in the country so recognized.

Other acts of state of the chief national executive, *Dole v. Wilson*, 16 Minn. 525 (1871); or by an official high in one of the chief departments of government, *Southern Pac. R. Co. v. Groeck*, 68 Fed. 609 (1895); or of a prominent bureau in such a department, *Lerch v. Snyder*, 112 Pa. St. 161, 4 Atl. 336 (1886), may be judicially known by the courts.

89. 1 Chamberlayne. Evidence, §§ 647-650.

90. *State v. Minnick*, Iowa 123 (1863); *Lindsey v. Atty.-Gen.*, 33 Miss. 508 (1857); *State v. Boyd*, 34 Neb. 435, 51 N. W. 964 (1892); 1 Chamb., Ev., § 647 and cases cited.

91. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 260, 90 Am. Dec. 575 (1866).

92. *Jones v. Gale*, 4 Mart. (La.) 635 (1817).

93. *Abrams v. State*, 121 Ga. 170, 48 S. E. 965 (1904).

94. *In re Clement*, 132 N. Y. App. Div. 598, 117 N. Y. Supp. 30 (1909).

95. *People v. Johr*, 22 Mich. 461 (1871).

96. *Hanson v. South Scituate*, 115 Mass. 336 (1874); *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982 (1904).

97. *Gates v. Johnson County*, 36 Tex. 144 (1872); 1 Chamb., Ev., § 648 and cases cited. But see *Burke v. Miltenberger*, 19 Wall. (U. S.) 519, 22 L. ed. 158 (1873).

98. *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 272 (1899).

99. *State v. Gramelspacher*, 126 Ind. 398, 26 N. E. 81 (1890).

1. *State v. Scampini*, 77 Vt. 92, 59 Atl. 201 (1904).

2. *Roach v. Fletcher*, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895).

3. *State v. Gramelspacher*, *supra*; *State v. Savage*, 65 Neb. 714, 91 N. W. 716 (1902); *New York v. Barker*, 179 U. S. 279, 21 S. Ct. 121, 45 L. ed. 190 (1900); 1 Chamb., Ev., § 648 and cases cited.

4. *State v. Wise*, 7 Ind. 645 (1856); *Dole v. Wilson*, 16 Minn. 525 (1871); *Porter v.*

County.— Courts of all grades judicially know the persons who hold the principal executive offices in the counties of the state.⁵ The courts of a county will judicially know all the officers of its own county,⁶ but in case of the officers of other counties a higher degree of official standing is necessary to warrant a similar course;⁷ and, in the absence of statutory requirement, courts will not judicially know who are the deputies appointed by county officials.⁸ Chief among county officers judicially known by courts in any county are sheriffs,⁹ tax collectors,¹⁰ or other officials discharging the duties usually included in the office of sheriff.¹¹

Municipal.— All courts know, as a primary result of legislation, what officers are legally required, at any time, for the administration of municipal government, the respective powers and duties of such officers, their terms of office, amount of salary and similar facts.¹² What individuals, at any time, are the municipal officers will be known to the courts of the municipality itself.¹³ It has been said that judicial knowledge will not be taken as to who are constables. The fact is not of "public notoriety."¹⁴ The courts of a county in which a given city is located will judicially know who is, from time to time, its mayor.¹⁵

§ 338. **Judicial Knowledge of Results of Law; Public Surveys.**¹⁶— Knowledge of the existence of public surveys made under national authority, as an act of Parliament,¹⁷ or of Congress,¹⁸ or under state authority,¹⁹ will be judicially

Waring, 2 Abb. N. Cas. (N. Y.) 230 (1877); 1 Chamb. Ev., § 648 and cases cited. A judge is apt to take judicial notice of a fact easily ascertainable from public official records. *Pleasant Valley Coal Co. v. Salt Lake County*, 15 Utah 97, 48 Pac. 1032 (1897).

5. *Slaughter v. Barnes*, 3 A. K. Marsh. (Ky.) 412, 12 Am. Dec. 190, note (1821); *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658, 682, note (1866).

6. *Russell v. Huntsville, etc., Co.*, 137 Ala. 627, 34 So. 855 (1902); *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879 (1896); *Slaughter v. Barnes*, *supra*; 1 Chamb. Ev., § 649 and cases cited.

7. *White v. Rankin*, 90 Ala. 541, 8 So. 118 (1899); *State v. Ledford*, 28 N. C. (6 Ired.) 5 (1845).

8. *Joyce v. Joyce*, 5 Cal. 449 (1855); *Alford v. State*, 8 Tex. App. 545 (1880). But see also *People v. Johr*, 22 Mich. 461 (1871); *People v. Lyman*, 2 Utah 30 (1877).

9. *Doe v. Riley*, 28 Ala. 164, 65 Am. Dec. 334 (1856); *Alexander v. Burnham*, 18 Wis. 199 (1864).

10. *Burnett v. Henderson*, 21 Tex. 588 (1858).

11. *Feld v. Loftis*, 140 Ill. App. 530 (1908), *affirmed* 240 Ill. 105, 88 N. E. 281 (1909).

12. 1 Chamb. Ev., § 650. Any relation which the law has established between incumbency of one municipal office and that of another, is a proper subject of judicial knowledge. *Inglis v. Hughes*, 61 Ind. 212 (1878).

13. *Fluegal v. Lards*, 108 Mich. 682, 66 N. W. 585 (1896).

14. *Doe v. Blackman*, 1 D. Chipman (Vt.) 109 (1797).

15. *Lucas v. Boyd*, 156 Ala. 427, 47 So. 209 (1908); *People v. Hall*, 45 Colo. 303, 100 Pac. 1129 (1909).

16. 1 Chamberlayne, Evidence, §§ 651, 652.

17. *Birrell v. Dryer*, 9 App. Cas. 345, 5 Asp. 267, 51 L. T. Rep. (N. S.) 130 (1884).

18. *Ledbetter v. Borland*, 128 Ala. 418, 29 So. 579 (1900); *Gardner v. Eberhart*, 82 Ill. 316 (1876); *Quinn v. Champagne*, 38 Minn. 322, 37 N. W. 451 (1888); 1 Chamb. Ev., § 651 and cases cited.

19. *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 90 Pac. 936 (1907).

taken by all courts ²⁰ as a secondary legal result of great public notoriety. Not only is the position of the boundaries of states, counties, towns, township and other municipalities, as related to the principal lines, established by these surveys, known to all courts of localities within which these facts are of public interest, but the position of the meridian,²¹ range ²² and section ²³ lines established in such localities are regarded in a similar way. In the same manner the nomenclature,²⁴ including abbreviations, adopted by the government surveyors, the numbering ²⁵ and relative position ²⁶ of territorial divisions, as counties,²⁷ towns, townships whole ²⁸ or fractional,²⁹ and the like, need not be proved. Incidentally the court judicially knows the actual ³⁰ and relative ³¹ size, of such divisions; and also their position both as regards each other ³² and also in relation to the meridian lines ³³ or points of the compass.³⁴ *An administrative assumption of regularity* exists in favor of the surveys made under official authority.³⁵ The general methods and results of government surveys may well be matters for either judicial or common knowledge.³⁶

§ 339. Judicial Knowledge of Results of Law; Rules and Regulations; Nation.³⁷—The procedure adopted in and the regulations prescribed by the great departments of national government,³⁸ as the department of state,³⁹ department of the treasury,⁴⁰ department of the interior,⁴¹ post-office,⁴² or of war or

20. *Wright v. Phillips*, 2 Greene (Iowa) 191 (1849).

21. *Muse v. Richards*, 70 Miss. 581, 12 So. 821 (1893).

22. *Muse v. Richards*, *supra*.

23. *Hill v. Bacon*, 43 Ill. 477 (1867).

24. *Quinn v. Windmiller*, 67 Cal. 461, 8 Pac. 14 (1885).

25. *Smitha v. Flournoy*, 47 Ala. 345 (1872); *Albert v. Salem*, 39 Or. 466, 65 Pac. 1068, 66 Pac. 233 (1901).

26. *Mossman v. Forest*, 27 Ind. 233 (1866).

27. *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439 (1905); *O'Brien v. Krockinski*, 50 Ill. App. 456 (1893); 1 Chamb., Ev., § 651 and cases cited.

28. *Peck v. Sims*, 120 Ind. 345, 22 N. E. 313 (1889).

29. *Webb v. Mullins*, 78 Ala. 111 (1884).

30. *Quinn v. Windmiller*, *supra*.

31. *Hill v. Bacon*, *supra*.

32. *Muse v. Richards*, *supra*.

33. *O'Brien v. Krockinski*, *supra*.

34. *Kile v. Yellowhead*, 80 Ill. 208 (1875).

On the other hand, facts of a limited public interest as the topography of a certain locality, *Wilcox v. Jackson*, 109 Ill. 261 (1883); its minor divisions, *Stanberry v. Nelson*, *Wright* (Ohio) 766 (1834); the position of a particular lot upon the surface

of the ground, *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18 (1895); or whether a certain piece of land is within the public domain, *Schwerdtle v. Placer Co.*, 108 Cal. 589, 41 Pac. 448 (1895), fall outside the range of the court's judicial knowledge.

35. *Town of West Seattle v. West Seattle Land Imp. Co.*, 38 Wash. 359, 80 Pac. 549 (1905).

36. *Little v. Williams*, 88 Ark. 37, 113 S. W. 340 (1908); *Davis v. State*, 134 Wis. 632, 115 N. W. 150 (1908).

37. 1 Chamberlayne, Evidence, §§ 652-654.

38. *Caha v. U. S.*, 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415 (1893); 1 Chamb., Ev., § 952 and cases cited.

39. *Zevely v. Weimer*, 5 Ind. T. 646, 82 S. W. 941 (1904).

40. *Low v. Hanson*, 72 Me. 104 (1881); *Dominiei v. U. S.*, 72 Fed. 46 (1896); 1 Chamb., Ev., § 652 and cases cited.

Regulations adopted by the Bureau of Internal Revenue must be proved. *Com. v. Crane*, 158 Mass. 218, 33 S. W. 388 (1893).

41. *Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089 (1906); *Campbell v. Wood*, 116 Mo. 196, 22 S. W. 796 (1893); *Caha v. U. S.*, *supra*; 1 Chamb., Ev., § 652 and cases cited.

The main rules of practice of the land office are of general notoriety and their re-

the navy, will be judicially known. In general, where a statute gives a department or other agency of government the right to pass regulations intimately affecting the conduct of large sections of the public, courts whose duty it is to enforce such regulations will judicially know them.⁴³ Another reason is that the power to enact these regulations not only to control the action of the public in doing business with a department, or any of its bureaus, but equally to pass ordinances for conduct of the community, as where the lighthouse board determines the number and kind of lights which shall be placed upon drawbridges across navigable waters,⁴⁴ regulations are made by federal authority for the quarantine and transportation of infected cattle,⁴⁵ or the British orders in council are adopted by virtue of an act of Parliament,⁴⁶ has often been granted by the terms of a public statute.

Administrative Boards.—The rules and regulations adopted by administrative boards, departments of state or other executive agencies of government are thus judicially cognized by the courts, where they are such as may be assumed to affect and, consequently, to be known by, a large proportion of the community.⁴⁷ On the other hand, regulations which affect only the internal administration of the office adopting them,⁴⁸ or a limited portion of the public, will not be judicially known.

sulta need no proof. *Parkersville Drainage Dist. v. Wattier*, 48 Or. 332, 86 Pac. 775 (1906). The practice of the patent office as to the consecutive numbering of patents falls within the scope of judicial knowledge. *A. Smith, etc., Carpet Co. v. Skinner*, 91 Hun (N. Y.) 641, 36 N. Y. Supp. 1000 (1895).

Department of justice.—A court will judicially know that the action of the president of the United States in passing upon an application for pardon may properly be taken through the department of justice. *Perovich v. Perry*, 167 Fed. 789 (1909).

Interstate Commerce Commission.—The court knows that the Interstate Commerce Commission has much to do with the regulation of freight rates on articles transported in commerce between the states or with foreign nations. *Law Reporting Co. v. Elwood Grain Co.*, 135 Mo. App. 10, 115 S. W. 475 (1909).

42. *Carr v. First Nat. Bank*, 35 Ind. App. 216, 73 N. E. 947 (1905). Judicial knowledge has, however, been refused, even in the federal courts. *Nagle v. U. S.*, 145 Fed. 302, 76 C. C. A. (N. Y.) 181 (1906).

43. *State v. Southern Ry. Co.*, 141 N. C. 846, 54 S. E. 294 (1906).

44. *Smith v. Shakopee*, 103 Fed. 240, 44 C. C. A. 1 (1900).

45. *Wabash R. Co. v. Campbell*, 219 Ill. 312, 76 N. E. 346 (1905).

46. *Reg. v. The Ship Minnie*, 4 Can. Exch. 151 (1894).

Authority of Congress.—Regulations made by an executive department in pursuance of authority delegated by Congress have the force of law, and the courts take judicial notice of their existence and provisions. *U. S. v. Moody*, 164 Fed. 269 (Mich. 1908). But when the action of an administrative board, as supervising inspectors of steam vessels, *The E. A. Packer*, 140 U. S. 360, 11 S. Ct. 794, 35 L. ed. 453 (1890), comes but little into direct touch with the public, their regulations will not receive judicial notice. On the contrary, where a great department of government, such as that of agriculture, is expressly empowered to regulate a matter which intimately concerns the public, e.g., the transportation of cattle, *State v. Southern Ry. Co.*, *supra*, the courts of a state will judicially notice these regulations. It follows that the practice of the departments will be judicially recognized and given suitable weight by the courts in the construction of a statute. *Griner v. Baggs & Perry*, 4 Ga. App. 232, 61 S. E. 147 (1908).

47. 1 Chamb. Ex., § 653.

48. *Hensley v. Tarpey*, 7 Cal. 288 (1857).

State.— Rules for the transaction of business ⁴⁹ adopted by the chief departments of state, ⁵⁰ or important state ⁵¹ or county ⁵² officials, may be judicially recognized by the courts. Cognizance is especially easy where the power to prescribe regulations is expressly conferred by statute. ⁵³ The regulations of official boards which come but little into contact with the general public must be proved. ⁵⁴

§ 340. **Judicial Knowledge of Results of Law; Signatures and Seals; National.** ⁵⁵
— The great seal of the nation ⁵⁶ and the national seal of any government, ⁵⁷ or any of its provinces, ⁵⁸ recognized by the executive of the sovereignty of the court of the forum, will be judicially cognized; but the seal of an unacknowledged government must be proved by such testimony as the nature of the case admits. ⁵⁹ National courts, and, in many instances, courts of state jurisdiction, ⁶⁰ judicially notice the signature even by initials, ⁶¹ and the seals, of national officials, of the higher grades ⁶² such as the chief executive, ⁶³ or the head of departments of state, or of bureaus under them. ⁶⁴

Executive Magistrates of Foreign States.— Except where other provision is made by statute, ⁶⁵ the seal of the chief magistrate, or an executive governmental department, ⁶⁶ of a foreign state or of any municipality existing therein ⁶⁷ will not be noticed, but is a subject of proof.

In any case, unless expressly required to take judicial notice of the action of an administrative board, a court may decline to do so and require that the fact be proved. *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323 (1908).

49. *People v. Palmer*, 6 N. Y. App. Div. 19, 39 N. Y. Supp. 631 (1896).

50. *City of Jeffersonville v. Louisville & J. Bridge Co.*, 169 Ind. 645, 83 N. E. 337 (1908); 1 Chamb., Ev., § 654 and cases cited

51. *People v. Kent County*, 40 Mich. 481 (1879).

52. *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727 (1895).

53. *Larson v. Pendler First Nat. Bank*, 66 Neb. 595, 92 N. W. 729 (1902). For example, quarantine regulations, e.g., those affecting the transportation of diseased cattle, will be noticed. *Wabash R. Co. v. Campbell*, 117 Ill. App. 630, affirmed 219 Ill. 312, 76 N. E. 346 (1905).

54. *New York City Health Dept. v. City Real Property Invest. Co.*, 86 N. Y. Supp. 18 (1904); *People v. Dalton*, 46 N. Y. App. Div. 264, 61 N. Y. Supp. 263 (1899); 1 Chamb., Ev., § 654 and cases cited.

55. 1 Chamberlayne, Evidence, §§ 655-659

56. *Yount v. Howell*, 14 Cal. 465 (1859)

57. *Watson v. Walker*, 23 N. H. 471

(1851); *Lincoln v. Bartelle*, 6 Wend. (N. Y.) 475 (1831); *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, 5 L. ed. 454 (1822); 1 Chamb., Ev., § 655 and cases cited

58. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404 (1862).

59. *U. S. v. Palmer*, 3 Wheat. (U. S.) 610, 4 L. ed. 471 (1818).

60. *Yount v. Howell*, *supra*; *Jones v. Gale*, 4 Mart. (La.) 635 (1817).

61. *Liddon v. Hodnet*, 22 Fla. 442 (1896). A telegram signed with the surname of the Attorney-General of the United States. *Pero-vich v. Perry*, 167 Fed. 789 (1909).

62. *Ferguson v. Benyon*, 16 Wkly. Rep. 71 (1867).

63. *Gardner v. Barney*, 6 Wall. (U. S.) 499, 18 L. ed. 890 (1867).

64. *York, etc., Line R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. ed. 27 (1854). The same rule applies to the signatures and seals of consuls. *Barber v. Mexico International Co.*, 73 Conn. 587, 48 Atl. 758 (1901), and other diplomatic representatives.

65. *Duffey v. Bellefonte Presby. Cong.*, 48 Pa. St. 51 (1864).

66. *Schoerken v. Swift, etc., Co.*, 7 Fed. 469, 19 Blatchf. (U. S.) 209 (1881)

67. *Chew v. Keck*, 4 Rawle (Pa.) 163 (1833); 1 Chamb., Ev., § 656 and cases cited.

State.— The great seal of state of the sovereignty of the forum,⁶⁸ the seal of every state⁶⁹ and territory⁷⁰ in the American Union, will be judicially noticed by all courts, state and federal, in the United States. So also the signature and public⁷¹ seal of the present or any past governor of the state,⁷² even when under a former government;⁷³ and those of leading officers of state,⁷⁴ present or past,⁷⁵ or of their substitutes,⁷⁶ will be noticed by all courts within a state of the Union.

County.— The signature and seal of the principal county executive officials,⁷⁷ as recorder of deeds,⁷⁸ registers,⁷⁹ sheriff,⁸⁰ tax collector⁸¹ and the like need not be proved; nor the signatures and seals of the deputies of such county officers⁸² appointed by virtue of statute, and acting for them.⁸³

Cities, Towns, etc.— The official signatures and seals of city, town and other municipal officers will be noticed judicially,⁸⁴ and also those of their deputies appointed under legal authority.⁸⁵

§ 341. **Judicial Knowledge of Results of Law; Legislative Department; General Facts.**⁸⁶— The existence of the national and its own state⁸⁷ legislature, the number of members in its several branches,⁸⁸ general facts regarding its membership, as that a certain body of men comprise the legislature,⁸⁹ and when a certain session ended,⁹⁰ will be noticed by all the courts.

68. *Chicago, etc., R. Co. v. Keegan*, 152 Ill. 413, 39 N. E. 33 (1894).

69. *U. S. v. Amedy*, 11 Wheat. (U. S.) 392 (1826).

70. *Coit v. Millikin*, 1 Den. (N. Y.) 376 (1845); *U. S. v. Amedy, supra*; 1 Chamb., Ev., § 657 and cases cited.

71. An unofficial seal must be proved. *Beach v. Workman*, 20 N. H. 379 (1850).

72. *Powers v. Com.*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1897, 53 L. R. A. 245 (1901); 1 Chamb., Ev., § 657 and cases cited.

73. *Jones v. Gale's Curatrix*, 4 Mart. (La.) 635 (1817).

74. *Cary v. State*, 76 Ala. 78 (1884); *Wetherbee v. Dunn*, 32 Cal. 106 (1867); *Roach v. Fletcher*, 11 Tex. Civ. App. 225, 32 S. W. 585 (1895); 1 Chamb., Ev., § 657 and cases cited.

75. *Smyth v. New Orleans, C. & B. Co.*, 35 C. C. A. 646, 93 Fed. 899 (1899).

76. *People v. Johr*, 22 Mich. 461 (1871).

77. *Himmelman v. Hoadley*, 44 Cal. 213 (1872); *Wetherbee v. Dunn, supra*.

78. *Scott v. Jackson*, 12 La. Ann. 640 (1857).

79. *Francher v. De Montegre*, 1 Head (Penn.) 40 (1858).

80. *Thielmann v. Burg*, 73 Ill. 293 (1874); *Alford v. State*, 8 Tex. App. 545 (1880);

Martin v. Aultman, 80 Wis. 150, 49 N. W. 749 (1891); 1 Chamb., Ev., § 658 and cases cited.

81. *Wetherbee v. Dunn, supra*; *Walcott v. Gibbs*, 97 Ill. 118 (1880).

82. *Himmelman v. Hoadley, supra*.

83. *Himmelman v. Hoadley, supra*; *Martin v. Aultman, supra*. Formal proof of the official signatures on a county warrant must be made where their genuineness is placed in issue by the pleadings. *Apache County v. Barth*, 177 U. S. 538, 20 S. Ct. 718, 44 L. ed. 878.

84. 1 Chamb., Ev., § 659.

85. *Himmelman v. Hoadley, supra*. The courts of England will judicially know the seal of the city of London. *Woodmass v. Mason*, 1 Esp. 53 (1793).

86. 1 Chamberlayne, Evidence, §§ 660-663.

87. *People v. Burt*, 43 Cal. 560 (1872). House of Commons. *Bradlaugh v. Gossett*, 12 Q. B. D. 271 (1884).

88. *State v. Mason*, 155 Mo. 486, 55 S. W. 636 (1900).

89. *State v. Kennard*, 25 La. Ann. 238 (1873); *State v. Schnitger*, 17 Wyo. 65, 95 Pac. 698 (1908).

90. *Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120 (1829); 1 Chamb., Ev., § 660.

But facts pertaining to individuals as that

Municipalities.—The legislative branch of a municipal government, as the aldermen of a city,⁹¹ will be judicially noticed.

Journals.—Journals of a branch of the legislature are public records. "They prove their own authenticity."⁹² Their existence and function in legislation are judicially known.⁹³ Judges of a majority of American states⁹⁴ hold that they may resort to these journals for the purpose of ascertaining what is the law which they are charged with the responsibility of knowing at their peril;⁹⁵ when a statute went into effect whether it was properly enacted, and facts of similar nature. In so doing, they judicially notice facts brought to their attention on such inspection, and give effect to them even to the extent of controlling the official certificate of enactment.⁹⁶

Legislative Proceedings.—Courts will take judicial notice of legislative proceedings, for example, that the legislature has done certain official acts other than the enactment of laws;—e.g., expelled certain of its members.⁹⁷ *Municipal legislative bodies* stand in a somewhat similar position.⁹⁸

Direct Results of Legislation.—The judge knows judicially the direct results of legal enactments by public statutes, e.g., that the sale of intoxicating liquor is prohibited in a particular county of the state.⁹⁹ That certain coun-

a particular person is a member, *State v. Polacheck*, 101 Wis. 427, 77 N. W. 708 (1898); or with relation to the internal machinery of law making, *Judah v. Vincennes University*, 16 Ind. 56 (1861); *State v. Dow*, 53 Me. 305 (1865); are outside the category;—except where the fact is one of notoriety. *Walden v. Canfield*, 2 Rob. (La.) 466 (1842).

91. *Fox v. Com.*, 32 Leg. Int. (Pa.) 257, 1 W. N. C. 243 (1873)

92. *Grob v. Cushman*, 45 Ill. 119 (1867); *State v. Denny*, 118 Ind. 449 (1888).

93. *State v. Swiggart*, 118 Tenn. 556, 102 S. W. 75 (1907).

94. *Sherman v. Story*, 30 Cal. 253, 275 (1866); *Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750 (1888); *People v. Chenango*, 8 N. Y. 317 (1853); *Dane County v. Reindahl*, 104 Wis. 302, 80 N. W. 438 (1899); *Post v. Supervisors*, 105 U. S. 667 (1881); 1 Chamb., Ev. § 661 and cases cited.

95. 1 Chamb., Ev. §§ 571 *et seq.*

96. The right of the legislature to amend its journal so as to conform to the facts at the same session, is not disputed. *Turley v. Logan*, 17 Ill. 151 (1855).

In other jurisdictions different views prevail. Not only is the certificate of the proper official that the act has duly become a law been accepted as final, *Harwood v. Went-*

worth, 102 U. S. 547, 16 S. Ct. 390 (1895); but the journals have been refused the status of public records. *Sherman v. Story*, *supra*; *Pangborn v. Young*, 32 N. J. L. 29 (1866). In these states they have been treated merely as public documents, *Grob v. Cushman*, *supra*; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710 (1869); which were to be proved by evidence in the usual way, *Coleman v. Dobbins*, 8 Ind. 156 (1856); *Burt v. Winona, etc., R. Co.*, 31 Minn. 472, 18 N. W. 285 (1884); 1 Chamb., Ev. § 661 and cases cited; upon an issue as to the validity of the statute regularly raised. *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173 (1892); 1 Chamb., Ev. § 661 and cases cited. The question, it will be noted, is really one of administration.

97. *French v. State Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556 (1905). An English court judicially knows the order and course of proceedings in Parliament. *Lake v. King*, 1 Wms. Saund. 131b (1846).

98. 1 Chamb., Ev. § 662. Thus, where a city council is required by law to meet at certain intervals, the fact will be known to the court. *Stoner v. City Council of Los Angeles*, 8 Cal. App. 607, 97 Pac. 692 (1908).

99. *Bass v. State*, 1 Ga. App. 728, 790, 57 S. E. 1054 (1907).

ties, cities, towns¹ and the like, are municipal corporations, need not be proved. Nor need the statute be introduced in evidence.²

§ 342. **Judicial Knowledge of Results of Law; Judicial Department; General Facts.**³—Among results of a primary nature established by law are the existence, organization, jurisdiction and powers of the judge's own court,⁴ and of other courts established by the constitution⁵ or statutes of the state⁶ or nation under the authority of which the court is organized.⁷

Inferior Courts.—The same rule or practice applies to courts of inferior jurisdiction,⁸ as county⁹ or municipal¹⁰ courts.

Special Tribunals.—No proof need be offered as to the existence, jurisdiction, and the like, of federal commissioners,¹¹ justices of the peace¹² and tribunals of special functions as probate¹³ courts, of inquest¹⁴ or other irregular judicial bodies.¹⁵

Federal Courts.—The jurisdiction of the federal courts over places within the limits of a state ceded to the national government by the state legislature will be judicially known;¹⁶ but not where the acquisition of title is by purchase or by the exercise of eminent domain by national authority.¹⁷

Foreign Courts.—The jurisdiction of a foreign court is not noticed.¹⁸ But the courts of any forum recognize, as a fact of notoriety, "that tribunals are established in the several states, for the adjustment of controversies and the ascertainment of rights;"¹⁹ other notorious facts concerning courts of a sister

1. *City of Brownsville v. Arbuckle*, 30 Ky. L. Rep. 414, 99 S. W. 239 (1907).

2. *In re Mohawk River Bridge Connecting Towns of Rotterdam and Glenville*, 128 N. Y. App. Div. 54, 112 N. Y. Supp. 428 (1908); 1 Chamb., Ev., § 663 and cases cited.

3. 1 Chamberlayne, Evidence, §§ 664–675.

4. *State v. Schlessinger*, 38 La. Ann. 564 (1886).

5. *Tucker v. State*, 11 Md. 322 (1857).

6. *Russell v. Sargent*, 7 Ill. App. 98 (1880); *In re Hackley*, 21 How. Pr. 103 (1861); *State v. Marsh*, 70 Vt. 288, 40 Atl. 836 (1898); 1 Chamb., Ev., § 664 and cases cited.

7. *Headman v. Rose*, 63 Ga. 458 (1879); *Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901); 1 Chamb., Ev., § 664 and cases cited. Bankruptcy courts are within the rule. *Lathrop v. Stuart*, 5 McLean (U. S.) 167 (1850). The existence of all courts established by Act of Parliament will be judicially noticed in England. *Tregany v. Fletcher*, 1 Ld. Raym. 154 (1694).

8. *Nelson v. Ladd*, 4 S. D. 1 (1893).

9. *St. Louis, etc., R. Co. v. Magness*, 68 Ark. 289, 57 S. W. 933 (1900); *Long v. State*, 1 Tex. App. 709 (1877); 1 Chamb., Ev., § 665 and cases cited.

10. *Hearson v. Graudine*, 87 Ill. 115 (1877); *Heffernan v. Hervey*, 41 W. Va. 766, 24 S. E. 592 (1896). A court of quarter sessions judicially knows the petty sessional divisions of a county. *R. v. Whittles*, 13 Q. B. 248 (1849).

11. *Ex parte Lane*, 6 Fed. 34 (1881).

12. *Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755 (1890); *Goodsell v. Leonard*, 23 Mich. 374 (1871).

13. *La Salle v. Milligan*, 143 Ill. 321, 32 N. E. 196 (1892); 1 Chamb., Ev., § 666 and cases cited.

14. *State v. Marsh*, *supra*.

15. *Tucker v. State*, 11 Md. 322 (1857). The court cannot take judicial notice in case of a grand jury. *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, judg. aff'd 214 Ill. 421, 73 N. E. 770 (1905).

16. *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922 (1891); 1 Chamb., Ev., §§ 571, 667.

17. *People v. Collins*, 105 Cal. 504, 39 Pac. 16 (1895).

18. *Newell v. Newton*, 10 Pick. (Mass.) 470 (1830).

19. *Dozier v. Joyce*, 8 Port. (Ala.) 303, 312 (1838); 1 Chamb., Ev., § 668 and cases

state or foreign country, as that courts of general jurisdiction are courts of record ²⁰ are equally known.

Districts.—The location and boundaries of the judicial districts, into which the nation ²¹ or a state ²² or a territory is divided, are established by statute and are, therefore, primary results of legislation of which judicial notice is necessarily taken.²³

Terms.—Courts, whether of general or inferior jurisdiction,²⁴ judicially know the times appointed by statute for holding terms of any court lawfully established by state or national ²⁵ authority in their jurisdiction; ²⁶ whether the term is that of the judge's own court ²⁷ or that of a court whose action is under review,²⁸ or the court is one of limited jurisdiction.²⁹

Administrative Boards.—The same rule applies to administrative boards, exercising judicial functions, as county commissioners ³⁰ or supervisors; ³¹ and the places at which their sittings are appointed to be held.³²

Length of Terms.—Judicial knowledge extends to cover the length of terms, when the fact is determined by law; ³³ subject, of course, to the court's power of adjournment.³⁴

Sessions; Length of Actual Sitting.—The actual length of a session or sitting of a court cannot judicially be known; ³⁵ nor the time at which a grand

cited. The rule applies to Canada. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404 (1862).

20. *Morse v. Hewett*, 28 Mich. 481 (1874). The rule does not apply to courts of inferior jurisdiction. *Holly v. Bass*, 68 Ala. 206 (1880); *Hill v. Taylor*, 77 Tex. 295, 14 S. W. 366 (1890).

21. *State v. Arthur*, 129 Iowa 235, 105 N. W. 422 (1905); 1 Chamb., Ev., § 669 and cases cited.

22. *Alabama, etc., Ins. Co. v. Cobb*, 57 Ala. 547 (1877); 1 Chamb., Ev., § 669 and cases cited.

23. *Chicago, etc., R. Co. v. Hyatt*, 48 Neh. 161, 67 N. W. 8 (1896). Courts will take judicial notice that a particular municipality is within the jurisdiction of a particular court. *Davis v. State*, 134 Wis. 632, 115 N. W. 150 (1908).

24. *Ex parte Voncent*, 43 Ala. 402 (1869).

25. *Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901); 1 Chamb., Ev., § 670 and cases cited.

26. *Edwards v. State*, 123 Ga. 542, 51 S. E. 630 (1905); *Fry v. Radzinski*, 219 Ill. 526, 76 N. E. 694 (1906); 1 Chamb., Ev., § 670 and cases cited.

27. *Harwood v. Toms*, 130 Mo. 225, 32 S.

W. 666 (1895); 1 Chamb., Ev., § 670 and cases cited.

28. *Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755 (1890); *Talbert v. Hopper*, 42 Cal. 397 (1871); *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 896 (1903); *Matter of Hackley*, 21 How. Pr. (N. Y.) 103 (1861); 1 Chamb., Ev., § 670 and cases cited.

29. *Van Duzer v. Towne*, 12 Colo. App. 4, 55 Pac. 13 (1898); *State v. Broderick*, 70 Mo. 622 (1879); 1 Chamb., Ev., § 670 and cases cited.

30. *Kane County v. Young*, 31 Ill. 194 (1863); *Collins v. State*, 58 Ind. 5 (1877).

31. *State v. Smith*, 87 Miss. 551 (1906).

32. *Ross v. Anstall*, 2 Cal. 183, 191 (1852); 1 Chamb., Ev., § 671.

33. *McMullan v. Long* (Ala. 1905), 39 So. 777; *Durre v. Brown*, 7 Ind. App. 127 (1893); 1 Chamb., Ev., § 672 and cases cited.

34. *Harrison v. Meadors*, 41 Ala. 274 (1867). Whether an act done on a certain day was done in term time or vacation. *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841 (1893), are also facts of the almanac. 1 Chamb., Ev., §§ 672, 727.

35. *Dudley v. Barner*, 4 Kan. App. 122, 46 Pac. 178 (1896); *Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 451 (1902); 1 Chamb., Ev., § 673 and cases cited.

jury in fact met,³⁶ or the time at which any court or board, other than the court in question,³⁷ actually adjourned the sitting.³⁸

Judges and Magistrates.—While the number of judges established for a particular court,³⁹ the length of their term of office,⁴⁰ the amount of their salaries⁴¹ and the manner of their selection⁴² and qualifications are cognized as "matter of law," knowledge as to what persons compose the judiciary of the state or nation cannot well be so regarded. It is, however, deemed a matter of notoriety, certainly in the legal community⁴³ of which judicial notice is taken. The courts of England,⁴⁴ Canada⁴⁵ and America⁴⁶ know who are and at any time were,⁴⁷ either officially or as a *locum tenens*,⁴⁸ judges of their own tribunals⁴⁹ or of any superior court of record within the jurisdiction, state or national,⁵⁰ including courts of probate.⁵¹ They also know who was the presiding officer at a given date,⁵² at what time,⁵³ and under what law⁵⁴ he was selected,⁵⁵ whether a proper commission has issued⁵⁶ and at what time a particular judge resigns his office⁵⁷ or, for any other reason, ceased to be a judge.⁵⁸

Inferior Courts.—In America, according to the prevailing view, judicial cognizance is taken as to who are justices of inferior tribunals⁵⁹ or even as to who are justices of the peace,⁶⁰ or magistrates commissioned for or acting in

36. Matter of Hackley, *supra*.

37. Hadley v. Bennero, *supra*.

38. Baker v. Knott, 3 Ida. 700, 35 Pac. 172 (1893).

39. Vahle v. Brackenseik, 145 Ill. 231 (1893); 1 Chamb., Ev., § 674 and cases cited.

40. People v. Ebanks, 120 Cal. 626, 52 Pac. 1078 (1898); Upton v. Paxton, 72 Iowa 295, 33 N. W. 773 (1887); 1 Chamb., Ev., § 674 and cases cited.

41. McKinney v. O'Conner, 26 Tex. 5 (1861).

42. Mayes v. Palmer, 206 Mo. 293, 103 S. W. 1140 (1907).

43. Ward v. State (Ala. 1905), 39 So. 923.

44. Van Sandau v. Turner, 6 Q. B. 773, 786 (1845).

45. Watson v. Hay, 5 N. Brunsw. 559 (1847).

46. Means v. Stow, 29 Colo. 80, 66 Pac. 881 (1901); Vahle v. Brackenseik, *supra*; State v. Ray, 97 N. C. 510, 1 S. E. 876 (1887); State v. Marsh, 70 Vt. 288, 40 Atl. 836 (1897); 1 Chamb., Ev., § 674 and cases cited.

47. Indianapolis St. R. Co. v. Lawn, 30 Ind. App. 515, 66 N. E. 508 (1903).

48. Bell v. State, 115 Ala. 25, 22 So. 526 (1896).

49. Gilliland v. Sellers, 2 Ohio St. 223 (1853).

50. Vahle v. Brackenseik, *supra*; Barnwell v. Marion, 58 S. C. 459, 36 S. E. 818 (1900).

51. McCarver v. Hertzberg, 120 Ala. 523, 25 So. 3 (1898).

52. Kilpatrick v. Com., 31 Pa. 198 (1858).

53. Fay v. Miville, 2 Rev. Leg. 333.

54. Clark v. Com., 29 Pa. St. 129 (1858).

55. De la Rosa v. State (Tex. Crim. App. 1893), 21 S. W. 192.

56. Follain v. Lefevre, 3 Rob. (La.) 13 (1842).

57. People v. McConnell, 155 Ill. 192, 40 N. E. 608 (1895).

58. People v. Ebanks, *supra*; 1 Chamb., Ev., § 674.

59. Perry v. Bush, 46 Fla. 242, 35 So. 225 (1903); People v. McConnell, *supra*; Indianapolis St. Ry. Co. v. Lawn, *supra*; Kilpatrick v. Com., *supra*; 1 Chamb., Ev., § 675 and cases cited. *Contra*: Ripley v. Warren, 2 Pick. (Mass.) 592 (1824); County of San Joaquin v. Budd, 96 Cal. 47 (1892).

60. Webb v. Kelsey, 66 Ark. 180, 49 S. W. 819 (1899); Gilbert v. National Cash-Register Co., 176 Ill. 288, 52 N. E. 22 (1898); 1 Chamb., Ev., § 675 and cases cited.

the county in which the court is sitting.⁶¹ Judicial notice has been taken as to who are the magistrates of parishes.⁶²

Other States.— But judicial cognizance cannot be taken as to who are judges, even of courts of record,⁶³ in another state, or who are magistrates commissioned to act in the jurisdiction of a sister state.⁶⁴

§ 343. **Judicial Knowledge of Results of Law; Attorneys and Counsel.**⁶⁵— Judicial notice is taken of who is attorney-general,⁶⁶ but not of who are deputies.⁶⁷ No necessity exists for proving any changes in the incumbency of the office.⁶⁸ Judges know, judicially, who are the prosecuting attorneys of the state⁶⁹ and their assistants⁷⁰ or deputies appointed under authority of law;⁷¹ and the length of their terms of office.⁷² A court will notice also who are the attorneys⁷³ or counsellors admitted to its bar, and are regularly licensed;⁷⁴ but does not know those legally practicing before the bar of an inferior domestic tribunal.⁷⁵

Signatures and Seals.— The signatures of attorneys admitted to practice in the court will, when attached to pleadings⁷⁶ or otherwise used, as an attorney, often be judicially noticed. The signature of a prosecuting attorney, in his official capacity, will be noticed.⁷⁷

Clerks.— Judges judicially know who are the clerks of the various courts,⁷⁸

61. *Graham v. Anderson*, 42 Ill. 514 (1867). The view in England is to the contrary *Van Sandau v. Turner*, 6 Q. B. 773, 9 Jur. 296, 51 E. C. L. 773 (1845).

62. *Despau v. Swindler*, 2 Mart. (La.) N. S. 705 (1825).

63. *Fellows v. Menasha*, 11 Wis. 558 (1860).

64. *In re Keeler*, Hempst. (U. S.) 306, 14 red. Cas. No. 7,637 (1843).

65. 1 Chamberlayne, Evidence, §§ 676–681.

66. *Curry v. State*, 7 Baxt. (Tenn.) 154 (1874); 1 Chamb., Ev., § 676 and case cited.

67. *Crawford v. State*, 155 Ind. 692, 57 N. E. 931 (1900).

68. *State v. Evans*, 8 Humphr. (Tenn.) 110 (1847).

69. *State v. Kinney*, 81 Mo. 101 (1883); and of particular counties in the state. *State v. Campbell*, 210 Mo. 202, 32 S. W. 670 (1908).

70. *People v. Lyman*, 2 Utah 30 (1877).

71. *State v. Guglielmo*, 46 Or. 250, 79 Pac. 577 (1905).

72. *State v. Seibert*, 130 Mo. 202, 32 S. W. 670 (1895).

73. *Ferris v. Commercial Nat. Bank*, 158 Ill. 237, 41 N. E. 1118 (1895); *Philadelphia*

v. Jacobs, 22 Wkly. Notes Cas. (Pa.) 348 (1888); *Cothren v. Connaughton*, 24 Wis. 134 (1869); 1 Chamb., Ev., § 676 and cases cited.

74. *Ferris v. Commercial Nat. Bank*, *supra*; *Sloan v. Hallowell*, 83 Neb. 762, 120 N. W. 449 (1909).

75. *Clark v. Morrison*, 5 Ariz. 349, 52 Pac. 985 (1898); *Sutton v. Chicago, etc., R. Co.*, 98 Wis. 157, 73 N. W. 993 (1898). Whether he is still in active practice, *Cothren v. Connaughton*, *supra*; or continues to reside in the state, *Sutton v. Chicago, etc., R. Co.*, *supra*, must be proved, if claimed.

76. *Markes v. Epstein*, 13 N. Y. Civ. Proc. 293 (1888); *Strippelmann v. Clark*, 11 Tex. 296 (1854); 1 Chamb., Ev., § 677. But not where the signature is made by the attorney in his personal capacity, *Masterson v. Le Claire*, 4 Minn. 163 (1860); as where he appears *pro se*. *Alderson v. Bell*, 9 Cal. 315 (1858); *Masterson v. Le Claire*, *supra*.

77. *State v. Kinney*, 81 Mo. 101 (1883), although the description of the office is incorrect.

78. *White v. Rankin*, 90 Ala. 541, 8 So. 118 (1890); *Major v. State*, 2 Sneed (Tenn.) 11 (1854). See also *State v. Kinney*, 21 S. D. 390, 113 N. W. 77 (1907).

whether state⁷⁹ or federal,⁸⁰ of the forum, and who are their deputies.⁸¹ As a rule, presenting but few exceptions,⁸² courts do not judicially notice who are the clerks of court in other states; and it has been assumed⁸³ that the clerk of an inferior court would not be judicially noticed.

Court Officers and Officials.—Judges will know for judicial purposes who are the customary⁸⁴ and legally appointed officers and officials of their own courts⁸⁵ and of other courts of state⁸⁶ or national⁸⁷ jurisdiction exercising judicial functions within the state.

Sheriffs, Constables, etc.—Courts judicially and officially know who is sheriff of a particular county,⁸⁸ and in certain jurisdictions his legally appointed deputies;⁸⁹ though not so in others.⁹⁰ Constables acting as court officers⁹¹ stand in the same position. The length of the term of these respective offices is judicially known.⁹²

Practice.—Judges judicially notice the rules regulating the practice of their own courts,⁹³ but not of those of inferior tribunals,⁹⁴ unless required to do so by statute or otherwise. The judge of a federal court judicially knows the practice and procedure of his own tribunal, but not those of a state court.⁹⁵ An appellate court judicially knows the rules and practice of the court whose proceedings it has the duty of revising.⁹⁶ A judge will assume that the practice of other domestic courts,⁹⁷ of law or equity,⁹⁸ is, in a general way, the same as that of his own. Courts of general jurisdiction will not judicially know the

79. *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000 (1890); *Mackimon v. Barnes*, 66 Barb. (N. Y.) 91 (1867); *Goodwin v. Harris*, 28 Tex. Civ. App. 7, 66 S. W. 308; 1 Chamb., Ev., § 678 and cases cited.

80. *Ledbetter v. U. S.*, 108 Fed. 52, 47 C. C. A. 191 (1901).

81. *Himmelman v. Hoadley*, 44 Cal. 213 (1872); *State v. Barrett*, 40 Minn. 65, 41 N. W. 459 (1889). Their names need not be proved. *Mountjoy v. State*, 78 Ind. 172 (1881). But the name of a clerk, as that of an individual, is not a subject of judicial cognizance. *Com. v. Fray*, 126 Mass. 235 (1879).

82. *Monroe v. Eastman*, 31 Mich. 283 (1875).

83. *Davis v. McEnaney*, 150 Mass. 451, 23 N. E. 221 (1890).

84. See *Frost v. Hayward*, 2 Dowl. P. C. (N. S.) 566, 6 Jur. 1045, 12 L. J. Exch. 84 (1842).

85. *Cary v. State*, 76 Ala. 78 (1884); *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176 (1898); 1 Chamb., Ev., § 679 and cases cited.

86. *Despau v. Swindler*, 3 Mart. (N. S.)

(La.) 705 (1825). But see *Norvell v. McHenry*, 1 Mich. 227 (1849).

87. *Buford v. Hickman*, 4 Fed. Cas. No. 2, 114a, Hempst. (U. S.) 232 (1834).

88. *Thompson v. Haskell*, 21 Ill. 215, 74 Am. Dec. 98 (1859); *Ex parte Bargagliotti*, 6 Cal. App. 333, 92 Pac. 96 (1907); 1 Chamb., Ev., § 680 and cases cited.

89. *Martin v. Aultman*, 80 Wis. 150, 49 N. W. 749 (1891).

90. *State Bank v. Curran*, 10 Ark. 142 (1849); *Ward v. Henry*, 19 Wis. 76 (1865).

91. *Harris v. Buehler*, 1 Pennw. (Del.) 346, 40 Atl. 733 (1898).

92. *Ragland v. Wynn*, 37 Ala. 32 (1860).

93. *Packet Co. v. Sickles*, 19 Wall. (U. S.) 611 (1873).

94. *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739 (1906).

95. *Randall v. New England O. of P.*, 118 Fed. 782 (1902).

96. *Johnson-Wynne Co. v. Wright*, 28 App. Cas. (D. C.) 375 (1906).

97. *Newell v. Newton*, 10 Pick. (Mass.) 470 (1830).

98. *Contee v. Pratt*, 9 Md. 67 (1856); 1 Chamb., Ev., § 681 and cases cited.

rules of practice of inferior tribunals.⁹⁹ But without statutory regulation,¹ he will not judicially cognize with precision the rules and regulations of other tribunals in the same jurisdiction,² or know or make any assumption as to the procedure or practice of courts of a sister state³ or foreign country.

§ 344. **Judicial Knowledge of Results of Law; Court Records, Papers, etc.**⁴—Both as a matter, at times, of legal requirement and by reason of the difficulty of making other proof and the ease and appropriateness of this method of establishing facts on a court record or in court papers, judges take judicial notice of such records and papers.⁵ They will, under proper circumstances, examine the records,⁶ papers or docket entries⁷ on file in a case either *sua sponte*,⁸ or at the suggestion of counsel.⁹ Facts so ascertained will be taken as proven;¹⁰—it being sufficient that the record or papers should be produced¹¹ and identified to the satisfaction of the judge.¹²

Own Court; Same Case.—It will not be necessary to prove to a judge the record or papers in a case before him for trial,¹³ whether originally filed in his own court or transmitted from another.¹⁴ He will, as a rule, judicially notice their existence¹⁵ and any facts which appear on their inspection,¹⁶ either as endorsements of the date of filing,¹⁷ amount of claim,¹⁸ and the like. The

99. *Powell v. Springston Lumber Co.*, 12 Idaho 723, 88 Pac. 97 (1906); *Bonney v. McClelland*, 138 Ill. App. 449, judg. aff'd 235 Ill. 259, 85 N. E. 242 (1908).

1. *Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234 (1897).

2. *Sweeney v. Stanford*, 60 Cal. 362 (1882); *Kindel v. Le Bert*, *supra*; *Gudgeon v. Casey*, 62 Ill. App. 599 (1895); *Rout v. Ninde*, 118 Ind. 123, 20 N. E. 704 (1888); 1 Chamb., Ev., § 681 and cases cited.

3. *Newell v. Newton*, *supra*.

4. 1 Chamberlayne, Evidence, §§ 682–690.

5. *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57 (1894); *Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 83 N. E. 188 (1907); *Stewart v. Rosengren*, 66 Neb. 445, 92 N. W. 586 (1902); 1 Chamb., Ev., § 682 and cases cited.

6. *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84 (1887).

7. *Dewey v. St. Albans Trust Co.*, *supra*.

8. *Denny v. State*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726 (1895).

9. *Denny v. State*, *supra*.

10. *Neville v. Kenny*, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230 (1899).

11. *Watkins v. Martin*, 69 Ark. 311, 65 S. W. 103, 425 (1901).

12. *Hollenbach v. Schnabel*, *supra*; *McGuire v. State*, 76 Miss. 504, 25 So. 495 (1898).

13. *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165 (1899); *State v. Bowen*, 16 Kan. 475 (1876); *Pittel v. Fidelity, etc., Ass'n*, 86 Fed. 255 (1898); 1 Chamb., Ev., § 683 and cases cited.

14. *Boteler v. State*, 8 Gill & J. (Md.) 359 (1836). For example, the probate papers relating to a given estate in connection with which the litigation in suit arises. *Knight v. Hamaker*, 40 Or. 424, 67 Pac. 107 (1901).

15. *Hollenbach v. Schnabel*, *supra*; *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837 (1886); *State v. Postlewait*, 14 Iowa 446 (1862); *Stewart v. Rosengren*, *supra*.

16. *World's Columbian Exposition Co. v. Lehigh*, 94 Ill. App. 433 (1900); *State v. Thomas*, 74 Kan. 360, 86 Pac. 499 (1906); *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656 (1892); *Farmers' L. & T. Co. v. Hotel Brunswick Co.*, 12 App. Div. (N. Y.) 628, 42 N. Y. Supp. 693 (1896); 1 Chamb., Ev., § 683 and cases cited.

17. *Chapman v. Currie*, 51 Mo. App. 40 (1892); *Fellers v. Lee*, 2 Barb. (N. Y.) 488 (1848).

18. *Chicago, etc., R. Co. v. Minard*, 20 Ill. 9 (1858).

judge will know judicially any fact that can be gathered from the face of the record or papers.¹⁹

Own Court Other Cases.— Courts do not generally take judicial notice of the records in other cases than that on trial²⁰ as it is deemed better for the parties themselves to submit what evidence they consider material, although this is sometimes done in cases of great notoriety²¹ or in actions *in rem*.²² Supplementary proceedings are treated as part of the main case and noticed only when growing out of the same case as is on trial.²³

Other Courts.— For still stronger reasons courts do not take judicial notice of the records, papers, etc., of other courts,²⁴ unless such knowledge is required by statute.²⁵ So state courts do not take cognizance of the proceedings of federal courts²⁶ and federal courts do not know judicially the proceedings of state courts,²⁷ and courts do not know judicially of the proceedings in courts outside of their jurisdiction.

Signatures and Seals.— The seal of a court of admiralty being of international jurisdiction will be recognized in all other courts²⁸ and a state court will judicially know the signature and seal of federal courts²⁹ and federal courts judicially know the signature and seal of state courts³⁰ and even the official seal and signature of notaries public have been judicially noticed.³¹

19. *State v. Kesner*, 72 Kan. 87, 82 Pac. 720 (1905); *George v. State*, 59 Neb. 163, 80 N. W. 486 (1899); *Blum v. Stein*, 68 Tex. 608 (1887); 1 Chamb., Ev., § 683 and cases cited. For example, defects on the record. *State v. Ulrich*, *supra*; *Searls v. Knapp*, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873 (1894). But not acts *in pais* concerning a cause. *Foster v. Chicago, etc., R. Co.*, 10 Tex. Civ. App. 476, 31 S. W. 529 (1895).

20. *Lake Merced Water Co. v. Cowles*, 31 Cal. 214 (1866).

21. *Story v. Uiman*, 88 Md. 244, 41 Atl. 120 (1898).

22. *Cushman Co. v. Goddard*, 37 C. C. A. 221, 95 Fed. 664 (1899).

23. *Lester v. People*, 150 Ill. 408, 37 N. E. 1004 (1894).

24. *Hall v. Cole*, 71 Ark. 601, 76 S. W. 1067 (1903).

25. *Ohm v. San Francisco* (Cal. 1890), 25 Pac. 155.

26. A state court cannot take judicial notice of bankruptcy proceedings. *Tube City Mining & Milling Co. v. Otterson*, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916 E 303 (1914).

27. *Stewart v. Masterson*, 131 U. S. 151, 9 S. Ct. 682, 33 L. ed. 114 (1888).

28. *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475 (1881).

29. *Adams v. May*, 33 Conn. 419 (1866).

30. *Turnbull v. Payson*, 95 U. S. 418 (1877).

31. *Black v. Minneapolis & St. L. R. Co.* (Iowa 1903), 96 N. W. 984.

CHAPTER IX.

KNOWLEDGE; COMMON.

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§ 345. **Common Knowledge.**¹— Common knowledge is general knowledge. It is the knowledge that every one has. The subject, as has been intimated, has no special relation to the law of evidence.² A trial at law takes the world as

1. Chamberlayne, Evidence, §§ 691, 692.

need not be proved." South & N. Ala. R. R.

2. "All men know them and therefore they

Co. v. Wood, 74 Ala. 449 (1883).

a whole precisely as it finds it. With only a small portion of its happenings does the law of evidence purport to deal. These it calls the *res gestæ*.³ Only by assuming the reality and correctness of common knowledge can the settlement of what the *res gestæ* are and what they mean in terms either of fact or law, possibly be reached within any reasonable limits of time. Indeed, the requirement of substantive law, that reason must be employed by all branches of the tribunal exercising administrative or judicial functions,⁴ is in reality in itself equivalent to and involves a permission and insistence, that the common knowledge of the community should be used equally both by judge and jury.

§ 346. [Common Knowledge]; Administrative Advantages.⁵—Were the forensic use of common knowledge not necessary, it should be adopted and given force and extension by reason of the marked advantages which it places within the reach of the administrative powers of a presiding judge. Few of the administrative duties of such a magistrate are more impressive, especially for the expediting of trials, than the necessity of seeing that any case before him keeps constantly, as it were, turning upon its hinge. That is, attention should be focused at all times on proof of the constituent facts or set of such facts as to which the parties are in dispute. The jury should at no time be allowed to digress to proof of facts which all persons know to be true, or as to which the parties do not care to enter into a contest. As a method of expediting trials⁶ and sustaining meritorious causes in an appellate court⁷ the advantages of steadily extending the forensic use of common knowledge are obvious. The province of the jury, orderly administration and preservation of the rights of the parties alike require that the judge should be the mouthpiece of the mixed tribunal. Facts which the judge rightly regards as commonly known go to the jury as established, without further proof, and the judge may charge the jury to that effect.⁸

§ 347. What Knowledge Is Common.⁹—The test of what knowledge is common is not furnished by any individual judge or any particular jury. Neither of these judicial tribunals may ever have heard of the fact claimed to be “commonly known.” Their ascertainment may require a long course of laborious investigation. Common knowledge covers such facts of notoriety and general

3. *Neville v. Kenney*, 125 Ala. 149, 28 So. 452, 454 (1899). “In seeking to ascertain the unknown from the known, a judicial tribunal is called on to use, apply, reflect upon, and compare a great body of facts and ideas of which it is already in possession, and of which no particle of ‘evidence,’ strictly so called, is ever formally presented in court. And then, in addition, it has to be put in possession of new material. It is this necessity, that of furnishing new matter, which gives occasion for rules of evidence.” *Thayer, Prelim. Treat.*, 270.

4. *Supra*, § 31, 6 *supra*, § 179 *et seq.*

5. 1 *Chamberlayne, Evidence*, §§ 693, 694.

6. *Supra*, § 303 *et seq.*

7. *Campbell v. Wood*, 116 Mo. 196, 22 S. W. 796 (1893); *Hunter v. New York, etc., R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246 (1889).

8. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896); *State v. Laffer*, 38 Iowa 422 (1874).

9. 1 *Chamberlayne, Evidence*, § 695.

acceptance as the ideal judge and jury *should* know; — the knowledge each would have if he were a perfect representative of the community. The tribunal, both court and jury,¹⁰ will assume such facts to be true, without evidence,¹¹ unless and until the judge demands that proof be furnished as to them.

§ 348. [What Knowledge Is Common]; Knowledge as Affected by Jurisdiction.¹²— Courts of general jurisdiction do not treat as matters of common knowledge facts of merely local notoriety. Within limits not well defined, and following, in part, the analogy of the court's knowledge of law, it is, as a rule, rather the community *for* which than the community *in* which the judge is sitting which determines the range of the facts which he will treat as common knowledge.

§ 340. [What Knowledge Is Common]; Restricted Communities.¹³— On the contrary, facts may be regarded as commonly known even by a judge of general jurisdiction; — provided they are so known and understood in a limited community with which the judge is specially familiar and, for which, in a real sense, he may be regarded as sitting.¹⁴

§ 350. [What Knowledge Is Common]; Potential Knowledge.¹⁵— The average community, in addition to facts directly known, has a certain knowledge as to the reach of the knowable, especially along scientific, historical or technical lines, and knows where reliable information concerning them is stored. As to these facts, about which no dispute exists, which are definitely settled, in a particular way, the easy and sensible thing for a court to do is what any intelligent person would do in his private affairs; — “look it up” in an encyclopædia, atlas, scientific treatise or other work of standard authority. The knowledge so acquired is deemed common knowledge.

§ 351. General Notoriety; Classes of Facts so Established; *Res Gestæ*.¹⁶— As elsewhere stated¹⁷ use may be made of common knowledge in the establishment of facts which are outside the necessity for strict proof. Where the fact in question is one of the *res gestæ*,¹⁸ or a probative one necessary to proof of

10. *Com. v. Peckham*, 2 Gray (Mass.) 514 (1854) (gin intoxicating); *Murdock v. Sumner*, 22 Pick. (Mass.) 156 (1839); *Spengler v. Williams*, 67 Miss. 1, 6 So. 613 (1889) (attractiveness to children of loosely piled lumber).

11. *State v. Main*, 69 Com. 123, 37 Alt. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897); *State v. Downs*, 148 Ind. 324, 47 N. E. 670 (1897); *King v. Gallun*, 109 U. S. 99, 3 S. Ct. 85, 27 L. ed. 870 (1883).

12. 1 Chamberlayne, Evidence, § 696.

13. 1 Chamberlayne, Evidence, § 697.

14. Thus, the legal profession is, to a certain extent, the community of all judges. It

is not necessary to prove to a judge facts of a technical nature notorious in the legal profession. In the same way courts dealing customarily with special subjects, as maritime or patent cases, regard as generally known facts commonly agreed upon among persons experienced in the particular branch in which the presiding judge is himself expert. In this connection, these persons constitute the judge's “community.”

15. 1 Chamberlayne, Evidence, § 698.

16. 1 Chamberlayne, Evidence, § 700.

17. *Supra*, § 346.

18. *Supra*, § 31. *Moore v. State*, 126 Ga.

the *res gestæ*,¹⁹ *a fortiori* where it is a constituent fact, either party is entitled to insist within the limits prescribed by reason, that proof shall be furnished as to its existence. It is not, therefore, established by the use of common knowledge.

§ 352. **What Facts Are Covered by the Rule.**²⁰—"Courts will not pretend to be more ignorant than the rest of mankind."²¹ Speaking broadly, the entire range of human knowledge commonly accepted as true in the community for which the court sits is regarded by it as generally known and its correctness is assumed in dealing with the *res gestæ* which are proved to the tribunal.²² An attempt to classify human knowledge in this connection must necessarily be in a sense arbitrary. It falls naturally, however, into certain broad divisions, distinct as a whole, though often indistinct in outline of boundary from cognate classes. Such are facts relating to (1) nature; (2) science; (3) geography; (4) human experience; (5) social life; (6) history; (7) business.

§ 353. **[What Facts Are Covered by the Rule]; Nature.**²³—Notorious facts regarding the order of nature need not be proved. The natural order of events, so far as invariable,²⁴ and obvious to common apprehension are commonly known.²⁵ Of this nature is the succession of the seasons.²⁶

414, 55 S. E. 327 (1906) (former county prohibited sale of liquor).

—Chase v. Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744 (1885); Huntress v. Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600 (1890).

—Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 248 (1874); Minnesota v. Barber, 136 U. S. 313 (1890). On a criminal proceeding for receiving stolen cotton, the court will not dispense with proof that cotton is a thing of value. Wright v. State, 1 Ga. App. 158, 57 S. E. 1050 (1907). "A matter which could legitimately be the subject of inquiry in a court could not well be said to be so well established and to have acquired such notoriety as to come within the judicial knowledge of the court." Chicago, etc., R. R. v. Champion (Ind. 1892), 32 N. E. 874. But see also Com. v. Peckham, 2 Gray (Mass.) 514 (1834) (gin) (intoxicating quality of certain liquor).

19. *Supra*, § 34; Tunnison v. Field, 21 Ill. 108 (1859); Shiverick v. Gunning Co., 58 Neb. 29, 78 N. W. 460 (1899). "This fact ought to have been proved, and not been thus assumed by the court as a historical fact, of which the court could take judicial notice." Simmons v. Trumbo, 9 W. Va. 358 (1876).

20. 1 Chamberlayne, Evidence, § 702.

21. Fisher v. Jansen, 30 Ill. App. 91 (1888).

22. —Jamieson v. Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 (1891).

—Com. v. Pear, 183 Mass. 242, 66 N. E. 719 (1903).

—Gilbert v. Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883); Howard v. Moot, 64 N. Y. 262 [*affirming* 2 Hun 475, 5 Thomps. & C. 89] (1876).

23. 1 Chamberlayne, Evidence, §§ 703-732.

24. Seufferle v. MacFarland, 28 App. Cas. (D. C.) 94 (1906); Rex v. Luffe, 8 East 193, 9 Rev. Rep. 406 (1807). "The natural laws of which courts take judicial notice are such as are of uniform occurrence and invariable in their action." Chicago, etc., R. R. v. Champion (Ind. 1892), 32 N. E. 874 (motion of a freight car under given conditions).

The effect of placing obstructions in streams, so far as uniform, will be commonly known. Tewksbury v. Schulenberg, 41 Wis. 584 (1877) (dams).

25. Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274, 292 (1872); Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47 (1904) (planting time).

26. Tomlinson v. Greenfield, 31 Ark. 557

In other words, the physical world, the operation of the established laws of nature,²⁷ including the application, in a familiar form, of combustion,²⁸ force,²⁹ gravitation,³⁰ momentum,³¹ are not proper subjects of special knowledge; — or, as is usually said, to be proved by expert testimony.

Regularly recurring and approximately uniform succession of *weather* conditions, as heavy rains at a particular season of the year,³² may be a subject of common knowledge. But mere maxims of personal experience — as that a foggy night is followed by a foggy morning³³ — must be established by proof.

The operation of natural laws, fairly invariable in their action, may, as in case of the action of water in running streams, under varied common conditions,³⁴ be facts of notoriety.

This rule includes the divisions of time into hours, minutes,³⁵ etc., the characteristic properties of matter whether solid³⁶ or liquid,³⁷ including intoxicating liquors,³⁸ distilled³⁹ or fermented,⁴⁰ or malt⁴¹ as beer,⁴² lager beer⁴³ and medicines⁴⁴ or wines,⁴⁵ and so also of gaseous substances.⁴⁶

(1876); *Ross v. Boswell*, 60 Ind. 235 (1877). See also *Barber Asphalt Pav. Co. v. City of Wabash* (Ind. App. 1909), 86 N. E. 1034; *First Nat. Bank v. Rogers* (Okla. 1909), 103 Pac. 582 (succession of seasons).

Agricultural seasons, not being fixed by dates, cannot be judicially known with precision. *Gove v. Downer*, 59 Vt. 139, 7 Atl. 463 (1886) (pasture season).

27. *Cooper v. Mills County*, 69 Iowa 350, 28 N. W. 633 (1886) (action of currents). Judicial notice must be taken of the primary physical laws. *Rome Ry. & Light Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468 (1908).

28. *Boothby v. Lacasse*, 94 Me. 392, 47 Atl. 916 (1900) (fire); *Welch v. Franklin Ins. Co.*, 23 W. Va. 288 (1883).

29. *Golson v. State*, 124 Ala. 8, 26 So. 975 (1899) (bullet); *Richardson v. Eureka*, 96 Cal. 443, 31 Pac. 458 (1892) (settling of building); *Weane v. Keokuk, etc., R. Co.*, 45 Iowa 246 (1876); *Passmore v. Passmore*, 60 Mich. 463, 27 N. W. 601 (1886).

30. *Paducah St. R. Co. v. Graham*, 15 Ky. L. Rep. 748 (1894) (fall from car).

31. *Chicago, etc., R. Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497 (1901) (train of cars).

32. *Elser v. Village of Gross Point*, 223 Ill. 230, 79 N. E. 27 (1906).

33. *Texas & N. O. R. Co. v. Langham* (Tex. Civ. App. 1906), 95 S. W. 686.

34. *Morton v. Oregon Short Line Ry. Co.*, 48 Or. 444, 87 Pac. 151, 7 L. R. A. (N. S.) 344 (1906) (freshet). It need not be proved

that when the specific gravity of a log becomes greater than that of water, it sinks to the bottom; or that if the stream has any considerable current, the log is apt to become embedded in the bottom. *Whitman v. Muskegon Log Lifting & Operating Co.*, 152 Mich. 645, 116 N. W. 614, 15 Detroit Leg. N. 383 (1908).

35. *Williamson v. Brandenburg*, 6 Ind. App. 97, 32 N. E. 1022 (1892); *McIntosh v. Lee*, 57 Iowa 356, 10 N. W. 895 (1881); *Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794 (1891); *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768 (1884).

Judicial cognizance is not taken of the hours of the day in England. *Collier v. Nokes*, 2 C. & K. 1012, 5 Exch. 275, 61 E. C. L. 1012 (1849).

36. *Ware v. Chew*, 43 N. J. Eq. 493, 11 Atl. 746 (1887) (brick wall); *Worden's Appeal*, 71 Conn. 531, 42 Atl. 659, 71 Am. St. Rep. 219 (1899) (asphalt); *Newlin v. St. Louis & S. F. R. Co.*, 222 Mo. 375, 121 S. W. 125 (1909) (rotting of wood); *Willis v. Lance*, 28 Or. 371, 43 Pac. 483, 487 (1896) (deflect currents of air).

37. *Wood v. North Western Ins. Co.*, 46 N. Y. 421 (1871).

38. *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049 (1889); *Johnston v. State*, 23 Ohio St. 556 (1873). To the contrary, see *State v. Biddle*, 54 N. H. 379 (1874). See *Garst v. State*, 68 Ind. 101 (1879); *Shaw v. State*, 56 Ind. 188 (1877); *Haines v. Hanrahan*, 105 Mass. 480 (1870). The courts will

§ 354. [What Facts Are Covered by the Rule]; Science.⁴⁷—The rule also includes matters of science⁴⁸ like mathematics,⁴⁹ standards of measure,⁵⁰ value⁵¹ and weight,⁵² the facts of the almanac⁵³ showing the movements of the heav-

take judicial notice of the fact that spirituous and vinous liquors such as whisky, brandy, wine, rum and gin, as well as malt liquors like beer and ale, are intoxicating, but the court cannot take notice that a new drink called "Malt Mead" is intoxicating when it has not become so well known as to have a reputation in the community. *Gourley v. Commonwealth*, 140 Ky. 221, 131 S. W. 34, 48 L. R. A. (N. S.) 315 (1910).

39. *Hodge v. State*, 116 Ga. 852, 43 S. E. 255 (1902); *Schlicht v. State*, 56 Ind. 173 (1877); *Com. v. Morgan*, 149 Mass. 314, 21 N. E. 369 (1889).

40. *State v. McLafferty*, 47 Kan. 140, 27 Pac. 843 (1891); *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92 (1890); *State v. Crawley*, 75 Miss. 919, 23 So. 625 (1898); *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570 (1888).

41 *Wiles v. State*, 33 Ind. 206 (1870). See also *State v. Gill*, 89 Minn. 502, 95 N. W. 449 (1903).

Malt liquor is commonly known to be a general term for an alcoholic beverage produced merely by the fermentation of malt as opposed to those obtained by the distillation of malt or mash. *Marks v. State* (Ala. 1909), 48 So. 864 [citing *Allred v. State*, 89 Ala. 112, 8 So. 56 (1889); *Tinker's Case*, 90 Ala. 647, 8 So. 814 (1889)].

42. *New York*.—*Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049 (1889).

Rhode Island.—*State v. Beswick*, 13 R. I. 211, 220 (1880).

43. *State v. Morehead*, 22 R. I. 272, 47 Atl. 545 (1900); *State v. Rush*, 13 R. I. 198 (1881). *State v. Kibling*, 63 Vt. 636, 22 Atl. 613 (1891). But see *Tinker v. State*, 90 Ala. 647 (1890); *Rau v. People*, 63 N. Y. 277 (1875). See also *Smith v. State*, 113 Ga. 758, 39 S. E. 249 (1901).

Whether bitters, tonics or other compounds are intoxicating is a question of evidence. *State v. Gregory*, 110 Iowa 624, 82 N. W. 335 (1900).

44. *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284 (1881); *Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17, 21 Ky. L. Rep. 222 (1899) (*Jamaica ginger*): *State v. Muncey*, 28 W. Va. 494 (1886) (*essence of cinnamon*).

See also *Robers v. State*, 4 Ga. App. 207, 60 S. E. 1082 (1908); *Mason v. State*, 1 Ga. App. 534, 58 S. E. 139 (1907).

45. *Iowa*.—*State v. Curley*, 33 Iowa 359 (1871).

North Carolina.—*State v. Packer*, 80 N. C. 439 (1879) (port).

Pennsylvania.—*Hatfield v. Com.*, 120 Pa. St. 395, 14 Atl. 151 (1888).

Vermont.—*Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109 (1897) (*Italian sour wine*).

Home-made blackberry wine is not known, judicially, to be intoxicating. *Loid v. State*, 104 Ga. 726, 30 S. E. 949 (1898).

46. *Jamieson v. Indiana Natural Gas, etc., Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652 (1891). Judicial notice will be taken that gas, unlike oil, cannot be brought to the surface and stored to await a market, but must remain in the ground, and, unless allowed to waste away, taken out only when producer can find a customer. *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836 (1909). See also *Indiana, etc., Gas Co. v. State*, 158 Ind. 516, 63 N. E. 220, 222 (1901). That gas pipes always leak is not a subject of judicial cognizance. *Indiana, etc., Co. v. Jones*, 14 Ind. App. 55, 52 N. E. 487 (1895).

47. 1 *Chamberlayne, Evidence*, § 733-748.

48. *Luke v. Calhoun County*, 52 Ala. 115 (1875); *Poor v. Watson*, 92 Mo. App. 89 (1901); *Cox v. Seyenite Granite Co.*, 39 Mo. App. 424 (1890) (gravitation).

49. *Falls v. U. S. Saving, etc., Co.*, 97 Ala. 417, 13 So. 25, 24 L. R. A. 174 (1892); *Scanlan v. San Francisco Ry. Co.* (Cal. 1898), 55 Pac. 694.

50. *Reid v. McWhinnie*, 27 U. C. Q. B. 289 (1868) (a pint is less than five gallons). No proof need be offered that a ten-cent glass of whiskey contains less than three gallons. *State v. Blands*, 101 Mo. App. 618, 74 S. W. 3 (1903); *Tison v. Smith*, 8 Tex. 147 (1852).

51. *Grant v. State*, 89 Ga. 393, 15 S. E. 488 (1892); *McCarty v. State*, 127 Ind. 223, 26 N. E. 665 (1890); *Jones v. State*, 39 Tex. Cr. 387, 46 S. W. 250 (1898).

52. *Mays v. Jennings*, 4 Humph. (Tenn.) 102 (1843); *Hockin v. Cooke*, 4 T. R. 314 (1791); *Reed v. McWhinnie*, 27 U. C. Q. B. 289 (1868). See also *Putnam v. White*, 76

only bodies,⁵⁴ photography,⁵⁵ statistics as the census⁵⁶ and mortality tables⁵⁷ or trade⁵⁸ tables or facts of public health.⁵⁹

§ 355. [What Facts Are Covered by the Rule]; Facts of Geography.⁶⁰—The same considerations apply to facts of geography⁶¹ as the boundaries of a country⁶² or state⁶³ and other political divisions,⁶⁴ what are the commercial

Me. 551 (1884); *Tison v. Smith*, 8 Tex. 147 (1852).

53. *Dawkins v. Smithwick*, 4 Fla. 158 (1851); *People v. Chee Kee*, 61 Cal. 404 (1882); *Wilson v. Van Leer*, 127 Pa. St. 371, 379, 17 Atl. 1097, 14 Am. St. Rep. 854 (1889).

54. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896); *Case v. Perew*, 46 Hun 57 (1887); *Cincinnati, etc., R. Co. v. Worthington*, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478 (1902) (3:20 A. M., October 12th, not daylight). It will be known that in the latitude of Illinois 5 o'clock in the afternoon of July 23d is about two hours before sunset. *Falkeneau Const. Co. v. Ginley*, 131 Ill. App. 399 (1907).

55. *Luke v. Calhoun County*, 52 Ala. 115 (1875); *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464 (1881); *Udderzook v. Com.*, 76 Pa. St. 340 (1874). The court takes judicial notice of the fact that X-ray machines sometimes cause serious burns. *State v. Lester*, 127 Minn. 282, 149 N. W. 297, L. R. A. 1915 D 201 (1914).

56. *Indiana*.—*Whitley County v. Garty*, 161 Ind. 464, 68 N. E. 1012 (1903); *Huntington v. Cast*, 149 Ind. 255, 48 N. E. 1025 (1898); *Stratton v. Oregon City*, 35 Or. 409, 60 Pac. 905 (1900).

57. *Joliet v. Blower*, 155 Ill. 414, 40 N. E. 619 (1895); *People v. Life Ins. Co.*, 78 N. Y. 128 (1879) (vital statistics). See note, *Bender ed.*, 165 N. Y. 171; *Campbell v. York*, 172 Pa. 205, 33 Atl. 879 (1896); *Crouse v. R. Co.*, 102 Wis. 196, 78 N. W. 446 (1899).

58. *Western Assur. Co. v. Mohlmann Co.*, 28 C. C. A. 157, 83 Fed. 811 (1897) (engineering tables). See *infra*, §§ 859c et seq. *Garwood v. R. Co.*, 45 Hun 129 (1887) (millwright's tables); *Hatcher v. Dunn* (Iowa 1896), 66 S. W. 905 (thermometer used in gauging oils); *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 53 (1901) (tide tables for Puget Sound); *Gallagher v. Ry. Co.*, 67 Cal. 16, 6 Pac. 869 (1885).

59. The court will take judicial notice of the fact that the sweepings of the streets contain matter injurious to the public health. *Savannah v. Jordan*, 142 Ga. 409, 83 S. E. 109,

L. R. A. 1915 C 741 (1914). The court may take judicial notice of the fact that hogs when kept in narrow limits are unclean and dangerous to health when kept in a city in the ordinary way. *Ex Parte Botts*, Tex. Crim. Rep., 154 S. W. 221, 44 L. R. A. (N. S.) 629 (1913). The court cannot, however, refuse to enjoin the operation of a gas holder as a nuisance on the ground that it knows that the escape of gas from it is a difficulty which is temporary and can be remedied, as the court should depend on evidence on this point. *Romano v. Birmingham Railway, Light & Power Co.*, 182 Ala. 335, 62 So. 677, 46 L. R. A. (N. S.) 642 (1913).

60. 1 Chamberlayne, Evidence, §§ 749-752

61. *Trenier v. Stewart*, 55 Ala. 458 (1876); *Bittle v. Stuart*, 34 Ark. 224 (1879); *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135 (1878); *Bell v. Barnet*, 2 J. J. Marsh (Ky.), 516 (1829); *U. S. v. La Vengeance*, 3 Dall. (U. S.) 297, 1 L. ed. 610 (1796); *Peyroux v. Howard*, 7 Pet. (U. S.) 324, 8 L. ed. 700 (1833).

62. *Cooke v. Wilson*, 1 C. B. (N. S.) 153, 163 (1856) (Colony of Victoria not in England). See also *Daly v. Old* (Utah 1909), 99 Pac. 460 (extent of territory named in contract). "It is a matter of which this court will take judicial notice, that, by law, the country is divided into collection districts for internal revenue purposes, and in some states there are several of these districts with defined geographical boundaries." *U. S. v. Jackson*, 104 U. S. 41 (1881).

63. *State v. Dunwell*, 3 R. I. 127 (1855); *Harrold v. Arrington*, 64 Tex. 233 (1885); *Thorson v. Peterson*, 9 Fed. 517, 10 Biss. 530 (1881); *King v. American Transp. Co.*, 14 Fed. Cas. No. 7,787, 1 Flipp. 1 (1859); *Toppan v. Cleveland, etc., R. Co.*, 24 Fed. Cas. No. 14,099, 1 Flipp. 74 (1862). Race Island is in the jurisdiction of Illinois. *Gilbert v. Moline Water Power & Mfg. Co.*, 19 Iowa 319 (1865); *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837 (1901); *Hoytt v. Russell*, 117 U. S. 401 (1885).

64. *Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123 (1892).

centers⁶⁵ and natural features like rivers,⁶⁶ railroads,⁶⁷ distances⁶⁸ and common facts about counties,⁶⁹ cities,⁷⁰ including their boundaries,⁷¹ streets and blocks,⁷² even in case of foreign cities,⁷³ and so of towns⁷⁴ and townships⁷⁵ in the jurisdiction or villages.⁷⁶

Maine.—Harvey v. Wayne, 72 Me. 430 (1881).

United States.—U. S. v. Jackson, 104 U. S. 41, 26 L. ed. 651 (1881).

65. Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698 (1884) (Chicago river); State v. Wabash Paper Co., 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949 (1898) (Wabash and Miami rivers). See also State v. Jones, 11 Ohio Cir. Dec. 496 (1900) *Ex parte* Davidson, 57 Fed. 883, 887 (1893) (laying out as the site of a city).

66. Walker v. Allen, 72 Ala. 456 (1882) (all rivers in a particular county are of fresh water). Supperle v. McFarland, 28 App. Cas. (D. C.) 94 (1906) (Potomac); State v. Southern Ry. Co. (N. C. 1906), 54 S. E. 294. No part of the Tallapoosa river is in the city of Montgomery. City Council of Montgomery v. Montgomery, etc., Plankroad, 31 Ala. 76 (1857). See also Thosvold v. Ryglund (Neb. 1908), 116 N. W. 971. It is commonly known that the Arkansas and Poteau rivers bound Ft. Smith on the west. McKenzie v. Newton, 89 Ark. 564, 117 S. W. 553 (1909). The court knows that the Snohomish River flows into Puget Sound. Vail v. McGuire (Wash. 1908), 96 Pac. 1042.

67. Hobbs v. Memphis, etc., R. Co., 9 Heisk. (Tenn.) 873 (1872); Texas & N. O. Ry. Co. v. Walker (Tex. Civ. App. 1906), 95 S. W. 743; Miller v. Texas, etc., R. Co., 83 Tex. 518, 18 S. W. 954 (1892). See also Patterson v. Missouri Pac. Ry. Co. (Kan. 1908), 94 Pac. 138. That the Missouri Pacific is a railroad corporation engaged in interstate commerce may well be a fact of judicial knowledge. State v. Missouri Pac. Ry. Co., 212 Mo. 658, 111 S. W. 500 (1908).

68. Bruson v. Clark, 151 Ill. 495, 38 N. E. 252 (1894); Williams v. Brown, 65 N. Y. Suppl. 1049, 53 App. Div. 486 (1900); Pearce v. Langfit, 101 Pa. St. 507, 47 Am. Rep. 737 (1882).

69. *Connecticut.*—State v. Powers, 25 Conn. 48 (1856).

Illinois.—Gooding v. Morgan, 70 Ill. 275 (1873).

Massachusetts.—Com. v. Desmond, 103 Mass. 445 (1869) (Suffolk county).

70. Baily v. Birkhofer, 123 Iowa 59, 98 N. W. 594 (1904); Goodwin v. Appleton, 22 Me. 453 (1843); French v. Barre, 58 Vt. 567, 5 Atl. 568 (1886); Woodward v. Chicago, etc., R. Co., 21 Wis. 309 (1867).

71. De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237 (1895) (river often mentioned in statutes); *In re* Independence Ave Boulevard, 128 Mo. 272, 30 S. W. 733 (1895); Atchison, T. & S. F. R. Co. v. Paxton, 75 Kan. 197, 88 Pac. 1082 (1907); Houlton v. Chicago, etc., R. Co., 86 Wis. 59, 56 N. W. 336 (1893).

Precise boundaries cannot be judicially known unless established by statute. Boston v. State, 5 Tex. App. 383, 32 Am. Rep. 515 (1879); Brune v. Thompson, 2 Q. B. 789 (1842) (tower of London not known to be within a certain city line in London).

72. Certain considerations are apt to affect the judge's action in any particular instance. (1) Where a plan has been recognized by statute the facts set forth in it will be more readily known [Whiting v. Quackenbush, 54 Cal. 306 (1880); Sever v. Lyons, 170 Ill. 395, 48 N. E. 926 (1897); Armstrong v. Cummings, 20 Hun (N. Y.) 313 (1880)] than when established by dedication or a municipal by-law. [Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283 (1895).] (2) Where judicial knowledge is taken of streets, etc., it is rather of their general direction [Brady v. Page, 59 Cal. 52 (1881); Canavan v. Stuyvesant, 7 Misc. (N. Y.) 113, 27 N. Y. Suppl. 413 (1894); Skelly v. New York El. R. Co., 7 Misc. 88, 27 N. Y. Suppl. 304 (1894)], the existence of the arrangement itself [McMaster v. Morse, 18 Utah 21, 55 Pac. 70 (1898)] and the interrelations in position of the streets, etc., to each other [Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283 (1895); Brady v. Page, 59 Cal. 52 (1881); Gardner v. Eberhart, 82 Ill. 316 (1876).] than an attempt, actually to know of the true position of these ways on the surface of the ground [Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283 (1895); Shepard v. Shepard, 36 Mich. 173 (1877)] or of their definite relations to established monuments [Pennsylvania Co. v. Frana, 13 Ill. App. 91 (1883) (inter-

§ 356. [What Facts are Covered by the Rule]; Facts of Human Experience.⁷⁷

— The broad inductions of experience are “assumed as truths in any process of reasoning by the mass of sane minds.”⁷⁸ A tribunal legally required to render judgments according to reason, must know⁷⁹ such propositions; and counsel may properly use them as a basis of their argument to the jury.⁸⁰ It has even been said that the knowledge is not optional;⁸¹—the use of sound reason is mandatory at all times upon the tribunal.

§ 357. [What Facts are Covered by the Rule]; Standards of Reasonable Conduct.⁸²—The standards of conduct which experience has established in the community are known to its courts.⁸³ An act which this standard of experi-

section of a street with a railroad location, not noticed), or even the actual distances between the streets themselves. [West Chicago St. R. Co. v. Vandehouten, 58 Ill. App. 318 (1895) (Chicago).] (3) Facts relating to streets widely known, because (a), in a great commercial metropolis [Poland v. Dreyfous, 48 La. Ann. 83, 18 So. 906 (1896) (New Orleans)]; *in re* City of New York, 96 N. Y. Suppl. 554, 48 Misc. 602 (1905) (New York); Gruber v. New York City R. Co., 53 Misc. (N. Y.) 322, 103 N. Y. Suppl. 216 (1907) (New York city); Canavan v. Stuyvesant, 7 Misc. 113, 27 N. Y. Suppl. 413 (1894) (New York city)], (b) long established [State v. Ruth, 14 Mo. App. 226 (1883); Breckinridge v. American Cent. Ins. Co., 87 Mo. 62 (1885) (less well-known streets, or their direction, not noticed). See, however, Allen v. Scharinghausen, 8 Mo. App. 229 (1880) (where cognizance was taken of a street number)], (c) located in the place where the court is actually sitting [State v. Ruth, 14 Mo. App. 226 (1883)], will be known by the court as notorious.

A Contrary View.—Several jurisdictions have peremptorily declined judicially to know these ways [Sever v. Lyons, 170 Ill. 395, 48 N. E. 826 (1897); Bailly v. Birkhofer, 123 Iowa 59, 98 N. W. 594 (1904); Ritchie v. Catlin, 86 Wis. 109, 56 N. W. 473 (1893)], and, *a fortiori*, the house numbering on them [Ritchie v. Catlin, 86 Wis. 109, 56 N. W. 473 (1893)].

Grades.—The court may take judicial notice of the fact that many sidewalks in the state have a grade of more than thirteen per cent. Dougan v. Seattle, 76 Wash. 821, 136 Pac. 1165, 51 L. R. A. (N. S.) 214 (1913).

73. Maese v. Hermann, 17 App. Cas. (D. C.) 52 [affirmed in 183 U. S. 572, 22 S. Ct. 91, 46 L. ed. 33] (1900) (Las Vegas in New

Mexico); Phillips v. Lindley, 98 N. Y. Suppl. 423, 112 App. Div. 283 (1906).

74. State v. Simpson, 91 Me. 83, 39 Atl. 287 (1897); Parker v. Burton, 172 Mo. 85, 72 S. W. 663 (1903); Winnipiseogee Lake Co. v. Young, 40 N. H. 420, 429 (1860).

75. Kile v. Yellowhead, 80 Ill. 208 (1875) (coincide with sectional lines); Wright v. Phillips, 2 Greene (Iowa) 191 (1849); Dexter v. Cranston, 41 Mich. 448, 2 N. W. 674 (1879). The exact position of boundary line and facts dependent on that position—whether, for example, the particular township is or is not within a given county—must be proved. Backenstoe v. Wabash, etc., R. Co., 86 Mo. 492 (1885); Mayes v. St. Louis, etc., R. Co., 71 Mo. App. 140 (1897). But see City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123 (1902).

76. U. S. v. Beebe, 2 Dak. 292, 11 N. W. 505 (1880); Chamberlain v. Litchfield, 56 Ill. App. 652 (1894); Shaw v. New York, etc., R. Co., 85 N. Y. Suppl. 91, 85 App. Div. 137 (1903); French v. Barre, 58 Vt. 567, 5 Atl. 568 (1886); Anderson v. Com., 100 Va. 860, 42 S. E. 865 (1902).

77. 1 Chamberlayne, Evidence, § 753.

78. Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274, 292 (1872).

79. Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274, 292 (1872).

80. Philadelphia R. Co. v. Lehman, 56 Md. 209 (1881); State v. Lingle, 128 Mo. 528, 31 S. W. 20 (1895).

81. Whatever is matter of common knowledge and experience, courts are bound to recognize Griffith v. Denver Consol. Tramway Co., 14 Colo. App. 504, 61 Pac. 46, 48 (1900).

82. 1 Chamberlayne, Evidence, § 754.

83. Postal Tel. Cable Co. v. Jones, 133 Ala. 217, 32 So. 500 (1901); Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274, 292 (1872).

ence unhesitatingly stamps as unreasonable will be known to the court to be so,⁸⁴ while conduct which the community's standard of prudence deems permissible will be so regarded by the court.⁸⁵

§ 358. [What Facts are Covered by the Rule]; Facts of Social Life.⁸⁶—No proof need be offered of facts which are well known incidents of the social life of the community. Courts know the customary methods of doing business, prevalent in the community. These will be regarded as notorious,⁸⁷ but not so of local customs.⁸⁸ The courts know also what is customarily known by persons of average intelligence concerning the fine arts,⁸⁹ gaming,⁹⁰ language⁹¹ and its abbreviations,⁹² and the meaning of words⁹³ or phrases,⁹⁴ allusions to well-known literature,⁹⁵ and the state of the mechanic arts⁹⁶ and medicine.⁹⁷

84. *Griffith v. Denver Consol. Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, 48 (1900); *Upton v. Corrigan*, 69 Hun (N. Y.) 320, 23 N. Y. Suppl. 431 (1893) (delay of twenty-nine years in starting to build a church); *Texas, etc., R. Co. v. Cox*, 145 U. S. 393, 12 S. Ct. 905, 36 L. ed. 829 (1892). That electricity is a dangerous and treacherous agent, similar to gunpowder or dynamite and is not to be handled with a low degree of caution, is a fact of common knowledge. *De Kallands v. Washtenaw Home Telephone Co.*, 153 Mich. 25, 116 N. W. 564, 15 Detroit Leg. N. 337 (1908).

85. *Gilbert v. Flint, etc., R. Co.*, 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883) (leaving a box freight car at a highway crossing).

86. 1 Chamberlayne, Evidence, §§ 755-782.

87. *City Electric St. R. Co. v. First Nat. Exch. Bank*, 62 Ark. 38, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535 (1896); *Pfeiffer v. Detroit Bd. of Education*, 118 Mich. 560, 71 N. W. 250, 42 L. R. A. 536 (1898); *Rowland v. Miln*, 2 Hilt. 150 (1858); *Watt v. Hoch*, 25 Pa. St. 411 (1853); *John O'Brien Lumber Co. v. Wilkinson* (Wis. 1904), 101 N. W. 1050; *U. S. v. Arredondo*, 6 Pet. 691, 8 L. ed. 547 (1832).

88. *Sanders v. Brown* (Ala. 1905), 39 So. 732 (on sale of business to secure covenant not to compete); *Schultz v. Ford Bros.* (Iowa 1906), 109 N. W. 614.

89. *Lumley v. Gye*, 2 F. & B. 216, 267, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216 (1833); *Beck, etc., Lithographing Co. v. Evansville Brewing Co.*, 25 Ind. App. 662, 58 N. E. 859 (1900); *Adams Express Co. v. Hoeing*, 9 Ky. L. Rep. 814 (1888).

90. *State v. Burton*, 25 Tex. 420 (1860); *Salomon v. State*, 28 Ala. 83 (1856); *Boullemer v. State*, 28 Ala. 83 (1856); *Lohman v. State*, 81 Ind. 15 (1881).

91. *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328 (1893).

92. *Sheffield Furnace Co. v. Hull Coal, etc., Co.*, 101 Ala. 446, 14 So. 672 (1892) ("F. O. B."); *Heaton v. Ainley*, 108 Iowa 112, 78 N. W. 798 (1899) ("acct."); *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360 (1890) ("Supt."). That "5 x 16," in speaking of shingles, means 5 inches wide and 16 inches long, is a matter of common knowledge. *Birmingham & A. R. Co. v. Maddox & Adams* (Ala. 1908), 46 So. 780. "O. N." signifies "order notify." *Ala. Gt. So. R. Co. v. Organ Power Co.* (Miss. 1908), 46 So. 254 (abbreviations).

93. *Sinnott v. Colombet*, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (1895); *Com. v. Pear*, 183 Mass. 242, 66 N. E. 719 (1903) ("vaccination"); *Simpson v. Press Pub. Co.*, 13 Misc. 228, 67 N. Y. Suppl. 401 (1900).

94. *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149 (1826); *Hoare v. Silverlock*, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624 (1848); *Clarke v. Fitch*, 41 Cal. 472 (1871); *Edwards v. San Jose Printing, etc., Soc.*, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70 (1893); *Greenfield First Nat. Bank v. Coffin*, 162 Mass. 180, 38 N. E. 444 (1894).

95. *Forbes v. King*, 1 Dowl. P. C. 672 (1883). The courts will take the same knowledge as the community at large of matters of literature. *St. Hubert Guild v. Quinn*, 118 N. Y. Suppl. 582, 64 Misc. Rep. 336 (1900).

96. *Phillips v. Detroit*, 111 U. S. 604, 4 S.

The court knows what the community as a whole knows as to animal⁹⁸ or human⁹⁹ life, the moral,¹ mental² or physical³ nature of human beings and diseases,⁴ or vegetable⁵ life. The court also knows the well recognized features of politics,⁶ religion⁷ or the general amusements⁸ of the people or their clothing,⁹ food,¹⁰ household conveniences,¹¹ the payment of taxes,¹² the use of tobacco,¹³ the value of property,¹⁴ or general distribution of wealth.¹⁵

(t. 580, 28 L. ed. 532 (1883); *Parsons v. Seelye*, 100 Fed. 452, 40 C. C. A. 484 (1900); *Heaton-Peninsular Button-Fastener Co. v. Schlochtmeier*, 69 Fed. 592 (1895); *Infra*, §§ 820, 902, 1988, 2404.

97. *Com. v. Pear*, 183 Mass. 242, 66 N. E. 719 (1903) (vaccination).

98. *Fisk v. Chicago, etc., R. Co.*, 74 Iowa 424, 38 N. W. 132 (1888); *Gilbert v. Flint, etc., R. Co.*, 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883); *Meyer v. Krauter*, 56 N. J. L. 696, 29 Atl. 426, 24 L. R. A. 575 (1894).

99. *Ricks v. Broyles*, 78 Ga. 610, 3 S. E. 772, 6 Am. St. 282 (1887).

1. *Fonville v. State*, 91 Ala. 39, 8 So. 688 (1890); *People v. Lou Yeck*, 123 Cal. 246, 55 Pac. 984 (1899); *Gurley v. Butler*, 83 Ind. 501 (drunkenness unfits administrator for his trust) (1882).

2. *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, 292 (1872); *Hunt v. Wing*, 10 Heiske. (Tenn.) 139 (1872).

3. *Hunter v. New York, etc., R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246 (1889). The court does not judicially know that the employment of women more than ten hours in one day is not injurious and not a proper subject of police regulation. *People v. Elerding*, 254 Ill. 579, 98 N. E. 982, 40 L. R. A. 893. Where the question of a child's ability to be of service is in issue and the court is doubtful the jury should pass upon it and the court should not take judicial notice of the fact that a child three years old of vigorous health is of no value for his services to his parents. Many precocious children of very tender years have shown great ability in various ways. *James v. Central of Georgia R.*, 138 Ga. 415, 75 S. E. 431, 41 L. R. A. (N. S.) 795 (1912).

4. *Kiernan v. Metropolitan L. Ins. Co.*, 13 Misc. (N. Y.) 39, 34 N. Y. Suppl. 95 (1895) (pneumonia). See also *Lidwinofsky's Petition*, 7 Pa. Dist. 188 (1898). See also *State v. Fox*, 19 Md. 514, 29 Atl. 601, 47 Am. St. 424 (1894).

5. *Meyers v. Menter*, 63 Neb. 427, 88 N. W. 662 (1902); *Barr v. Cardiff* (Tex. Civ. App. 1903), 75 S. W. 341; *Wetzler v. Kelly*, 83 Ala. 440, 442, 3 So. 747 (1888); *Person v. Wright*, 35 Ark. 169 (1879); *Garth v. Caldwell*, 72 Mo. 622 (1880); *State v. Main*, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897).

6. *State v. Lindahl*, 11 N. D. 320, 91 N. W. 950 (1902).

7. *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 32 L. R. A. 838 (1896); *State v. So. Kingstown*, 18 R. I. 258, 273, 27 Atl. 599, 22 L. R. A. 65 (1893) ("Seventh-day baptists" do not work on Saturday); *State v. District Board*, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330 (1890).

8. *State v. Maloney*, 115 La. 498, 39 So. 539 (1905); *Ex parte Berry*, 147 Cal. 523, 82 Pac. 44 (1905); *U. S. v. Strauss, Bros. & Co.*, 69 C. C. A. 201, 136 Fed. 185 (1905); *Sieberts v. Spangler* (Iowa 1908), 118 N. W. 292.

9. *Wamser v. Browning, King, & Co.*, 95 N. Y. Suppl. 1051, 109 App. Div. 53 (1905).

10. *People v. Meyer*, 44 N. Y. App. Div. 1, 60 N. Y. Suppl. 415 (1899); *People v. Hillman*, 58 N. Y. App. Div. 571, 69 N. Y. Suppl. 66, 15 N. Y. Cr. 394 (1901); *Brown v. Piper*, 91 U. S. 37 (1875) (ice cream freezer); *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721 (1909).

11. *Roberts v. Bennett*, 69 C. C. A. 533, 136 Fed. 193 (1905); *Moeckel v. C. A. Cross & Co.*, 190 Mass. 280, 76 N. E. 447 (1906). The practice of lighting fires with coal oil is commonly known. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 S. Ct. 270 (1909); *P. Hoffmaster Sons Co. v. Hodges*, 154 Mich. 641, 118 N. W. 484, 15 Detroit Leg. N. 926 (1908).

12. *State v. Muttly*, 39 Wash. 624, 82 Pac. 118 (1905).

13. *Austin v. State*, 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478 [affirmed in 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224] (1898); *Kappes v. City of Chicago*, 119 Ill. App. 436 (1903). "Cigars are

§ 359. [What Facts are Covered by the Rule]; Facts of History.¹⁶—Facts of history stand in much the same position, in regard to practical possibilities of proof, as that of facts of science.¹⁷ Certain matters of recent occurrence of a local nature may at times be established by witnesses possessing first-hand knowledge. Other facts may be regularly proven by persons of exceptional skill and training from the use of original documents or other historical data. In exercising his right to make proof of his case according to the practical possibilities of procuring evidence which it presents,¹⁸ a party, to substantiate an historical fact, must, in the average case, rely directly or indirectly, upon hearsay;—either as presented by a witness who has examined treatises on the subject or by production of the treatise itself. The natural, and at times, the necessary resort of one who would seek knowledge on the subject, is to printed works on history. These being excluded as evidence of the truth of the statements contained in them by the rule against hearsay,¹⁹ the administrative expedient is adopted of treating the matter as one of common knowledge and allowing the use of the book to refresh the memory of the court on a point, in many cases, of which it has never heard. The community in general has gained knowledge of certain protruding historical facts in much the same way, to wit, from standard treatises. The court, in like manner, in the absence of evidence to the contrary, will assume the knowledge so gained as correct and proceed to act judicially in accordance with it. More recondite facts, the court, *ex necessitate rei*, will investigate for itself, by action of the judge, with or without the assistance of the parties. The operation of this administrative expedience, supplementing the common knowledge of judge and jury, may cover the entire range of history, sacred or profane;—whether of the world, the nation, state, county or of smaller municipal divisions, cities, towns, parishes, etc.

For example, notorious facts of the world history will be noticed, whether ancient or contemporaneous,²⁰ but not minor facts.²¹ The courts will notice the important facts of the history of their own nation²² as the development

manufactured articles familiar to everybody." *Com. v. Marzynski*, 149 Mass. 68.

14. *Rock Island & E. I. R. Co. v. Gordon*, 184 Ill. 456, 56 N. E. 810 (1900); *Bradford v. Cunard Co.*, 147 Mass. 55, 16 N. E. 719 (1888); *Head v. Hargrave*, 105 U. S. 45, 49 (1881) (expert evidence as to land values). Courts will recognize that a grossly inadequate price is merely nominal. *York v. Leverett* (Ala. 1909) 48 So. 684.

15. *Central of Georgia R. Co. v. Wright*, 125 Ga. 589, 54 S. E. 64 (1906). What facts may not be judicially noticed, specific instances. See note, *Bender Ed.*, 108 N. Y. 56. Of facts concerning the operation of railroads. See note, *Bender Ed.*, 137 N. Y. 302.

16. 1 Chamberlayne, *Evidence*, §§ 783-808.

17. *Supra*, § 698.

18. *Supra*, § 334.

19. *Infra*, § 2700.

20. *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa 1903), 95 N. W. 232 (basis of foreign law); *Dowie v. Sutton*, 227 Ill. 183, 81 N. E. 395 (1907) (Boer war); *Underhill v. Hernandez*, 168 U. S. 18 S. Ct. 83, 42 L. ed. 456 (1897) (Venezuela); *Sears v. The Scotia*, 14 Wall. (U. S.) 170, 20 L. ed. 822 (1871).

21. *Hebblethwaite v. Flint*, 115 N. Y. App. Div. 597, 101 N. Y. Suppl. 43 (1906); *City of Chicago v. Gage*, 237 Ill. 328, 86 N. E. 633 (1908).

22. *U. S. v. Reynes*, 9 How. (U. S.) 127, 147, 13 L. ed. 74 (1850). "The court will take judicial notice of the leading and con-

of commerce,²³ its action in foreign affairs,²⁴ its wars,²⁵ its habits and customs²⁶ and the general course of affairs in important periods like the Civil War.²⁷ The courts know also the history of their own state,²⁸ the history of land titles,²⁹ and industrial development³⁰ such as the establishment of telephones,³¹ mining³² and railroads³³ and the recent general³⁴ and political³⁵ history of the state, including that of the great national parties,³⁶ the results of elections³⁷ and the religious history³⁸ of the state. Even county history,³⁹

trolling events in the history of the country and of the official relations of the principal actors therein to the government; and, in elucidation thereof, also of less important transactions of general and public interest immediately connected therewith, when they have passed into commonly received authentic history." *De Celis v. U. S.*, 13 Ct. of Claims. 117 (1877); *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474 (1891).

23. *Wood v. Cooper*, 2 Heisk. 441 (1871). Compare, however, *Laird v. Folwell*, 10 Heisk. 92 (1872); *Hart v. State*, 55 Ind. 599 (1877).

24. *Neely v. Henkel*, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448 [affirming 103 Fed. 631] (1901); *U. S. v. Reynes*, 9 How. (U. S.) 127, 13 L. ed., 73 (1850).

25. *MacLane's Trial*, 26 How. St. Tr. 797 (1797); *R. De Berenger*, 3 M. & S. 67, 69 (1814) ("so many statutes that speak of a war with France"); *La Rue v. Kansas Mut. L. Ins. Co.* (Kan. Sup. 1904), 75 Pac. 494 (1904).

26. *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548 (1889); *Com. v. Whitney*, 11 Cush. (Mass.) 477 (1853); *Williamson v. Freer*, L. R. 9 C. P. 393, 43 L. J. C. P. 161, 30 L. T. Rep. N. S. 332, 22 Wkly. Rep. 878 (1874); *Robinson v. Jones*, L. R. 4 Ir. 391 (1879); *State v. Chingren*, 105 Iowa 169, 74 N. W. 946 (1898); *Marsh v. Colby*, 39 Mich. 626, 33 Am. Rep. 439 (1878); *Zapf v. State*, 11 Ind. App. 360, 39 N. E. 171 (1894); *Von Mumm v. Wittemann*, 85 Fed. 966, 967 (1898); *The Conqueror*, 166 U. S. 110, 17 S. Ct. 510, 14 L. ed. 937 (1896) (before November 1st).

27. *Brooke v. Filer*, 35 Ind. 402 (1871); *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684 (1870).

28. *Howard v. Moot*, 64 N. Y. 262 [affirming 2 Hun 475] (1876); *State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246, 52 Atl. 1069 (1902).

29. *City of Paterson v. East Jersey Water*

Co. (Ch. 1908), 70 Atl. 472. *Townsend v. Trustees of Freeholders and Commonalty of Town of Brookhaven*, 89 N. Y. Suppl. 982, 97 App. Div. 316 (1904).

30. *Funderburg v. Augusta & A. Ry. Co.*, 81 S. C. 141, 61 S. E. 1075 (1908); *New York Cent. & H. R. R. Co v. Williams*, 118 N. Y. Suppl. 785, 64 Misc. 15 (1909); *Jackson Consol. Traction Co. v. Jackson Circuit Judge*, 155 Mich. 522, 119 N. W. 915, 15 Detroit Leg. N. 1081 (1909).

31. *Wolfe v. Missouri Pacific Railway Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331 (1888), quoted in *Western Union Telegraph Co. v. Rowell* (Ala. 1907), 45 So. 73, 80.

32. *State v. Jacksonville* (Fla. 1904), 37 So. 652 (phosphate); *State v. Indianapolis Gas Co.* (Ind. 1904), 71 N. E. 139; *State v. Barrett* (Ind. 1909), 87 N. E. 7.

33. *Knowlton v. New York, etc., R. Co.*, 72 Conn. 188, 44 Atl. 8 (1899); *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336 (1873); *Knowlton v. R. Co.*, 72 Conn. 188, 44 Atl. 8 (1899); *Miller v. Texas, etc., R. Co.*, 83 Tex. 518, 18 S. W. 954 (1892); *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576, 75 S. W. 375 (1903) (live stock traffic shows yearly increase).

34. *Brooke v. Filer*, 35 Ind. 402 (1871); *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193 (1872); *Douthitt v. Stinson*, 63 Mo. 268 (1876); *Jackson County v. Arnold*, 135 Mo. 207, 36 S. W. 662 (1896); *Taylor v. Rennie*, 35 Barb. (N. Y.) 272 (1861).

35. *State v. Metcalf* (S. D. 1904), 67 L. R. A. 331, 100 N. W. 923.

37. *In re Denny*, 156 Ind. 104, 59 N. E. 359, 52 L. R. A. 722 (1901); *State v. Stearns*, 72 Minn. 200, 75 N. W. 210 (1898).

38. *State v. District Board*, 76 Wis. 177 (1890); *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536 (1898); *State v. District Board*, 76 Wis. 177 (1890).

39. *Hix v. Hix*, 25 W. Va. 481 (1885).

officials,⁴⁰ population by census,⁴¹ and public institutions⁴² unless of minor character⁴³ need not be proved. The court may also know the commercial growth of cities and towns⁴⁴ but not minor facts in connection with them⁴⁵ but may know their officials.⁴⁶

§ 360. [What Facts are Covered by the Rule]; Facts of Business.⁴⁷— Courts regard as commonly known the facts relating to business matters generally accepted as true in the community. “We cannot close our eyes,” say the Supreme Court of the United States, “to the well-known course of business in the country.”⁴⁸ This common course of business,⁴⁹ its instrumentalities, the distinctions between them usually made in various branches,⁵⁰ and the changes which have taken place in it,⁵¹ are matters of such notoriety and generally recognized importance as to warrant, and in a sense, require, that they be treated as matters of common knowledge.⁵²

That the courts of a given county were open in 1861 and 1862 will be judicially known. *Breckenridge Cannel Coal Co. v. Scott* (Tenn. 1908), 114 S. W. 930.

40. *New Jersey*.— *Campbell v. Dewick*, 20 N. J. Eq. 186 (1869) (constable serving as tax collector).

Pennsylvania.— *Rauch v. Com.*, 78 Pa. St. 490 (1875) (treasurer).

Wisconsin.— *Martin v. Aultman*, 80 Wis. 150, 49 N. W. 749 (1891) (sheriff).

41. Thus, where it is claimed that the population of a county is in reality greater than as given by the census, the fact must be proved. *Funderburg v. Augusta & A. Ry. Co.*, 81 S. C. 141, 61 S. E. 1075 (1908).

Actual population is not known to the court, as matter either of common or judicial knowledge. *Adams v. Elwood*, 176 N. Y. 106, 68 N. E. 126 (1903).

42. *State v. Tully* (Mont. 1904), 78 Pac. 760.

43. *Atkeson v. Lay*, 115 Mo. 538, 22 S. W. 481 (1893) (that one is published). *Johnson v. Parke*, 12 U. C. C. P. 179 (1860).

44. *Bookman v. New York El. R. Co.*, 137 N. Y. 302, 33 N. E. 33 [reversing 60 N. Y. Super. Ct. 493, 17 N. Y. Suppl. 951] (1893); *Denegre v. Walker*, 114 Ill. App. 234 (1904) [decree affirmed, 73 N. E. 409 (1905)] (Chicago).

45. *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633, 724 (1847); *McKinnon v. Bliss*, 21 N. Y. 206 (1860); *Chicago, I. & L. Ry. Co. v. Town of Salem* (Ind. 1906), 76 N. E. 631, 634.

46. *Himmelman v. Hoadley*, 44 Cal. 213

(1872) (superintendent of streets); *Fleugel v. Lards*, 108 Mich. 682, 66 N. W. 585 (1898) (marshal); *St. Louis v. Greely*, 14 Mo. App. 578 (1883) (street commissioner); *Alford v. State*, 8 Tex. App. 545 (1880) (marshal); *Fox v. Com.*, 81½ Pa. St. 511 (1875) (aldermen); *Alford v. State*, 8 Tex. App. 545 (1880) (deputy marshal). But see *Himmelman v. Hoadley*, 44 Cal. 213 (1872) (deputy superintendent of streets).

47. 1 Chamberlayne, Evidence, § 809.

48. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 185 (1876).

49. *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 402 (1895); *Howe v. Provident Fund Society*, 7 Ind. App. 586, 504, 34 N. E. 830 (1893) (that applications for insurance are usually made to agents of the company); *City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116 (1895) (thieves dispose of stolen articles through pawn brokers and junk dealers).

50. *City of Kansas City v. Butt*, 58 Mo. App. 237 (1901) (between wholesaler and manufacturer).

51. *Gregory v. Wendell*, 30 Mich. 337, 33 Am. Rep. 390 (1878); *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Mo. App. 347 [reversed in 73 Mo. 389, 39 Am. Rep. 519] (1878); *Sacalaris v. Eureka, etc., R. Co.*, 18 Nev. 155, 51 Am. Rep. 737 (1883).

52. See *Farmers', etc., Bank v. Butchers', etc., Bank*, 28 N. Y. 431, 26 How. Pr. (N. Y.) (1863).

The court may take judicial notice of the usual method of operating crematories. *Abbey Land & Improvement Co. v. Mateo*, 167

§ 361. [What Facts are Covered by the Rule]; Evidence of Skilled Witness not Required.⁵³—The jury need no expert assistance as to the methods of transacting ordinary business which the average man does or may do, or has occasion to observe understandingly at frequent intervals.⁵⁴ For example, general features of the business of selling lumber;⁵⁵ or running wires,⁵⁶ are too well known to require professional aid, though as to the more technical features of the business a different rule prevails.⁵⁷

§ 362. [What Facts are Covered by the Rule]; Various Matters Covered.⁵⁸—No proof need be offered of notorious facts concerning agriculture⁵⁹ as the characteristics of farm animals,⁶⁰ and of ordinary farm products,⁶¹ stock raising,⁶² banking,⁶³ building,⁶⁴ education,⁶⁵ and insurance.⁶⁶ The same rule covers the mechanic arts,⁶⁷ mercantile agencies,⁶⁸ and mining,⁶⁹ but not minor

Cal. 434, 139 Pac. 1068, 52 L. R. A. (N. S.) 408 (1914).

53. 1 Chamberlayne, Evidence, § 810.

54. Georgia R., etc., Co. v. Hicks, 95 Ga. 301, 22 S. E. 613 (1894).

55. Baldwin v. St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918 (1885) (piling lumber); Brown v. Doubleday, 61 Vt. 523, 17 Atl. 135 (1889) (piling bark).

56. Flynn v. Boston Electric Light Co., 171 Mass. 395, 50 N. E. 937 (1898) (among trees).

57. *Infra*, § 362.

58. 1 Chamberlayne, Evidence, §§ 811-847.

59. Raridan v. Central Iowa R. Co., 69 Iowa 527, 530 (1886).

60. Shubrick v. State, 2 S. C. 21 (1870) ("sow"); State v. Abbott, 20 Vt. 537 (1848) ("steer").

61. Putnam v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App. 1906), 94 S. W. 1102 (no pears or apples on trees in January). Courts know that it requires more than a month to raise a crop of cotton. First Nat. Bank v. Rogers (Okla. 1909), 103 Pac. 582.

62. Mathews v. Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085 (1897).

63. Lewis, Hubbard & Co. v. Montgomery Supply Co. (W. Va. 1906), 52 S. E. 1017; Salt Springs Nat. Bank v. Burton, 58 N. Y. 430, 17 Am. Rep. 265 (1874); Lewis, Hubbard & Co. v. Montgomery Supply Co. (W. Va. 1906), 52 S. E. 1017 (in cities and large towns not earlier than 9 A. M.).

64. Duby v. Jackson, 69 Minn. 342, 72 N. W. 568 (1897); Doyle v. New York, 69 N. Y. Suppl. 120, 58 App. Div. 588 (1901); Duby

v. Jackson, 69 Minn. 342, 72 N. W. 568 (1897) ("crushed stone").

65. *In re Oxford Rate Poor-Rate*, 8 E. & B. 184, 92 E. C. L. 184 (1857) (University of Oxford). The State University will be known to be at Eugene. Mayhew v. City of Eugene (Or. 1909), 104 Pac. 727; People v. Maxwell, 84 N. Y. Suppl. 947, 87 App. Div. 391 (1903) (25 years). The court will know, as a matter of common knowledge, that by reason of these changes, one competent to teach 20 years ago is not necessarily so at the present time. People v. Maxwell, 84 N. Y. Suppl. 947, 87 App. Div. 391 (1903); Sinnott v. Colombet, 107 Colo. 187, 40 Pac. 329 (1895).

66. Williams v. Niagara F. Ins. Co., 50 Iowa 561 (1879) (adjusting loss); Perkins v. Augusta Ins. Co., 10 Gray (Mass.) 312, 77 Am. Dec. 654 (1858).

Customary methods of conducting the business of life insurance need not be proved. Thus, it is a matter of common knowledge that life insurance is solicited by agents. Modern Woodmen of America v. Lawson (Va. 1909), 65 S. E. 509 (use of agents).

67. Brown v. Piper, 91 U. S. 37 (1875).

68. Holmes v. Harrington, 20 Mo. App. 661 (1886); Wilmot v. Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394 (1888); Ernst v. Cohn (Tenn. Ch. App. 1900), 62 S. W. 186.

69. Black Diamond Coal-Min. Co. v. Excelsior Coal Co., 156 U. S. 611, 15 S. Ct. 482, 39 L. ed. 553 (1895). "The true meaning of such expressions as shaft, tunnels, levels, chutes, slopes, uprisings, crossings, inclines, etc., signifies instrumentalities whereby and through which such mines are opened, de-

business facts.⁷⁰ The court knows also what are professional occupations⁷¹ and the meaning of medical terms⁷² as well as the general operation of railroads⁷³ and freight⁷⁴ and passenger service.⁷⁵ Well known facts concerning real estate dealings,⁷⁶ stock transactions,⁷⁷ and street railways,⁷⁸ surveying,⁷⁹ telegraphing,⁸⁰ trading,⁸¹ the transportation of the mail⁸² and the business of express companies⁸³ or the length of time consumed in transit from well-

veloped, prospected, improved and worked." need not be proved. *Hines v. Miller*, 122 Cal. 517, 519, 55 Pac. 401 (1898). The court takes judicial notice that explosions occur in the best equipped, best regulated and perfectly ventilated coal mines. *Dickinson v. Stuart Colliery Co.*, 71 W. Va. 325, 76 S. E. 654, 43 L. R. A. (N. S.) 335 (1912).

70. *Clark v. Babcock*, 23 Mich. 164 (1871). It cannot be known that the cutting and boxing of pine trees for turpentine, destroys their value as timber, such not being a uniform result of experience. *Board of Sup'rs of Hancock Co. v. Imperial Naval Stores Co.* (Miss. 1908), 47 So. 177; *Knight v. Empire Land Co.* (Fla. 1908), 45 So. 1025.

71. *O'Reilly v. Erlanger*, 95 N. Y. Suppl. 760, 108 App. Div. 318 (1905).

72. *State v. Wilhite* (Iowa 1907), 109 N. W. 730 ("pathological neurology").

73. *Alabama, etc., R. Co. v. Coskry*, 92 Ala. 254, 9 So. 202 (1890). In like manner the art of measuring railroad embankments, need not be proved. *Scanlan v. Ry. Co.* (Cal. 1898), 55 Pac. 694; *Chicago & M. Electric R. Co. v. Diver*, 213 Ill. 26, 72 N. E. 758 (1904); *Fleischman, Morris & Co. v. Southern Ry.*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519 (1907).

74. *Illinois Cent. R. Co. v. Green*, 81 Ill. 19 (1875); *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373 (1861); *President, etc. v. Cason*, 72 Md. 377, 20 Atl. 113 (1890).

75. *Leary v. Fitchburg Ry. Co.*, 173 Mass. 373, 53 N. E. 817 (1899) (custom in alighting from cars). It need not be proved to a court that more passengers and other persons frequent a station in a large city than in a small town. *Cincinnati, N. O. & T. P. Ry. Co. v. Harrod's Adm'r* (Ky. 1909), 115 S. W. 699. Courts know that a passenger need not retire beyond the range of flyinganders to escape them. He can effectually accomplish the same result simply by shading his eyes. *Houston & T. C. Ry. Co. v. Pollock* (Tex. Civ. App. 1909), 115 S. W. 843.

76. *Anderson v. Blood*, 86 Hun (N. Y.) 244, 33 N. Y. Suppl. 233 (1895).

Mortgagor's payment of charges of negotiating mortgage.—The custom of requiring one borrowing on mortgage to pay all incumbrances and expenses of effecting the loan out of the amount of the loan is a proper subject for judicial knowledge. *Pennsylvania Steel Co. v. Title Guarantee & Trust Co.*, 193 N. Y. 37, 85 N. E. 820 (1908) [judgment reversed, 105 N. Y. Suppl. 1135, 120 App. Div. 879 (1907)] [which affirms 100 N. Y. Suppl. 299, 50 Misc. 51 (1906)].

77. *Fox v. Hale, etc., Silver Min. Co.*, 108 Cal. 369, 41 Pac. 308 (1895).

78. *Meyer v. Krauter*, 56 N. J. L. 696, 29 Atl. 426 (1894); *Cook v. Decker*, 63 Mo. 328 (1876); *Towne v. St. Anthony, etc., Co.*, 8 N. Dak. 200, 77 N. W. 608 (1898); *Bookman v. N. Y. Elevated R. R. Co.*, 137 N. Y. 302 (1893); *Geist v. Detroit City R. Co.*, 91 Mich. 446, 51 N. W. 1112 (1892).

79. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575 (1866); *infra*, §§ 886, 1970, 2384; *Bryan v. Beckley*, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276 (1809); *Putnam v. White*, 76 Me. 551 (1884).

80. *Mobile & O. R. Co. v. Postal T. C. Co.*, 120 Ala. 21, 24 So. 408 (1897); *People v. Western Union Tel. Co.*, 166 Ill. 15, 46 N. E. 731 (1897); *State v. Indiana, etc., R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502 (1892); *Yoree v. Vicksburg, etc., R. Co.*, 110 La. 791, 34 So. 779 (1903).

81. *Kansas City v. Butt*, 88 Mo. App. 237 (1901); *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49 (1897).

82. *Bouden v. Long Acre Square Bldg. Co.*, 86 N. Y. Suppl. 1080, 92 App. Div. 325 (1904). *Ætna Indemnity Co. of Hartford, Conn. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738 (1909) [reargument denied, 74 Atl. 369].

83. *Harper Furniture Co. v. Southern Express Co.*, 144 N. C. 639, 57 S. E. 758 (1907).

known points,⁸⁴ or the meaning of phrases⁸⁵ and methods of transportation,⁸⁶ are also within the rule.

§ 363. **How Actual Knowledge May be Acquired.**⁸⁷— In matters of fact, the actual knowledge of a particular judge may be either greater or less than that of the general community. His knowledge is greater when the attempt is made by him to dispense with evidence of a fact because he chances to know one which is not generally known or ascertainable by resort to a recognized source of information. When it is said that a judge judicially knows a fact, i.e., accepts it as one of common knowledge, it is by no means implied that the judge actually knows it. All that is meant is that he either knows the fact or as to how he may readily learn the truth with regard to it.⁸⁸

Where the judge's actual knowledge is less than that of the average member of the community, or where, for any reason, he declines to know a particular fact, he may do one of several things: (1) He may absolutely decline to know the fact, (2) he may invoke the assistance of the party who requests judicial cognizance, (3) he may investigate the question for himself as a matter of administration, with or without the aid of the parties, i.e., he may gain such light as he can from them and seek fuller mental certitude by an examination conducted in his own way and on his own initiative.⁸⁹

§ 364. **[How Actual Knowledge May be Acquired]; Judge May Decline to Know Fact.**⁹⁰— There is authority for the proposition that it is the duty of the court to take cognizance of facts of common knowledge,⁹¹ if a party asks for it.⁹² But, regarding matters of fact, the better rule is that the court may decline to take any fact as being one of common knowledge—even when it is only a probative one—and may require proof of it.⁹³ A judge is not required to know a particular fact judicially.⁹⁴ He may decline to take any cognizance whatever of an alleged fact of common knowledge.⁹⁵

84. *State v. Seery*, 95 Iowa 652, 64 N. W. 631 (1895); *Williams v. Brown*, 65 N. Y. Suppl. 1049, 53 App. Div. 486 (1900); *Oppenheim v. Leo Wolf*, 3 Sandf. Ch. (N. Y.) 571 (1846); *Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737 (1882).

85. *Kilmer v. Moneyweight Scale Co.* (Ind. App. 1905) 76 N. E. 271; *Vogt v. Shienebeck* (Wis., 1904), 67 L. R. A. 756, 100 N. W. 820.

86. *Gamble v. Central R. Co.*, 80 Ga. 595, 12 Am. St. 276, 7 S. E. 315 (1888); *Michigan R. Co. v. McDonough*, 21 Mich. 165, 194 (1870) (cattle); *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477 (1891); *Isaacson v. New York Cent., etc., R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142 (1884).

87. 1 Chamberlayne, Evidence, § 848.

88. *Ball v. Flora*, 26 App. Cas. (D. C.) 394 (1905).

89. *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859); *Atty.-Gen. v. Drummond*, 1 C. & L. 210, 1 Dr. & Wal. 353 (1842).

90. 1 Chamberlayne, Evidence, § 849.

91. *State v. Magers*, 35 Or. 520, 57 Pac. 197 (1899) (time of sunset); *Gilbert v. Flint, etc., R. Co.*, 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883).

92. *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37 (1902).

93. *People v. Mayes*, 113 Cal. 618, 45 Pac. 861 (1896); *Littlehale v. Dix*, 11 Cush. (Mass) 364 (1853) (distance between places).

94. *Hunter v. N. Y., O. & W. R. Co.*, 116 N. Y. 615, 621, 23 N. E. 9 (1889); *In re Osborne*, 52 C. C. A. 595, 115 Fed. 1 (1902).

§ 365. [How Actual Knowledge May be Acquired]; May Require Aid of Parties.⁹⁶— In such an event, the party is put to his proof.⁹⁷ While a judge may properly require that the parties aid him by evidence in completing or refreshing his knowledge as to matters of general notoriety, he cannot require evidence from the parties as to matters which he is required *judicially* to know, e.g., the adoption of a constitution or of an amendment to it.⁹⁸ Naturally, however, a judge is at liberty to use his common knowledge in discharging his judicial function in announcing a rule of law. In construing statutes the court is ruling on a matter of law.⁹⁹ The judge may, therefore, in preparing to do so, reject any evidence offered by the party which is contrary to his judicial knowledge,¹ or may, in his discretion, request such evidence, or take judicial cognizance of relevant facts.² But, in such cases, the knowledge is *judicial*, rather than common.

§ 366. [How Actual Knowledge is Acquired]; Examination by Judge.³— The course and range of any investigation carried on by the judge, or under his direction, is entirely within his administrative power; — i.e., as is commonly said, it is a matter entirely within his own discretion. As in cases involving judicial knowledge of law,⁴ the judge is preparing himself to discharge a judicial function. The responsibility is entirely his and the test from the sources from which information is to be sought is absolutely subjective; — i.e., as to what is helpful to him, individually.⁵ He is controlled by no rules of evidence. Nor need he be required to hear testimony on such a subject.⁶ He may inquire of others, in whom he has confidence.⁷ It is open to him to adopt or reject the suggestion of a party,⁸ as he deems most in accordance with his

On the contrary, a judge cannot well regard a fact as of common knowledge which is recognized as being otherwise by a statute. *Timmon v. Manufacturers' Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565 (1909).

95. *Cary v. State*, 76 Ala. 78 (1884); *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813 (1883); *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444 (1887).

96. 1 Chamberlayne, Evidence, §§ 850, 851.

97. *People v. Mayes*, 113 Cal. 618, 45 Pac. 861 (1896); *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444 (1887).

98. *State v. Board of Com'rs of Silver Bow County*, 34 Mont. 426, 87 Pac. 450 (1906).

99. *Supra*, § 57.

1. *Com. v. Marzynski*, 149 Mass. 68, 21 N. 228 (1889).

2. *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 93 Am. St. Rep. 431 (1901).

3. 1 Chamberlayne, Evidence, §§ 852-855.

4. *Supra*, § 316.

5. *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81,

43 Am. St. Rep. 100 (1894); *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688 (1894); *Littlehale v. Dix*, 11 Cush. 364 (1853); *Hunter v. New York, etc., R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246 (1889); *Underhill v. Hernandez*, 168 U. S. 250, 18 S. Ct. 83, 42 L. ed. 456 (1897).

6. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896); *State v. Main*, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623 (1897) (what "peach yellows" means).

Massachusetts.—*Com. v. Marynski*, 149 Mass. 68, 21 N. E. 228 (1889) (meaning of phrase "drugs and medicines").

7. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896). "The rule has been held in many instances to embrace information derived informally by inquiry from experts." *Gordon v. Tweedy*, 74 Ala. 232 (1883).

8. *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100 (1894); *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859).

own needs. He may consult official records,⁹ or public documents of any kind,¹⁰ almanacs¹¹ or calendars,¹² historical works¹³ or encyclopedias.¹⁴

§ 367. [How Actual Knowledge is Acquired]; Function of the Jury.¹⁵— In cases where the jury are to decide an issue of fact on which they use matters as to which they may take judicial cognizance, the judge may properly permit them to examine publications such as histories,¹⁶ encyclopedias¹⁷ and the like, which he feels will aid them in reaching a correct conclusion as to the fact to be judicially known. He will so exercise his administrative power as to allow them to consider only such printed statements as are relevant, because made by a person of adequate knowledge and without motive to misrepresent.¹⁸

§ 368. [How Actual Knowledge is Acquired]; Books not Evidence.¹⁹— The publications resorted to for the purpose of enabling the judge to ascertain a fact of common knowledge are not, in reality, evidence at all.²⁰ They are used merely for the purpose of aiding the "memory and understanding of the court."²¹ While therefore the publications, books and other documents may be rejected when offered as evidence,²² as it is deemed irregular to receive them,²³ the irregularity of receiving them as evidence may take place and still

9. *People v. Williams*, 64 Cal. 87, 27 Pac. 930 (1883) (census); *State v. Wagner*, 61 Me. 178, 186 (1873) (census); *Whiton v. Albany City Ins. Co.*, 109 Mass. 24 (1871) (census); *Kirby v. Lewis*, 39 Fed. 66 (1889) (land office).

10. *Keyser v. Coe*, 37 Conn. 597 (1871); *McMillen v. Blattner*, 67 Iowa 287, 25 N. W. 245 (1885). See also *In re Decatur St. in City of New York*, 117 N. Y. Suppl. 855, 133 App. Div. 321 (1900) [order reversed, *Walker v. Schauf*, 196 N. Y. 286, 89 N. E. 829.]

11. *Louisville, etc., R. Co. v. Brinkerhoff*, 119 Ala. 606, 24 So. 892 (1898); *Montenes v. Metropolitan St. R. Co.*, 78 N. Y. Suppl. 1059, 77 App. Div. 493 (1902).

12. *Cohn v. Kahn*, 14 Misc. (N. Y.) 255, 35 N. Y. Suppl. 829 (1895).

13. *Darby v. Ouseley*, 1 H. & N. 1, 12 (1856) (Papal excommunication of kings, etc.). *Charlotte v. Chouteau*, 33 Mo. 194, 201 (1862) (*Garner's History of Canada*). A history of the Southern Confederacy, "The Lost Cause," may be resorted to for dates and events. *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174 (1867). *Keyser v. Coe*, 37 Conn. 597 (1871); *Com. v. Alburger*, 1 Whart. (Pa.) 469 (1836); *U. S. v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. No. 15,958 (1872). "Information to guide their judgment may be obtained by re-

sort to original documents in the public archives or to books of history or science or any other proper source." *Hoyt v. Russell*, 117 U. S. 401 (1885).

14. *Steinbrunner v. R. Co.*, 146 Pa. 504, 515, 23 Atl. 239 (1892) (*Britannica*: preparation of life tables).

15. 1 Chamberlayne, Evidence, §§ 856, 857.

16. *McKinnon v. Bliss*, 21 N. Y. 206 (1860); *Gregory v. Baugh*, 4 Rand. (Va.) 611 (1827).

17. *Stainer v. Droitwich*, 1 Salk. 281 (1695) (*Camden's Britannica*).

18. *Evans v. Getting*, 6 C. & P. 586, 25 E. C. L. 587 (1834).

19. 1 Chamberlayne, Evidence, § 858.

20. *Mobile, etc., R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169 (1890) (almanac).

United States.—*Brown v. Piper*, 91 U. S. 37, 42, 23 L. ed. 200 (1875) (dictionaries).

21. *Nix v. Hedden*, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 (1892).

22. *Louisville & N. R. Co. v. Brinkerhoff*, 119 Ala. 606, 24 So. 893 (1898) (almanac to show sunset); *Com. v. Marzynski*, 149 Mass. 68, 21 N. E. 228 (1889); *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389 (1879); *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859).

23. *Rodger v. Kline*, 56 Miss. 808, 31 Am. Rep. 389 (1879).

no error be committed.²⁴ The parties, in fact, have no rights in the matter whatever.

§ 369. [How Actual Knowledge is Acquired]; Standard Treatises.²⁵— On a matter pertaining to geography resort may be had to maps,²⁶ geographies,²⁷ histories,²⁸ public documents²⁹ in general. The meaning of words as a rule may be ascertained by a resort to the dictionary,³⁰ glossaries,³¹ grammars,³² for scientific words to an appropriate treatise,³³ or, in case of a word of archaic or other than current meaning, to works of history,³⁴ or other publications.³⁵ As has been said the only administrative danger in the use of standard treatises is that the jury may abuse the statements by taking them as probative facts.

Situations arise upon which opposing views may reasonably be held and incessantly clash. Persons of equal training and intelligence may not unnaturally "take sides" on such a question and partisanship thus replace the disinterested search for truth. But it is evident that these characteristic differences between a complete and an incomplete induction in reality sketch the essential differentiations between an exact and an inexact science. Where the statement of a standard authority relates to some part of the subject-matter of an exact or mathematical science, i.e., where the deduction follows from the relations between the parts of hypothetical constructions involving no observation of fact but taking cognizance only of the creations of the mind,³⁶ the danger of error is reduced to a minimum. The result *must*, if correctly worked out, correspond to the postulate;—for the dealing is altogether with arbitrary subjective conceptions rather than with the realities of objective existence.

Where the science with regard to which the treatise speaks is an inexact or moral one, an entirely different administrative situation is presented. The conclusions of the text writer now rest not, as in case of the exact science, upon arbitrary assumptions or hypotheses, but upon the objective reality of nature;—from the intricacy of whose manifestations various inferences may properly

24. *Cook v. State*, 110 Ala. 40, 47, 20 So. 360 (1895) (Webster's International Dictionary). But see *Atty.-Gen. v. Dublin*, 38 N. H. 459, 516 (1859).

25. 1 Chamberlayne, *Evidence*, §§ 859-864.

26. *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530 (1901).

27. *U. S. v. The Montello*, 11 Wall. (U. S.) 411, 20 L. ed. 191 (1870).

28. *Keyser v. Coe*, 37 Conn. 597 (1871); *State v. Wagner*, 61 Me. 178 (1873); *U. S. v. The Montello*, 11 Wall. (U. S.) 411, 20 L. ed. 191 (1870).

29. *Keyser v. Coe*, 37 Conn. 597 (1871); *State v. Wagner*, 61 Me. 178, 190 (1873).

30. *Illinois*.—*Parker v. Orr*, 158 Ill. 609, 41 N. E. 1003 (1895) (Webster).

United States.—*Nix v. Hedden*, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 (1892) ("fruit" and "vegetable").

31. Answer of Judges, 22 How. St. Tr. 302 (1789).

32. Answer of the Judges to the House of Lords, 22 How. St. Tr. 302 (1789).

33. *State v. Wilhite* (Iowa 1907), 109 N. W. 730 (medical).

34. *Atty.-Gen. v. Dublin*, 38 N. H. 459, 516 (1859).

35. *Com. v. Kneeland*, 20 Pick. (Mass.) 206 (1838); *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859).

36. Cent. Dict. *in verbo* SCIENCE.

be drawn. The administrative danger of permitting the unsworn written statement of an author to act with an indiscriminating tribunal as proof of the facts asserted in it remains unabated.

Probative facts are frequently proved by such means especially in case of mathematical calculations³⁷ as those contained in mortality tables³⁸ or trade manuals,³⁹ as well as historical works to prove ancient facts,⁴⁰ or market reports,⁴¹ registers of pedigree⁴² and the like. The same considerations apply to deliberative facts⁴³ which may be shown to the jury by means of dictionaries,⁴⁴ encyclopedias, histories⁴⁵ and law reports⁴⁶ and this use is often approved by statute.⁴⁷

Courts have however often declined to use this practice on the ground that it is a clear infringement on the hearsay rule.⁴⁸

§ 370. [How Actual Knowledge is Acquired]; Testimony of Skilled Wit-

37. *Huffman v. Click*, 77 N. C. 55 (1877).

38. *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 538, 88 N. W. 1078 (1902); *Sternfels v. Metropolitan St. R. Co.*, 174 N. Y. 512, 66 N. E. 1117 [*affirming* 77 N. Y. Suppl. 309, 73 App. Div. 494] (1903).

Mortality tables may be put in evidence to show probable length of life where injuries claimed are permanent. *Coons v. Pritchard*, 69 Fla. 362, 68 So. 225, L. R. A. 1915 F 558 (1915).

Mortality tables may be admissible even in a case of a person afflicted with ill-health or diseased or in a hazardous employment. Such evidence may impair or destroy their probative effect but it does not make them inadmissible. *Broz v. Omaha Maternity, etc., Ass'n.*, 96 Neb. 648, 148 N. W. 575, L. R. A. 1915 D 334 (1914).

39. *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 651 (1897) (engineers tables on strength of materials). *Jones v. McMillan*, 129 Mich. 86, 88 N. W. 206 (1901); *Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. 622 (1900); *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55 (1901).

40. *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833).

41. *Nash v. Classen*, 163 Ill. 409, 45 N. E. 276 (1896); *Aulls v. Young*, 98 Mich. 231, 57 N. W. 119 (1893); *Terry v. McNiel*, 58 Barb. (N. Y.) 241 (1870); *Cliquot v. U. S.*, 3 Wall. (U. S.) 114, 18 L. ed. 116 (1865).

42. *Pittsburgh, etc., R. Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732 (1897); *Louisville, etc., R. Co. v. Frazee*, 71 S. W. 437, 24 Ky. L. Rep. 1273 (1903).

43. *Western Assur. Co. v. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561 (1897).

44. *Nix v. Hedden*, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 (1893); *Zante Currants*, 73 Fed. 183 (1896). See also *Cook v. State*, 110 Ala. 40, 20 So. 360 (1895).

45. *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. ed. 781 (1833); *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857) (report of secretary of state from a state historical collection); *Com. v. Alburger*, 1 Whart. (Pa.) 469 (1836); *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa 1903), 95 N. W. 232 (*Bouvier's Dictionary as to law of Mexico*).

46. *Supra*, § 333; *Mackay v. Easton*, 19 Wall. (U. S.) 619, 22 L. ed. 211 (1873) [*affirming* 16 Fed. Cas. No. 8,843, 2 Dill. 41]. See also *Stayner v. Baker*, 12 Mod. 86 (1796). *Donellan v. Hardy*, 57 Ind. 393 (1877); *Freeman v. Bigham*, 65 Ga. 580 (1880); *Charlotte v. Chouteau*, 33 Mo. 194 (1862); *Marguerite v. Chouteau*, 33 Mo. 540 (1862); *Inge v. Murphy*, 10 Ala. 885 (1846); *Billingsley v. Dean*, 11 Ind. 331 (1858); *Musser v. Stauffer*, 192 Pa. St. 398, 43 Atl. 1018 (1899).

47. *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419 (1894).

48. *Bloomington v. Schrock*, 110 Ill. 221 (1884); *Epps v. State*, 102 Ind. 539, 550, 1 N. E. 491 (1885); *Com. v. Marzynski*, 149 Mass. 72, 21 N. E. 228 (1889); *New Jersey Z. & I. Co. v. L. Z. & I. Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

nesses.⁴⁹—Should the court decline to learn, in this way, the existence of a fact of common knowledge, the only available method is to use the witness of special knowledge, the “expert,” as he is called.⁵⁰

§ 371. **How Far Knowledge is Binding.**⁵¹—The effect of the court’s taking judicial or common knowledge has been said, by certain courts, to be final. The reasoning is that judicial knowledge takes the place of *proof*—consequently, that it is proof and equally conclusive.⁵² A marked difference apparently exists, however, in this connection, according as the knowledge of the judge is judicial or common;—i.e., according as the court’s knowledge relates to matter of law, or to matter of fact.

§ 372. [**How Far Knowledge is Binding**]; **Matter of Fact.**⁵³—The line of demarcation between law and fact is frequently, however, hard to draw. This is not to be regarded as unexpected in case of a differentiation which has no basis in the reality of things. Indeed, to refuse to hear evidence, whether this is done by way of a so-called “conclusive presumption,” or of judicial cognizance, is, in itself, to leave the field of fact and lay down a rule of substantive law. But so far as the court’s knowledge retains the position of an assumption of the truth of a notorious fact or of easily accessible statements, a party should be permitted to contravene and, if possible, control, the judge’s opinion.

§ 373. [**How Far Knowledge is Binding**]; **Matter of Law.**⁵⁴—As a matter of course the action of the parties cannot conclude the judicial knowledge of the court with regard to matters of law. In this class would therefore fall the construction of a document, the effect of a public statute and so on.⁵⁵ The court may properly decline to hear evidence to aid it in construing a statute.⁵⁶ or other document. It is eminently proper to hold, in such cases, that where a judge reaches a wrong conclusion in knowing judicially such a fact the act is as much error as if he had mistaken a rule of law.⁵⁷

Where the knowledge is judicial, i.e., relates to matter of law, the action of the judge is final, for the purposes of the case;—even in connection with the direct results of law, or with respect to the construction of a statute, where the matter is for the judge, though properly one of fact.⁵⁸ Thus, a judge in construing a statute is not required to hear evidence to an effect which he feels is

49. 1 Chamberlayne Evidence, § 865.

50. *Infra*, § 713 Stoudenmeier v. Williamson, 29 Ala. 558 (1857).

51. 1 Chamberlayne Evidence, § 866.

52. Com. v. Marzynski, 149 Mass. 68 (1889); Thomson-Houston, etc., Co. v. Palmer, 52 Minn. 174, 177, 53 N. W. 1137 (1893); Brown v. Piper, 91 U. S. 37, 43 (1875).

53. 1 Chamberlayne Evidence, § 867.

54. 1 Chamberlayne Evidence, § 868.

55. People v. Oakland Water-Front Co., 118 Cal. 234, 50 Pac. 305 (1897) (incorporation of a city).

56. Com. v. Marzynski, 149 Mass. 68, 72, 21 N. E. 228 (1889). *Supra*, § 57.

57. Gilbert v. Flint, etc., R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592 (1883); U. S. v. One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. No. 15,958 (1872).

58. *Supra*, § 57.

contrary to common knowledge.⁵⁹ In other words, the situation is administrative where the knowledge of the trial judge is *judicial*. The parties have no more right to control by their agreements the action of the court than they would have to determine, in the same way, what should be the rule of law applicable to the case. The judge is preparing to discharge an administrative function and he is entirely unfettered, except by the rules of reason, as to what effect he may give the information, arguments or agreements of the parties.

§ 374. **Cognizance as Affected by Action of the Parties; Waiver.**⁶⁰—To the number of facts not requiring proof because judicially noticed as commonly known may properly be added facts of little or no notoriety which are assumed as true during the course of the trial because asserted on the one side and not denied on the other. No rule of law demands that a party should insist upon proof of such facts. Few administrative expedients for expediting trials are more effective in the hands of a competent judge than this recognition that not all facts are controverted between the parties with equal vehemence. While not intruding into the actual management of the case so far as to remove the function of initiative from the parties where it properly belongs, wise judicial administration may well employ a considerable portion of its energy in increasing, in any given case, the number of uncontroverted facts. It not infrequently happens that this is, intentionally or unintentionally, accomplished by the presiding justice through the formula of announcing that he judicially knows a certain fact, or that it is commonly known.

59. *Ex parte Kair* (Nev. 1905), 80 Pac. 463 (that prolonged labor in a mill for re-
 ducing ores is not prejudicial to health).

60. 1 Chamberlayne, Evidence, § 869.

CHAPTER X.

KNOWLEDGE; SPECIAL.

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§ 375. **Special Knowledge.**¹— Secondary in importance only to the judicial or law knowledge of the judge ² and the common knowledge of both judge and jury as to facts of notoriety ³ is the *special* knowledge of skilled or experienced witnesses; — the consideration of which will occupy the present chapter. The judicial office of special knowledge is to supply the inadequacies of the common knowledge of the jury. The underlying necessity for using it is the limited experience of the average member of the community. As is elsewhere observed, and as, indeed, is obvious, the inferences which both court and jury are constantly drawing as a very large part of the required exercise of reason in connection with their judicial acts, rest ultimately upon some general proposition of experience which is part of common knowledge. From this as a major premise, and some fact in evidence as a minor, a conclusion is reached. This, in its turn, alone or in connection with other facts, becomes the major premise of a second and usually more comprehensive syllogism, and so on, until the supposed *res gestæ* are established.

1. 1 Chamberlayne, Evidence, § 870.

3. *Supra*, § 351.

2. *Supra*, § 316.

§ 376. [Special Knowledge]; Reason for Excluding Knowledge in General.⁴

— In testifying to special knowledge, rather than particular knowledge a witness is exercising a function usually denied to those who testify. Witnesses are not to reason.⁵ The precise basis for this rule is that it is not, in general, within the province of a witness to state *knowledge*. In view of the fact, just mentioned, that the major premise of reasoning is some proposition derived ultimately from experience in the community which, as affected by reflection and the experience of others constitutes common knowledge, the use of reason on the part of a witness implies and requires the transfer into the case of the general or special knowledge of the witness, in the form of his inference, conclusion or judgment.⁶ Common knowledge it is the function of the counsel, judge and jury to utilize in course of the reasoning process. The witness, so far as reasonably feasible, must be content to furnish eyes and ears for the tribunal, to place a judge and jury, to the extent of his ability, in the position of original observers of the scene reproduced in the evidence. This is his ancient oath and at all times his characteristic duty.⁷ His office is as it were to supply the “raw materials” for judgment, the minor premises of logical syllogisms of which knowledge or, more direct experience, supplies to each a major premise.

§ 377. [Special Knowledge]; Administrative Action of Judge.⁸— As an administrative matter, the right of a party to prove his case by the best evidence in his power is paramount.⁹ Unquestionably it is the general procedural rule, dating from very early times in English law,¹⁰ that jurors should reason and witnesses should not. To harmonize these two administrative or procedural principles, the court is, in effect compelled to say, that so far as the common knowledge of the jury enables them rationally to deal with a particular set of facts, they must be permitted to do so; and that where they are not, the proponent may supplement this general knowledge by special knowledge or even by inferences from such special knowledge. In other words, as to matters of common knowledge, a jury can, generally speaking, gain nothing of essential value from the judgment of witnesses, however experienced or skillful.¹¹ To form the major premise of the syllogism which gives relevancy to any minor premise supplied by a fact in evidence knowledge is needed. So far as possible, this knowledge should be that of the average juror, i.e., common knowl-

4. 1 Chamberlayne, Evidence, § 871.

5. *Infra*, § 672 *et seq.*

6. His conclusion is a function of two variables; — (1) the knowledge of the witness and (2) the existence of certain facts as proved by the evidence. To receive his conclusion imports his general knowledge and accepts his *finding* as to the effect of the evidence or phenomena observed by him.

7. *Infra*, § 674.

8. 1 Chamberlayne, Evidence, § 872.

9. *Supra*, § 149.

10. *Supra*, § 120.

11. *Compton v. Bates*, 10 Ill. App. 7th (1881); *Knoll v. State*, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704 (1882); *Wright v. Com.*, 72 S. W. 340, 24 Ky. L. Rep. 1838 (1903); *Hovey v. Sawyer*, 5 Allen 554 (1863); *McCall v. Moschcowitz*, 10 N. Y. Civ. Proc. 107 (1886).

edge. Whenever a judge finds, as a matter of administration, that in his opinion, the common knowledge of the jury may reasonably be assumed to be insufficient, he may properly allow it to be supplemented by that possessed by persons of special experience. With regularity and little consideration, the judge will permit relevant *facts* of special knowledge and experience to be placed before the jury. With greater hesitancy and the establishment of stronger administrative reasons, he will allow the skilled witness, as an expert, to use his own mental faculties upon the basis of this special knowledge in the formation of judgments, in which the facts in evidence, or certain of them, constitute the minor premise, being submitted to the witness by means of hypothetical questions.¹²

§ 378. [Special Knowledge]; Necessity of Relevancy.¹³— It follows from what has been said that evidence of special knowledge is not only supplementary to common, but that it is, in a sense, secondary to it. Under these circumstances, the ordinary rule of administration obtains that the secondary evidence will be admitted only (1) when an adequate forensic necessity has been shown for using it and, (2) that it be affirmatively shown by the proponent or assumed by the court that the secondary evidence is relevant, i.e., is from a person of adequate knowledge and without controlling motive to misrepresent.

§ 379. [Special Knowledge]; Adequate Knowledge.¹⁴— Among the elements of relevancy those which are subjective are of special importance in this connection and, as between the two elements of subjective relevancy, adequate knowledge is of higher consequence. The testimony of a skilled witness may be valuable to the jury if he be suitably equipped by professional knowledge and experience although biased in favor of the party calling him, while, however disinterested he may be, his evidence will be of little value should he know nothing about the technical subject on which he proposes to testify. It is therefore an important part of the administrative action of the court in this connection that only such technical testimony should be allowed to go to the jury as is reasonably calculated to aid their deliberations. The skilled witness may, as a matter of course, testify to the same facts as would an ordinary witness — the “man on the street.” But he may go further, into fields where an ordinary witness cannot follow him and it is in these that his qualifications become of especial importance. In other words, the skilled observer may

12. *Infra*, §§ 816 *et seq.* The principle being entirely settled that common knowledge is to be primarily relied upon as the major premise for judicial inferences so far as it extends, to the exclusion of “expert knowledge,” so called, a ruling or finding as to the admissibility of the judgments of skilled witnesses is, in effect, deciding as to what constitutes common knowledge. If expert testimony is rejected it amounts to a

holding that the subject-matter is sufficiently within the common knowledge of the jury to enable them to deal with it in a satisfactory manner.

Per contra, admitting expert knowledge is in reality a ruling or finding that the common knowledge of the jury is inadequate to deal with the matter disclosed in the evidence.

13. 1 Chamberlayne, Evidence, § 873.

14. 1 Chamberlayne, Evidence, § 874.

testify as to any relevant fact but should it be one of special knowledge,¹⁵ i.e., one connected with a particular profession, trade or calling, the court will require that the witness should qualify as possessing the knowledge appropriate to a member of it.¹⁶ Such a fact may either have been one observed by him¹⁷ or generally known in the calling in which his experience lies. An individual fact of common technical knowledge may have fallen but rarely under his own observation; he may not have chanced actually to observe it at all. That makes no difference.¹⁸

§ 380. **Technical or Scientific Facts.**¹⁹— The development of the modern law of evidence requires that knowledge, in many and varied directions, should be brought to the jury to supplement their common knowledge. The complexity of business or social life and the rapidly expanding field of knowledge leave common knowledge but a sorry tool with which to shape the reasoned conclusions of the jury. The deficiency is obvious. The best method of supplying it is not so clear. Apart from an essential modification of the jury system and its replacement by a more scholarly and teachable tribunal, the remedies adopted in main are three. 1. A direct extension of the scope of common knowledge through investigations conducted by the presiding judge as the executive officer of the court.²⁰ 2. Where the jury may be so informed concerning matters outside their judicial knowledge as to be able to co-ordinate them into a reasonable judgment, suitably skilled witnesses will be permitted to state appropriate facts to them. They are then left to exercise their function of judging without further assistance. 3. Where the knowledge required for drawing a reasonable inference from the facts covers matters which are too numerous to be readily imparted to the jury from the witness stand or requires for its adequate appreciation certain specially developed qualities of mind or habits of looking at things only obtained by specialized training, the facts assumed to exist in the jury's mind are placed before the skilled witness in the form of a hypothetical question and he is permitted to state the judgment which his learning, skill and training enable him to form;— the jury, in turn, being at liberty to follow the mental operations of the skilled witness, precisely, within limits of reason, as they see fit.

§ 381. **[Technical or Scientific Facts]; Administrative Considerations.**²¹— The incessant operation of slight differences of fact produces, in addition to lack of

15. *Supra*, § 375.

16. *Osborne v. Troup*, 60 Conn. 485, 23 Atl. 157 (1891); *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307, 80 N. W. 644 (1899).

17. *Infra*, §§ 713 *et seq.*

18. *Boswell v. State*, 114 Ga. 40, 39 S. E. 897 (1901); *Helfenstein v. Medart*, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294 (1896); *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625 (1903); *Fordyce v. Moore*, (Tex.

Civ. App. 1893) 22 S. W. 235. Where a witness has never personally done an act of which he has learned the theory, but thinks he could do it if called upon he is not necessarily to be excluded. *Childs v. O'Leary*, 174 Mass. 111, 54 N. E. 490 (1899).

19. 1 Chamberlayne, Evidence, § 875.

20. 1 *Supra*, § 366.

21. 1 Chamberlayne, Evidence, § 876.

value as precedents, the effect of great apparent conflict of decision among cases sustaining the same general principle of administration. This contrariety of ruling will be, perhaps, less inexplicable, if certain general considerations affecting the practical administration of the principle be borne in mind. Among these are; (1) The entire state of the case in all particulars must have been considered by the presiding judge in determining how necessary the evidence of the skilled witness actually was to the proponent, and, consequently, how his administrative function should be exercised. (2) The same considerations may very well appear to different judges as possessing different relative importance. (3) In proportion as the subject-matter becomes vital to the issue, the judge's impulse to exclude special knowledge in which an element of inference may lurk is intensified. (4) It is not sufficient that the inquiry relate, more or less directly, to a matter which is largely, or, indeed, almost exclusively, known only to persons who have had a special experience. Certain things may be commonly known about very recondite or technical subjects. (5) The judge may properly consider whether the special knowledge is not of such a nature that the jury could conveniently be *instructed* in the matter sufficiently for all essential purposes of the trial. If the presiding judge, in discharge of his administrative function,²² is persuaded that the subject-matter is one on which the jury may be adequately instructed during the course of the trial he may require that the jury exercise their own judgment²³ upon facts supplied by skilled witnesses. (6) The court may reasonably admit evidence as to the special knowledge of the skilled witness under circumstances where it would decline to permit the same witness to apply this knowledge to the evidence either in the form of a conclusion²⁴ or that of a judgment.²⁵ That the special knowledge of an expert should be received in the form of his judgment regarding definite propositions of fact it is necessary that the precise subject of inquiry be outside the realm of common knowledge.²⁶ If the fact as to which inquiry is made be within the jury's field of knowledge the judgment of the expert is excluded, though as to the great number of correlated facts, knowledge is confined to technically trained persons.

§ 382. [Technical or Scientific Facts]; Scope.²⁷—The range of facts relating to any calling which the witness skilled or experienced in that vocation may

²² *Middlebury Bank v. Rutland*, 33 Vt. 414 (1860).

²³ *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462 (1873).

Massachusetts.—*Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63 (1871); *Nourie v. Theobald*, 68 N. H. 564, 41 Atl. 182 (1896); *Roberts v. New York El. R. Co.*, 128 N. Y. 455, 25 N. E. 486, 13 L. R. A. 499 (1891).

²⁴ *Infra*, §§ 792 *et seq.*, 803 *et seq.*

²⁵ *Infra*, §§ 808 *et seq.*

²⁶ The subject-matter as to which inquiry is made must so far partake of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it. *Wight Fire-proofing Co. v. Poczekai*, 130 Ill. 139, 22 N. E. 543 (1889); *People v. Barber*, 115 N. Y. 475, 22 N. E. 182 (1889); *Fairchild v. Bascomb*, 35 Vt. 398 (1862).

²⁷ 1 Chamberlayne, Evidence, § 877.

state is limited only by the bounds of human knowledge and facts of which the human brain is capable of forming a concept. Obviously, it is not limited to any particular profession.²⁸ The entire list of human activities physical, business and social are embraced within this range. Any fact not one of particular knowledge which the witness knows and the jury presumably do not, and which the court, in the exercise of its administrative powers, feels would be helpful to the tribunal, may be received,²⁹ provided that the fact is relevant³⁰ and that the witness limit himself to giving the fact within his knowledge and does not undertake to state the bearing of the fact upon the truth of a proposition in issue.³¹

No Moral Requirement.—No requirement that the trade or calling to which the fact relates should be beneficial to society or even moral in itself has been imposed. The gambler may show the jury how a novice can be cheated by tricks at cards³² or how to play a gambling game.³³

Witnesses not "Experts."—No reason is perceived for speaking of such witnesses as to matters of special knowledge as "experts"³⁴ though the use of the term is frequent.³⁵ So customary a use is, indeed, made natural by the fact that only from among those possessed of technical facts relating to a particular business, etc., can the "expert," as a rule, be selected. Any such witness, moreover, upon an ordinary subpoena, may be required to give his judgment as an expert.³⁶ Conversely, those competent to testify as experts may fairly be expected to have in mind the facts commonly known to those versed in that specialized pursuit.³⁷ Frequently such facts form part of the major premise of his judgment when testifying hypothetically.³⁸

§ 383. [Technical or Scientific Facts]; Properties of Matter.³⁹—While the more familiar properties of matter are commonly known, the more obscure may be stated to the tribunal by any one adequately versed in an art in which such properties are known⁴⁰ or who otherwise, for any reason knows the fact.⁴¹

28. *McFadden v. Murdock*, 15 Wkly. Rep. 1079 (1867).

29. *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621 (1863); *Folsom v. Concord, etc., R. Co.*, 68 N. H. 454, 38 Atl. 209 (1896).

30. *Wynn v. Central Park, etc., R. Co.*, 14 N. Y. Suppl. 172 (1891).

31. *Lake Erie, etc., R. Co. v. Mulcahy*, 16 Ohio Cir. Ct. 204, 9 Ohio Cir. Dec. 82 (1898).

32. *Hall v. State*, 6 Baxt. (Tenn.) 522 (1873).

33. *Nuckolls v. Com.*, 32 Gratt. (Va.) 884 (1879) ("keno").

34. *State v. Melvern*, 32 Wash. 7, 72 Pac. 489 (1903).

35. *Shields v. State*, 149 Ind. 395, 49 N. E. 351 (1897); *Cottrill v. Myrick*, 12 Me. 222 (1835).

36. *Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841 (1893).

37. *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 148, 83 Am. Dec. 621 (1863).

"One who is an expert may not only give opinions, but may state general facts which are the result of scientific knowledge or professional skill." *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 148, 83 Am. Dec. 621 (1863).

38. *Anderson v. Illinois Cent. R. Co.*, 109 Iowa 524, 80 N. W. 561 (1899).

39. 1 Chamberlayne, Evidence, §§ 878, 879.

40. *Shufeldt v. Searing*, 59 Ill. App. 341 (1895) (explosion of dust); *St. Louis Gaslight Co. v. Philadelphia American F. Ins. Co.*, 33 Mo. App. 348 (1889) (gas).

41. *Standard Oil Co. v. Tierney*, 96 Ky. 89, (1835).

State of the Art.—The “state of the art” at any given time in his trade or calling,⁴² and the facts which naturally flow from it, as, for example, whether a certain device has novelty,⁴³ may be stated by the specially experienced witness. Nor is such a statement deemed objectionable by reason of the fact that it covers the precise proposition in issue.⁴⁴ This is apt to be of special prominence in patent causes.⁴⁵

§ 384. [Technical or Scientific Facts]; Business Affairs.⁴⁶—While many of the more familiar facts relating to business matters are of sufficient notoriety to be covered by common knowledge, a multitude of them are constantly presenting themselves as to which the evidence of an experienced witness is received and still others, of a more technical nature, in proof of which such evidence is required. These considerations apply to the duties of clerical assistants,⁴⁷ mercantile marks,⁴⁸ to the elements of profit and loss,⁴⁹ to business customs,⁵⁰ and technical terms used in business.⁵¹

§ 385. [Technical or Scientific Facts]; Various Matters.⁵²—Testimony of this nature may be given by persons having special knowledge or skill in building,⁵³ chemistry,⁵⁴ ecclesiastical matters,⁵⁵ in engineering questions whether civil,⁵⁶ electric,⁵⁷ hydraulic⁵⁸ or mining,⁵⁹ in farming,⁶⁰ stock-raising⁶¹ or insurance whether fire,⁶² life,⁶³ or marine.⁶⁴

27 S. W. 983, 16 Ky. L. Rep. 327 (1894) (properties of illuminating oil).

42. *Winans v. New York, etc., R. Co.*, 21 How. (U. S.) 88, 100, 16 L. ed. (1858).

43. *Haley v. Flaccus*, 193 Pa. St. 521, 44 Atl. 566 (1899).

44. *Tillotson v. Ramsay*, 51 Vt. 309 (1878).

45. *Burton v. Burton Stock-Car Co.*, 171 Mass. 437, 50 N. E. 1029 (1898).

46. 1 Chamberlayne, Evidence, §§ 880–882.

47. *Pepper v. Planters Nat. Bank*, 5 Ky. L. Rep. 85 (1883) (cashier).

48. *Downing v. State*, 66 Ga. 110 (1880) (kerosene).

49. *Sexton v. Lamb*, 27 Kan. 426 (1882) (handling ice).

50. *Georgia*.—*Horan v. Strachan*, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471 (1890); *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121, 96 N. W. 718 (1903); *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234 (1878); *Hart v. Brooklyn*, 52 N. Y. Suppl. 113, 31 App Div. 517 (1898).

51. *Webb v. Mears*, 45 Pa. St. 222 (1863); *Evans v. Commercial Mut. Ins. Co.*, 6 R. I. 47 (1859); *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 121 Fed. 524, 58 C. C. A. 634 (1903).

Experience in the business rather than formal inclusion in it is the test. In seeking, for example, to testify as to the meaning of terms used in the wholesale grocery business a retail grocer of large transactions may be better qualified as a witness than a wholesale grocer doing a smaller business. *Nordlinger v. U. S.*, 115 Fed. 828 (1902).

52. 1 Chamberlayne, Evidence, §§ 883–893.

53. *Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. 851 (1903) (coal stage); *Rockland First Cong. Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587 (1893) (removing paint).

54. *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53 (1896); *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50 (1898); *Otey v. Hoyt*, 47 N. C. 70 (1854) (acid applied to ink).

55. *Bird v. St. Mark's Church*, 62 Iowa 567, 11 N. W. 747 (1883); *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844) (Roman Catholic).

56. *Union Pac. R. Co. v. Clopper*, 131 U. S. appendix excii, 26 L. ed. 243 (1881) (bridge and abutments).

57. *Houston, etc., R. Co. v. Hopson* (Tex. Civ. App. 1902) 67 S. W. 458; *Excelsior*

§ 386. [Technical or Scientific Facts]; Interstate or Foreign Law.⁶⁵— The existence of written or unwritten law in a foreign country⁶⁶ or sister state of the American Union⁶⁷ is a fact and, in the absence of statutory regulation, is to be proved, as other facts are proved, by the statement of one who knows it. In any event, the answer of the witness must, in order to be relevant, cover specifically the question raised,⁶⁸ and, where the evidence is in conflict, it has been held, that the court must examine text-books and other authorities and decide the point for itself.⁶⁹

The written law of a foreign country⁷⁰ or sister state⁷¹ stands in the same position. Anyone who, in the opinion of the court, knows what the foreign law is, may state it; identifying, if convenient to the judge, the volume in which the written law is contained, and pointing out, if desired, the written law itself. A conflict of views exists as to whether the oral evidence of a qualified witness is still competent in jurisdictions which prescribe that the written law of a sister state may be proved by official printed copies of its laws and decisions. In the view of certain courts, the witness' oral statement may still be received.⁷² Other courts have adopted a different administrative principle and hold that the means of proof provided by the statute constitute the "best evidence" i.e., the original or primary grade of evidence and must be produced or a sufficient reason given for its absence.⁷³ Where the printed book or written document is received affirmatively proof of its authentic nature must be offered⁷⁴ as called for by the laws of the forum.⁷⁵ The interpretation given

Electric Co. v. Sweet, 57 N. J. L. 224, 30 Atl. 553 (1894).

58. Ohio, etc., R. Co. v. Nuetzel, 143 Ill. 46, 32 N. E. 529 (reversing 43 Ill. App. 108] (1892.)

59. Clark v. Babcock, 23 Mich. 164 (1871) (salt wells).

60. Thresher v. Gregory (Cal. 1895), 42 Pac. 421; Krippner v. Biebl, 28 Minn. 139, 9 N. W. 671 (1881); Wells v. Eastman, 61 N. H. 507 (1881); Ferguson v. Hubbell, 26 Hun (N. Y.) 250 (1882).

61. Dunham v. Rix, 86 Iowa 300, 53 N. W. 252 (1892); Folsom v. Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209 (1896); New York, etc., R. Co. v. Estill, 147 U. S. 591, 612, 13 S. Ct. 444, 37 L. ed. 292 (1893).

62. Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595 (1896); Cornish v. Farm Buildings F. Ins. Co., 74 N. Y. 295 [affirming 10 Hun 466] (1878). See also Pepper v. Planters' Nat. Bank, 5 Ky. L. Rep. 85 (1883).

63. Shover v. Myrick, 4 Ind. App. 7, 30 N. E. 207 (1891); Fry v. New York Provident Sav. Assur. Soc. (Tenn. Ch. App. 1896), 38 N. E. 116.

64. Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 100 (1876); Hawes v. New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,241, 2 Curt. 229 (1855).

65. 1 Chamberlayne, Evidence, §§ 894-900.

66. Temple v. Pasquotank County, 111 N. C. 36, 15 S. E. 886 (1892) (Cuba).

67. Chattanooga, etc., R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109 (1890); Barrows v. Downs, 9 R. I. 446, 11 Am. Rep. 283 (1870) (New York).

68. Clardy v. Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52 (1900).

69. Rice v. Gunn, 4 Ont. 579 (1884).

70. Short v. Kingsmill, 7 U. C. Q. B. 350 (1850).

71. People v. McQuaid, 85 Mich. 123, 48 N. W. 161 (1891).

72. Brady v. Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27 (1899).

73. Johnson v. Hesser, 61 Neb. 631, 85 N. W. 894 (1901).

74. Mexican Nat. R. Co. v. Ware (Tex. Civ. App. 1900), 60 S. W. 343.

75. Mexican Nat. R. Co. v. Ware (Tex. Civ. App. 1900), 60 S. W. 343.

to the law of the foreign country,⁷⁶ state,⁷⁷ or territory, by its tribunals is an integral and essential part of the law itself and should be stated by the witness.

The standard of administrative requirement prevailing in many jurisdictions of the American Union regarding the qualifications for testifying as to foreign law is much lower than that prevailing in England.

The practicing attorney of the foreign county or sister state⁷⁸ or one who has so practiced⁷⁹ for a reasonable time, is deemed competent to testify as a skilled witness on the subject. Attorneys⁸⁰ practicing in a sister state or foreign country,⁸¹ and other persons deemed by the judge to be sufficiently qualified⁸² to do so may state the existence and effect of an unwritten law in their respective jurisdictions, all other witnesses being rejected.⁸³

It is not, however, necessary that the witness should be a lawyer.⁸⁴ All that is required is what the presiding judge regards as a sufficiently intelligent and thorough acquaintance with the foreign law;⁸⁵—the connection through which the knowledge may have been acquired being regarded as a matter of comparative indifference.

The fact that the question is one of law naturally places it, in many points of administration, within the hands of the presiding judge, familiar with the decisions of questions of domestic law. His finding is not absolutely controlled by the testimony of the witness;—even when uncontradicted. Thus, the most unequivocal testimony of a skilled witness as to the construction given to the foreign law, cannot control the court's understanding of the meaning of the written law and the plain decisions of the foreign court.⁸⁶ In other words, the presiding judge may examine for himself the documents which the skilled witness refers to as a correct statement of the foreign law, "not as evidence *per se* but as part of the testimony of the witness."⁸⁷

§ 387. [Technical or Scientific Facts]; Maritime Affairs.⁸⁸—The sea has also

76. *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283 (1870).

77. *Crafts v. Clark*, 38 Iowa 237 (1874) (Pennsylvania); *Jenne v. Harrisville*, 63 N. H. 405 (1885); *Title Guarantee, etc., Co. v. Trenton Potteries Co.*, 56 N. J. Eq. 441, 38 Atl. 422 (1897) (New York); *Bollinger v. Gallagher*, 163 Pa. St. 245, 29 Atl. 751, 43 Am. St. Rep. 791 (1894) (Maryland).

78. *Baltimore Consol. Real Estate, etc., Co. v. Cashow*, 41 Md. 59 (1874); (law of New York).

79. *Union Cent. L. Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355 (1900) (law of Ohio).

80. *Baltimore Consol. Real Estate, etc., Co. v. Cashow*, 41 Md. 59 (1874); *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207 (1868).

81. *Concha v. Murrieta*, 40 Ch. D. 543, 60 L. T. Rep. (N. S.) 798 (1889).

82. "In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on the point, is competent." *Hall v. Costello*, 48 N. H. 176, 179, 2 Am. Rep. 207 (1868).

83. *Phelps v. Town*, 14 Mich. 374 (1866) (banker); *City Sav. Bank v. Kensington Land Co.* (Tenn. Ch. App. 1896), 37 S. W. 1037.

84. *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207 (1868).

85. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449 (1894).

86. *China, etc., Bank v. Morse*, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139 (1901).

87. *Concha v. Murrieta*, 40 Ch. D. 453, 60 L. T. Rep. N. S. 798 (1889).

88. 1 Chamberlayne, Evidence, § 901.

its technical side. Men of nautical experience or training may state the special facts known to those who "follow the sea." Principal among these are the influences of the natural forces of winds and waves⁸⁹ upon vessels⁹⁰ or, to put the same idea in different words, what a vessel will do under given conditions⁹¹ may be proved in this way. In like manner an experienced witness may state the duties of the captain,⁹² officers⁹³ and crew of a vessel under a given set of circumstances and the general usages of navigation⁹⁴ are important matters of nautical knowledge.

§ 388. [Technical and Scientific Facts]; **Mechanic Arts.**^{95 96}—Manufacturing and the mechanic arts present a favorite field for the employment of evidence regarding technical facts, which, when relevant may be stated by those qualified either through experience⁹⁷ or technical training⁹⁸ to do so. The knowledge of the witness must be affirmatively shown or reasonably assumed to be as specific as is the fact which the testimony covers. Mere general knowledge and experience in a particular branch of manufacturing is not sufficient unless it may be assumed to qualify the witness as to the precise question which is asked him.⁹⁹ For a still stronger reason, absence of even this general experience disqualifies the witness.¹

These considerations apply to the dangers of manufacturing,² the proper management of the business,³ the strength of mechanical appliances,⁴ the use

89. *Eastern Transp. Line v. Hope*, 95 U. S. 297, 299, 24 L. ed. 477 (1877). See *infra*, §§ 718, 811.

90. *Western Ins. Co. v. Tobin*, 32 Ohio St. 77 (1877) (certain type of vessel will leak).

91. *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645 (1870); *Walsh v. Washington Mar. Ins. Co.*, 32 N. Y. 427 (1865); *Western Ins. Co. v. Tobin*, 32 Ohio St. 77 (1877); *Folkes v. Chadd*, 3 Dougl. 157, 26 E. C. L. 111 (1782).

92. *Sills v. Brown*, 9 C. & P. 601, 38 E. C. L. 351 (1840).

93. *Malton v. Nesbit*, 1 C. & P. 70, 12 E. C. L. 51 (1824).

94. *The Alaska*, 33 Fed. 107 (1887).

95. 1 Chamberlayne, Evidence, §§ 902-908.

96. *Supra*, §§ 358, 362, *infra*, §§ 719, 811.

97. *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972 (1903) (engineer); *Pullman's Palace-Car Co. v. Harkins*, 55 Fed. 932, 5 C. C. A. 326 (1893) (machinist).

98. *Bradley v. District of Columbia*, 20 App. Cas. (D. C.) 169 (1902).

Familiarity with a physical effect of natural laws will not, of itself, qualify the person to speak as to the operation of these laws. A fireman, for instance, is not qualified

to state the natural process by which a fire creates its own current of air. *State v. Watson*, 65 Me. 74 (1876). Nor is a millwright competent to testify as to the cause of anchor ice in a particular stream. *Woods v. Allen*, 18 N. H. 28 (1845).

99. *Fraim v. National F. Ins. Co.*, 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. Rep. 753 (1895) (gasoline in silver plating).

1. *Merchants Wharf-Boat Assoc. v. Wood* (Miss. 1887), 3 So. 248.

2. *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718 (1895) (powder mill); *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257 (1886) (roller mills).

3. *Leslie v. Granite R. Co.*, 172 Mass. 468, 52 N. E. 542 (1899) (derricks for stone); *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504, 81 N. W. 518 (1900) (hydraulic elevator); *Scheider v. American Bridge Co.*, 78 N. Y. App. Div. 163, 79 N. Y. Suppl. 634 (1903) (guying derricks); *Fritz v. Western Union Tel. Co.*, 25 Utah 263, 71 Pac. 209 (1902) (telephone wires); *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467 (1904) (erecting hoisting gear).

4. *Louisville, etc., R. Co. v. Berkey*, 136 Ind.

of firearms,⁵ the value, weight or strength of materials,⁶ and other matters connected peculiarly with mechanics.

§ 389. [Technical or Scientific Facts]; Mining; Natural History.⁷—The art of mining presents a number of facts not covered by the scope of common knowledge and miners of experience may testify to such facts as the details of mine construction⁸ and their operation.⁹ So one who has made a special study of natural history may state to a tribunal facts of special knowledge as to the habits of animals or their characteristics.¹⁰

§ 390. [Technical or Scientific Facts]; Professional Facts; Medicine.¹¹—The presiding judge will receive as a witness to facts of special knowledge relating to the medical profession any person who has been proved to his satisfaction or whom he can reasonably assume to know the fact as to which he proposes to testify with such fullness and accuracy as to make his evidence helpful to the jury. As in other matters presenting administrative questions regarding the adequacy of the knowledge of a witness, the qualification required is only such as is commensurate with the testimony which is offered. Were the question asked a medical practitioner one which involved a wide experience and mature judgment the court might well insist upon receiving testimony of a professional witness who might be assumed to possess these qualities. But certain professional facts, obtainable in their entirety by reading may be equally well known, or even better remembered, by a young doctor just graduated from the medical school than by an older and more experienced practitioner.¹² But nurses,¹³ undertakers¹⁴ and other nonscientific and nonprofessional witnesses, will, as a rule, not be received merely by virtue of their occupation, though, in such case, as in that of any other witness, proof of special and adequate knowledge and experience, *quoad* the fact to be elicited will render them competent witnesses.

Those duly qualified may testify concerning the state of medical knowl-

181, 35 N. E. 3 (1893) (coupling pin); *Lau v. Fletcher*, 104 Mich. 295, 62 N. W. 357 (1895) (saw).

5. *Long v. Travellers' Ins. Co.*, 113 Iowa 259, 85 N. W. 24 (1901) (effect of gas generation by discharge of a gun). See also *Dugan v. Com.*, 102 Ky. 241, 43 S. W. 418, 19 Ky. L. Rep. 1273 (1897).

6. *McFaul v. Madera Flume, etc., Co.*, 134 Cal. 313, 66 Pac. 308 (1901) (wrought and cast iron); *Caven v. Bodwell Granite Co.*, 97 Me. 381, 54 Atl. 851 (1903) (wood and iron).

7. 1 Chamberlayne, Evidence, §§ 909-912.

8. *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771 (1895); *McNamara v. Logan*, 100 Ala. 187, 14 So. 175 (1893) (safe distance between wall and car).

9. *Ohio, etc., Torpedo Co. v. Fishburn*, 61

Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437 (1899) (blasting); *Beaman v. Martha Washington Min. Co.*, 23 Utah 139, 63 Pac. 631 (1900) ("skip" out of an incline shaft).

10. *Smith v. People*, 46 Ill. App. 130 (1891); *Cottrill v. Myrick*, 12 Me. 222 (1835); *Lewis v. Hartford Dredging Co.*, 68 Conn. 221, 35 Atl. 1127 (1896) (seeding oysters); *State v. McIntosh*, 109 Iowa 209, 80 N. W. 349 (1899) (wolf).

11. 1 Chamberlayne, Evidence, §§ 913-918.

12. *Tullis v. Kidd*, 12 Ala. 648 (1847); *Murphy v. Murphy*, 65 S. W. 165, 23 Ky. L. Rep. 1460 (1901) (effect of alcoholism on the human will).

13. *State v. Cook*, 17 Kan. 392 (1877).

14. *Osborne v. Troup*, 60 Conn. 485, 23 Atl. 157 (1891).

edge,¹⁵ the symptoms of disease,¹⁶ or insanity,¹⁷ their proper treatment¹⁸ and the facts of surgery either human¹⁹ or veterinary.²⁰

§ 391. [Technical or Scientific Facts]; Railroad Facts; Rules.^{21 22}— The great prominence of the railroad in the social and industrial life of the modern community and in the practical work of the courts not only make a number of facts relating to such a carrier matter of common or judicial knowledge²³ but constantly call for proof of cognate facts more or less technical in their nature, as to which special knowledge is required. Facts of the latter class may be furnished by those who are found by the court to have had adequate technical training or practical experience in regard to the fact in question.²⁴ A person not in the railroad business may state a fact relating to railroad matters; — provided it be shown that he knows it,²⁵ and not merely that he has had sufficient opportunities for observation to enable him to ascertain it.²⁶

15. *State v. Knight*, 43 Me. 11 (1857) (blood stains); *Johnson v. Winston*, (Neb. 1903), 94 N. W. 607; *State v. Miller*, 9 Houst. (Del.) 564, 32 Atl. 137 (1892) (human blood); *State v. White*, 76 Mo. 96 (1882) (undergoing child birth while standing); *People v. Osmond*, 138 N. Y. 80, 33 N. E. 739 (1893).

16. *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889).

Conversely, the witness may testify as to what certain medical phenomena indicate as to disease; its cause, etc., assuming the inference is a necessary and unreasoned one. *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908 (1885); *Kelly v. Erie Tel. etc., Co.*, 84 Minn. 321, 25 N. W. 706 (1885); *Dilleber v. Home L. Ins. Co.*, 87 N. Y. 79 (1881); *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625 (1903) (no water in stomach).

17. *State v. Reddick*, 7 Kan. 143 (1871); *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889); *Williams v. State* (Fla. 1903), 34 So. 279; *State v. Reddick*, 7 Kan. 143 (1871); *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889); *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074 (1900) (portable aluminum boiler).

18. *State v. Meyers*, 99 Mo. 107, 121, 12 S. W. 516 (1889); *Bonart v. Lee* (Tex. Civ. App. 1898), 46 S. W. 906 ("medical treatment"); *Hartung v. People*, 4 Park. Cr. (N. Y.) 319 (1859) (cause of inflammation discovered on *post mortem* examination); *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599 (1902).

19. *Johnson v. Winston* (Neb. 1903), 94 N. W. 607; *Crites v. New Richmond*, 98 Wis.

55, 73 N. W. 322 (1897); *Kelly v. U. S.*, 27 Fed. 616 (1885). *Infra*, § 722.

In states which permit it, the evidence of technical facts may be elicited on cross examination. *Rowell v. Lowell*, 11 Gray (Mass.) 420 (1858); *Kelly v. U. S.*, 27 Fed. 616 (1885); *Powers v. Mitchell*, 77 Me. 361 (1885) (concussion of the spine).

20. *Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 (1896); *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113 (1891).

A physician, though he has never acted as a veterinary surgeon regarding it may state the symptoms of a given disease. *State v. Sheets*, 89 N. C. 543 (1883).

21. 1 Chamberlayne, Evidence, §§ 919-929.

22. *Supra*, §§ 359, 362, *infra*, 731 *et seq.*, 814 *et seq.*

23. *Supra*, §§ 345 *et seq.*, 362.

Skilled witnesses are not required to state such facts.— For example, the community knows how a cattle guard should be constructed. *New York, etc., R. Co. v. Zumbaugh*, 12 Ind. App. 272, 39 N. E. 1058 (1894); *Swartout v. New York Cent., etc., R. Co.*, 7 Hun (N. Y.) 571 (1876).

24. Qualifications must be affirmatively shown. Unless this is done, the witness may be rejected. *Born v. Philadelphia, etc., R. Co.*, 198 Pa. St. 409, 48 Atl. 263 (1901).

25. *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291 (1885); *Chesapeake, etc., R. Co. v. Stephens*, 15 Ky. L. Rep. 815 (1894); *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99 (1868) (mail clerk); *Robertson v. Wabash, etc., R. Co.*, 84 Mo. 119 (1884).

26. *Manhattan, etc., R. Co. v. Stewart*, 30 Kan. 226, 2 Pac. 151 (1883); *Mammerberg*

Evidence of this character may be offered of the duties of officers or employees,²⁷ the operation of the road,²⁸ freight²⁹ and passenger³⁰ transportation, the possibilities and probabilities of railroads,³¹ and facts concerning the roadbed and equipment.³² So facts as to the construction, equipment and operation of street railways,³³ the duties of their officers and employees³⁴ and the possibilities of street railways³⁵ may be shown in the same way. The rules of the company may be put in evidence to show the proper standard of care.³⁶

v. Metropolitan St. R. Co., 62 Mo. App. 563 (1895).

27. Galveston, etc., R. Co. v. Brown (Tex. Civ. App. 1900), 59 S. W. 930; Culver v. Alabama Midland R. Co., 108 Ala. 330, 18 So. 827 (1895) (proper position); Quinlan v. Chicago, etc., R. Co., 113 Iowa 89, 84 N. W. 960 (1901).

28. Birmingham, etc., Ry. Co. v. Harris, 98 Ala. 326, 13 So. 377 (1893); Kerns v. Chicago, etc., R. Co., 94 Iowa 121, 62 N. W. 692 (1895) (pilot bar); Price v. Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732 (1892) (make up train); Walker v. Lake Shore, etc., R. Co., 104 Mich. 606, 62 N. W. 1032 (1895) (using lantern); Louisville, etc., R. Co. v. Reagan, 96 Tenn. 128, 33 S. W. 105 (1895) (uncoupling).

29. Price v. Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732 (1892); Vicksburg, etc., R. Co. v. Stocking (Miss. 1892), 13 So. 469; Conway v. Fitzgerald, 70 Vt. 103, 39 Atl. 634 (1897) (lumber).

30. Union Pac. R. Co. v. Novak, 61 Fed. 573, 9 C. C. A. 629 (1894); Louisville, etc., R. Co. v. Banks, 132 Ala. 471, 31 So. 573 (1901).

31. Chicago, etc., R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033 (1899) (spark); Whitsett v. Chicago, etc., R. Co., 67 Iowa 159, 25 N. W. 104 (1885); Frace v. New York, etc., R. Co., 68 Hun 325, 22 N. Y. Suppl. 958 (1893).

Ohio.—Bellefontaine, etc., R. Co. v. Bailey, 11 Ohio St. 333 (1860) (prevent accident).

Conway v. Fitzgerald, 70 Vt. 103, 39 Atl. 634 (1897); Davidson v. St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324 (1885) (throw sparks); Jamieson v. New York, etc., R. Co., 162 N. Y. 630, 57 N. E. 1113 (1900) (spark arrester door open).

32. Kerns v. Chicago, etc., R. Co., 94 Iowa 121, 62 N. W. 692 (1895); Walker v. Lake Shore, etc., R. Co., 104 Mich. 606, 62 N. W. 1032 (1895) (roadmaster); Kelly v. Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588 (1881); State v. Toledo R., etc., Co., 24 Ohio

Cir. Ct. 321 (1903) (side track); Ft. Worth, etc., R. Co. v. Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686 (1893) (good construction); Baltimore, etc., R. Co. v. Elliott, 9 App. Cas. (D. C.) 341 (1896) (draw head); McDonald v. Michigan Cent. R. Co., 108 Mich. 7, 65 N. W. 597 (1895) (cross-bar).

33. *Supra*, § 362, *infra*, §§ 732, 815; North Kankakee St. Ry. Co. v. Blatchford, 81 Ill. App. 609 (1898) (use of fenders); Chicago City R. Co. v. McLaughlin, 146 Ill. 353, 34 N. E. 796 (1893); Geist v. Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112 (1892).

34. Czezewzka v. Benton-Bellefontaine R. Co., 121 Mo. 201, 25 S. W. 911 (1894).

35. Chicago City R. Co. v. McLaughlin, 146 Ill. 353, 34 N. E. 796 (1893); Geist v. Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112 (1892); Watson v. Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742 (1893).

36. Rules of a railway company as to the operation of its trains are some evidence when promulgated for the safety of the public of the proper care and precaution which should be used. Deister v. Atchison T. & S. F. R. Co., 99 Kan. 525, 172 Pac. 282, L. R. A. 1917 C 784 (1917). A rule of a common carrier forbidding passengers from going on the steps is admissible to show that a conductor was not negligent in allowing a passenger to stand on the platform where he did not know that he was there, as the rule shows that he had no reason to look for him. Renaud v. New York, New Haven & Hartford R. Co., 210 Mass. 553, 97 N. E. 98, 38 L. R. A. (N. S.) 689 (1912). In an action for negligence the plaintiff may not introduce evidence of the rules of the defendant company as showing the proper standard of care to be used by the employees. Such rules should not be used to show an admission, as they may simply show that the company tries to maintain a high standard of care unless they show a general practice of those in that business. Virginia Railway & Power Co. v. Godsey, 117 Va. 167, 83 S. E. 1072.

CHAPTER XI.

BURDEN OF PROOF.

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§ 392. **Preliminaries to a Trial by Jury.**—That any forensic contest whatever between contending parties should be conducted to a definite and speedy conclusion, at least three things, among others, should be predetermined. (1) What facts must be proved by any litigant to insure his success. This is entirely a matter of substantive law.¹ (2) Upon whom lies the duty of proving the truth of a particular proposition or of introducing evidence as to the existence of any given individual fact. This falls under the head of Burden of Proof, the topic under consideration.² (3) What happens should the person upon whom this duty rests fail to discharge it. This is determined by procedure at a subsequent stage, with which the law of evidence has no immediate concern.³

§ 393. **Burden of Proof has a Double Meaning.**—As commonly employed,—and few phrases are utilized more constantly,—“burden of proof” is ambiguous in meaning. It represents one or the other of two entirely distinct things; ⁴ (1) the burden or necessity of establishing a case, of making good

1. 2 Chamberlayne, Evidence, §§ 930, 931, 932, 933.

2. 2 Chamberlayne, Evidence, §§ 932, 935.

3. 2 Chamberlayne, Evidence, §§ 932, 935a.

4. 2 Chamb., Ev., § 936 and cases cited in note 3. *Contra*: State v. Thornton, 10 S. D. 349, 73 N. W. 196.

Not always is this done.—Certain courts have taken the proper distinctions with great clearness. Scott v. Wood, 81 Cal. 398 (1889);

Buswell v. Fuller, 89 Me. 600 (1897); Morgan v. Morse, 13 Gray (Mass.) 150 (1859).

An increasing clearness in statement seems observable in the decisions. See Ruth v. Crone, 10 Cal. App. 770, 103 Pac. 960 (1909); Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 667 (1905); Alabama & V. Ry. Co. v. Groome, 97 Miss. 201, 52 So. 703 (1910); Foss v. McRae, 105 Me. 140, 73 Atl. 827 (1909); Dorrell v. Sparks, 142 Mo. App.

against all opposition the truth of a proposition is issue or, (2) the burden or duty of going forward and producing evidence to make a *prima facie* case in his own favor or to meet, minimize and counteract such a case when established against him.⁵ This has led to much confusion of thought.⁶ A *very slight change*, in the single word,—“proof” to “evidence” when the phrase is used in its secondary meaning, suffices to eliminate the difficulty.⁷

§ 394. Position of Burden of Proof; Who Would Fail if no Further Evidence Were Introduced.—The position of the burden of establishing has been located in different ways by different authorities;—though it is fairly obvious at times that the statement relates rather to the position of the burden of evidence than of that of establishing. Thus, for example, it has been said that the burden is on him who would lose his case if no further evidence were produced.⁸ It is certainly true that at the beginning of any trial at law the burden of proof and the burden of evidence rest on the same person.⁹ Here, therefore, the test applies. It applies equally where the actor¹⁰ is the losing party at the end of the trial;—for the two burdens are again together. At other stages of the trial the test is workable with regard to the burden of evidence. It is not necessarily applicable to the burden of proof, properly so-called;—except where the party not having the burden of establishing, i.e., the non-actor, has destroyed the actor's *prima facie* case. It scarcely need be said that the burden of proof cannot be on both parties at the same time.¹¹

§ 395. [Position of Burden of Proof]; Never Shifts.—That the burden of

400, 127 S. W. 103 (1910); *Toube v. Rubin-Blankfort Co.*, 63 Misc. Rep. (N. Y.) 298, 116 N. Y. Supp. 673 (1909).

5. This last mentioned duty is spoken of in Chamberlayne's treatise and in this digest as the “burden of evidence,” as it should more properly be called. The phrase “burden of proof” is restricted to its original and primary meaning of the burden of establishing a case.

6. See *Borton v. Blin*, 23 Vt. 151 (1851). It has been proposed that the use of the objectionable phrase be abandoned. Thayer, Prelim. Treat., 384; *Abrath v. North Eastern R. Co.*, 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620 (1883). 2 Chamb., Ev., § 934.

7. “Proof” ambiguous.—For a discussion of this question and the divergent views which the civil law procedure and its modern successors of equity and code pleading took as compared with the common law, of the nature of a trial, see 2 Chamb., Ev., § 936, note 7.

8. *Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664 (1904). See also, *Mayer v. C. P. Lesh Paper Co.*, 45 Ind. App. 250, 89 N. E. 894

(1909); *Herndon v. Louisville Nat. Banking Co.* (Ky. 1910), 124 S. W. 835; *John Turl's Sons, Inc., v. Williams Eng. & Con. Co.*, 121 N. Y. Supp. 478 (1910); *Hauser v. Western Union Telegraph Co.*, 150 N. C. 557, 64 S. E. 503 (1909); 2 Chamb., Ev., § 937 and cases cited. Occasionally, this test of the position of the burden of proof has been adopted by statute. *Chaplin, etc., Turnpike Co. v. Nelson Co.*, 25 Ky. L. Rep. 1154, 77 S. W. 377 (1903).

9. *Veiths v. Hagge*, 8 Iowa 163, 192 (1859); *Reagan v. El Paso & N. E. Ry. Co.*, 15 N. M. 270, 106 Pac. 376 (1910).

10. The term “actor” is used to designate the party on whom rests the burden of establishing—burden of proof in its correct and primary meaning. By “non-actor” or *reus* is designated the party on whom the burden of establishing does not rest;—though, of course, the burden of evidence may and frequently does.

11. *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (1905).

proof, properly so-called, never shifts, in civil causes, seems established by the great weight of authority; — when correctly interpreted, in any instance.¹² The same rule is equally applicable and controlling in criminal cases.¹³ *On a criminal proceeding*, the burden of proof never leaves the prosecution. The issue has been fixed once for all by the pleadings, and the rules of pleading do not permit it to be altered during the progress of a trial on those pleadings.¹⁴ So far as the party having the burden of proof is concerned, two results obviously follow from the rule. (1) The two burdens are upon the same person at the beginning of the trial; (2) if the actor fails to maintain his case, they are united at the end of it.¹⁵ At other stages of the trial, the burden of evidence follows automatically the logical necessities of the situation. The burden of proof is voluntarily assumed by one or other of the parties, once for all, and cannot be displaced except upon the formation of a new issue. It remains persistent through all the fluctuations of the burden of evidence. The position of the burden of evidence, however, at any time, is determined by answering the question as to who would lose if no further evidence were introduced.¹⁶ The confusion, and consequent error, lies in speaking of this burden of evidence as the “burden of proof.”¹⁷

§ 396. [Position of Burden of Proof]; Common Law Pleading.— Under common-law pleading, procedure in assigning the burden of proof to one of the respective parties, adopts as its final and determinative guide, the condition of the issues formed by the pleadings. Whichever of the parties has

12. *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380 (1889); *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514 (1898); *Foss v. McRae*, 105 Me. 140, 73 Atl. 827 (1909); *Carroll v. Boston Elevated Ry. Co.*, 200 Mass. 527, 86 N. E. 793 (1909); *Aulls v. Young*, 98 Mich. 231 (1893); *Vertress v. Gage County*, 75 Neb. 332, 102 N. W. 242 (1905); *Heineman v. Heard*, 62 N. Y. 448 (1875); 2 Chamb., Ev., § 938 and cases cited. The burden of proof is not shifted even by the failure of a party in court to take the stand in his own behalf, if it originally rested upon the other party. *Meyer v. Minsky*, 128 App. Div. (N. Y.) 589, 112 N. Y. Supp. 860 (1908). Nor does the non-actor assume the burden of proof merely by introducing evidence tending to break down the actor's case. *Wylie v. Marinofsky*, 201 Mass. 583, 88 N. E. 448 (1909). The burden of proof does not shift in a case involving fraud but remains on him who claims fraud, though the duty of going forward with the evidence may shift. *Boardman v. Lorentzen*, 155 Wis. 566, 145 N. W. 750, 52 L. R. A. (N. S.) 476 (1914).

13. *Boykin v. People*, 22 Colo. 496, 45 Pac. 419 (1896); *Dacey v. People*, 116 Ill. 555, 6 N. E. 165 (1886); *Trogdon v. State*, 133 Ind. 1, 32 N. E. 725 (1892); *State v. Conway*, 56 Kan. 682, 44 Pac. 627 (1896); *State v. Hardelein*, 169 Mo. 579, 70 S. W. 130 (1902); *People v. Downs*, 123 N. Y. 558, 23 N. E. 988 (1890); *Agnew v. U. S.*, 165 U. S. 17 S. Ct. 235 (1897); 2 Chamb., Ev., § 939 and cases cited.

14. 2 Chamb., Ev., § 939 and cases cited: *Wright v. Wright*, 139 Mass. 177 (1885).

15. 2 Chamb., Ev., § 940.

16. *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871 (1889); *Fornes v. Wright*, 91 Iowa 392, 59 N. W. 51 (1894); *Porter v. Still*, 63 Miss. 357 (1885); *Haines v. Merrill Trust Co.*, 56 N. J. L. 312, 28 Atl. 796 (1893); *Baulee v. New York, etc., R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325 (1874); *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434 (1894); 2 Chamb., Ev., § 940 and cases cited.

17. 2 Chamb., Ev., § 940. See Discussion of Simile of the Scales, in connection with trials at law, 2 Chamb., Ev., § 941.

the affirmative of the issue as determined by the pleadings, has the burden of proof,¹⁸ to establish his contention by the legally required preponderance of the evidence.¹⁹ This burden necessarily includes the fact that all conditions precedent to the right claimed have been performed.²⁰

For example in actions for negligence the burden rests on the plaintiff to prove all facts necessary to show negligence²¹ but in most jurisdictions the burden is on the defendant to prove that the plaintiff was guilty of contributory negligence.²² All the necessary elements in an action for breach of contract must likewise be proved by the plaintiff.²³

Burden on Plaintiff.—Where the defendant traverses, or denies one or more material allegations²⁴ of the plaintiff's declaration, either in an action of tort,²⁵ or contract,²⁶ or concerning land,²⁷ the burden of proof is on the plaintiff;²⁸—even where the traverse is an argumentative one, in the form

18. *English v. Porter*, 109 Ill. 285 (1884); *McCollister v. Yard*, 90 Iowa 621, 57 N. W. 447 (1894); *Heineman v. Heard*, 62 N. Y. 448 (1875); *Klunk v. Hocking Valley Ry. Co.*, 74 Ohio St. 125, 77 N. E. 752 (1906); *Connor v. Green Pond, etc., R. Co.*, 23 S. C. 42, 1885; 2 Chamb., Ev., §§ 942, 943 and cases cited.

19. *Chicago, etc., R. Co. v. Lambert*, 119 Ill. 255, 10 N. E. 219 (1887); *Oaks v. Harrison*, 24 Iowa 179 (1868).

20. *Sext v. Geise*, 80 Ga. 698, 6 S. E. 174 (1888); *Home L. Assoc. v. Randall*, 30 Can. Sup. Ct. 97 (1899). But see *Thayer v. Connor*, 5 Allen (Mass.) 25 (1862); *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 655, 32 N. Y. 1076 (1893). Burden of proof—where it lies, see note, Bender ed., 11 N. Y. 9, 121. Burden to show *ultra vires*, see note, Bender ed., 143 N. Y. 632. Of bona fides of purchase, see note, Bender ed., 153 N. Y. 76. Burden to show bona fides in purchasing note, see note, Bender ed., 123 N. Y. 207. Burden of proof to show bona fides in holder of fraudulent note, see note, Bender ed., 119 N. Y. 372. Burden of proof upon proposing will for probate, see note, Bender ed., 11 N. Y. 9, 121.

21. One who had the burden of proof to show the cause of ice formed near a railroad track cannot go to the jury by showing that it was possible that the ice was formed from water cast there by one of defendant's engines when there is an equal possibility that it was cast there by other individuals. *Eisentrager v. Great Northern R. Co.*, 178 Iowa 713, 160 N. W. 311, L. R. A. 1917 B 1245 (1916). Burden to prove cause of accident, see note, Bender ed., 18 N. Y. 534. Burden to prove negli-

gence, see note, Bender ed., 47 N. Y. 282. Burden of proof in action by servant to recover for personal injuries, see note, Bender ed., 145 N. Y. 409. Burden of proof of negligence and contributory negligence, see note, Bender's ed., 113 N. Y. 386.

22. *Conway v. Salt Lake & Ogden R. Co.*, 47 Utah 510, 155 Pac. 339, L. R. A. 1916 D. 1109 (1916). Right to infer absence of contributory negligence, burden of proving it, see note, Bender ed.,

23. One who seeks to prove breach of warranty in a heating apparatus has the burden of showing that it was operated under proper conditions. *Waterman-Waterbury Co. v. School Dist.*, 182 Mich. 498, 148 N. W. 673, L. R. A. 1015 B 626 (1914). Burden of proof in insurance cases, see note, Bender ed., 149 N. Y. 735.

24. *Marcotte v. Sheridan*, 91 N. Y. Supp. 744 (1905); *John Ainsfield Co. v. Rasmussen*, 30 Utah 453, 85 Pac. 1002 (1906); 2 Chamb., Ev., § 944 and cases cited.

25. *Hudson v. Miller*, 97 Ill. App. 74 (1901); *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37 (1897); *Taylor v. Guest*, 58 N. Y. 262 (1874); *Griswold v. Gebbie*, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878 (1889); 2 Chamb., Ev., § 944 and cases cited.

26. *Florida Ry. Co. v. Thomas*, 55 Fla. 287, 45 So 720 (1908); *Clark v. Hoffman*, 128 Ill. App. 422 (1906); *Laubheimer v. Naill*, 88 Md., 174, 40 Atl. 888 (1898); *Ford v. Standard Oil Co.*, 32 App. Div. (N. Y.) 596, 53 N. Y. Supp. 48 (1898).

27. *Clifton v. Town of Weston*, 54 W. Va. 250, 46 S. E. 360 (1903).

28. *Western R. Co. v. Williamson*, 114 Ala.

of an affirmative plea,²⁹—though a party is not called to explain or disprove his opponent's allegations.³⁰ If the form of the defendant's pleading is negative,—as where he files a general issue, the burden of proof is upon the plaintiff even should the defendant introduce an affirmative defense under this negative allegation.³¹

Replication.—Should the defendant set up an affirmative defense, the plaintiff may compel his opponent to assume the burden of proof by denying or traversing the new matter set up by the defendant. But he may adopt a different course by alleging on his own behalf, new facts in confession and avoidance. Should this affirmative replication be traversed by the defendant, the burden of proof is on the plaintiff.³²

Burden on Defendant.—Where the defendant does not traverse, but sets up affirmative matter, as by pleading in abatement,³³ by claiming³⁴ or setting up new matter in avoidance of the plaintiff's action,³⁵ the burden of proof is on him;³⁶ although the plaintiff answers by anticipation in his declaration the facts which he assumes will be set up by the defendant,³⁷ or makes an argumentative traverse in his replication.³⁸ Nor, is it important, in this connection, should the plaintiff take issue on this new matter, by denying or traversing it, that such affirmative defense involves proof of negative propositions.³⁹ Should the plaintiff's replication set up an affirmative defense which the defendant meets with a rejoinder by way of confession and avoidance the burden of proof is upon the defendant,⁴⁰ and it is said not to be material that the plaintiff undertakes to establish, by evidence, the truth of his replication.

131, 21 So. 827 (1896); *Starratt v. Mullen*, 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697 (1889); *Pares v. St. Louis, etc., R. Co.* (Tex. Civ. App.), 57 S. W. 301.

29. *Wilder v. Cowles*, 100 Mass. 487 (1868).

30. *Schallman v. Royal Ins. Co.*, 94 Ill. App. 364 (1901).

31. *Adams v. Pease*, 113 Ill. App. 356 (1904).

32. *Chicago & A. Ry. Co. v. Jennings*, 114 Ill. App. 622 (1904); *Meeh v. Missouri Pac. R. Co.*, 61 Kan. 630, 60 Pac. 319 (1900); *Blunt v. Barrett*, 54 N. Y. Super. Ct. 548 (1887); 2 Chamb., Ev., § 945 and cases cited. The burden of showing that an automobile in which plaintiff was riding was not registered is upon the defendant. *Conroy v. Mather*, 217 Mass. 91, 104 N. E. 487, 52 L. R. A. (N. S.) 801 (1914).

33. *Seidachlag v. Town of Antioch*, 109 Ill. App. 291 (1904); *Boyce v. Augusta Camp*, No. 7429, M. W. A., 14 Okl. 642, 78 Pac. 322 (1904).

34. *Jewett v. Davis*, 6 N. H. 518 (1834); *Robertson v. Ephraim*, 18 Tex. 118 (1856);

Gilmer v. Grand Rapids, 16 Fed. 708 (1883); 2 Chamb., Ev., § 946 and cases cited.

35. *Bliley v. Wheeler*, 5 Colo. App. 287, 38 Pac. 603 (1894); *Swift v. Ratliff*, 74 Ind. 426 (1881); *Sayles v. Quinn*, 196 Mass. 492, 82 N. E. 713 (1907); *Truax v. Heartt*, 135 Mich. 150, 97 N. W. 394 (1903); *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 635, 32 N. E. 1076, affirming 61 N. Y. Super. Ct. 51, 18 N. Y. Supp. 782 (1892); *Home Ben. Assoc. v. Sargent*, 142 U. S. 691, 12 S. Ct. 332, 35 L. ed. 1160 (1892); 2 Chamb., Ev., § 946 and cases cited.

36. *Pickup v. Thames Ins. Co.*, 3 Q. B. D. 594 (1875).

37. *Henry v. Ward*, 40 Neb. 392, 68 N. W. 518 (1896); *Hill v. Allison*, 51 Tex. 390 (1879).

38. *Fox v. Hilliard*, 35 Miss. 160 (1858); *Wilson v. Hodges*, 2 East 312 (1802).

39. *Craig v. Proctor*, 6 R. I. 547 (1860).

40. *Miller v. Sollitt*, 131 Ill. App. 196 (1907), and it is said not to be material that the plaintiff undertakes to establish, by evidence, the truth of his replication.

What Defenses are Affirmative is a matter of some technicality and a natural divergence of ruling exists in different jurisdictions. "Undoubtedly many matters which, if true, would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant; for instance, infancy, coverture, or, probably, illegality."⁴¹ In general, however, such affirmative defenses agree by implication of law that the cause of action relied upon by the plaintiff once existed as claimed, but assert that it has been lost or modified by subsequent events.⁴² The non-actor or *reus*, by simply relying on a defense affirmative in form which, in reality, merely traverses the affirmative case of the actor does not necessarily shift the burden of proof. Thus, for example, where a defendant relies upon *lack of consideration* for a contract, this does not shift the burden of proving the existence of a consideration as essential to a valid contract.⁴³

Negative Allegations.—It is the *affirmative of the issue*, not the affirmative in point of form of the proposition submitted to investigation, which determines the position of the burden of proof.⁴⁴ The affirmative of the issue may require, under the rules of substantive law, proof of negative allegations,⁴⁵ by the party having the burden of proof, whether he be plaintiff⁴⁶ or defendant.⁴⁷

41. *Starratt v. Mullen*, *supra*. See also *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659 (1890); 2 Chamb., Ev., § 947 and cases cited.

42. *Moore v. Barber Asphalt Paving Co.*, 118 Ala. 563, 23 So. 798 (1897); *Chandler v. Smith*, 70 Ill. App. 638 (1897); *Swift v. Ratliff*, *supra*; *Truax v. Heartt*, *supra*, *Knoche v. Whiteman*, 86 Mo. App. 568 (1900); *Hood v. Smiley*, 5 Wyo. 70, 36 Pac. 856 (1894); 2 Chamb., Ev., § 947 and cases cited. *Light v. Woodstock, etc., R. Co.*, 13 U. C. Q. B. 216 (1857).

43. *Chaplin & B. Turnpike Road Co. v. Nelson County*, 25 Ky. L. Rep. 1154, 77 S. W. 37; *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524, 531 (1854). See *Roberts v. Padgett*, 82 Ark. 331, 101 S. W. 753 (1907).

44. *Small v. Clewley*, 62 Me. 155 (1873); *Harris v. Harris*, 154 Pa. St. 501 (1893); *Jones v. Simpson*, 116 U. S. 609; *Clark v. Hilla*, 67 Tex. 141 (1886); 2 Chamb., Ev., § 949 and cases cited. It is said, for example, that "he who affirms must prove." *Marigny v. Union Bank*, 12 Rob. (La.) 283 (1844); *Crowninshield v. Crowninshield*, *supra*; *præsumitur pro negante*, *Union Nat. Bank v. Glenwick*, 45 Ill. 375 (1867); that no one is obliged to prove a negative, *Carroll v. Ma-*, 28 Ala. 521 (1856); *State v. Melton*, 8 N. C. 117 (1844); *State v. Morrison*, 14 N. C. 117 (1831); or that the party who has the

"affirmative of any proposition" has the burden of proof. *People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480 (1870); *Simon v. Krimko*, 123 N. Y. Supp. 697 (1910). This is, in reality, a misapprehension. Where the defendant in a civil action for wrongful death admits the killing but puts in evidence sufficient to justify it as in self-defense, it has been recently held that the burden is on the plaintiff to show by independent testimony that the killing was wrongful. This decision seems to be contrary to the weight of authority. *Welch v. Creech*, 88 Wash. 429, 153 Pac. 355, L. R. A. 1918A 353.

45. *Douglass v. Willard*, 129 Cal. 38, 61 Pac. 572 (1900); *Cleveland, O., etc., Ry. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540 (1908); *Phipps v. Mahon*, 141 Mass. 471, 5 N. E. 835 (1886); *Schlesinger v. Hexter*, 34 N. Y. Super. Ct. 499 (1872); *Pusey v. Wright*, 31 Pa. St. 387 (1858); 2 Chamb., Ev., § 949, note 6, and cases cited.

46. *Baird v. Brown*, 29 La. Ann. 842 (1876); *Eastman v. Gould*, 63 N. H. 89 (1884); 2 Chamb., Ev., § 949, note 7, and cases cited.

47. *Atlantic Trust Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647 (1902); *Western Union Tel. Co. v. Jackson*, 19 Tex. Civ. App. 273, 46 S. W. 279 (1898); 2 Chamb., Ev., § 949, note 8, and cases cited.

The substantive law may require that the existence of conditions antecedent to liability should be negatived;⁴⁸ and, so far as can reasonably be demanded in any particular case,⁴⁹ the party having the burden of proof may fairly be expected to establish the truth of such negative allegations, even where special knowledge is possessed by his antagonist.

§ 397. [Position of Burden of Proof]; Equity Pleading.—In equity, as at law, the burden of proof is on the party who has the affirmative of the issue raised by the pleadings.⁵⁰ There being no constructive admission in equity, as distinguished from common law pleading, a plaintiff or complainant has the burden of proof as to all material facts not expressly admitted by the answer.⁵¹ Under the general rule the defendant has the affirmative of the issue as to any plea set up by him,⁵² or any affirmative defences relied upon in the answer, and, by consequence, as to these has the burden of proof.

§ 398. [Position of Burden of Proof]; Statutory Pleading.—Under code pleading the plaintiff, or complainant, states such facts as, in his opinion, entitle him to relief. The burden of proof is on him as to all allegations not specifically admitted by the defendant in his answer.⁵³ Such allegations are regarded as denied,⁵⁴ though the denial be merely argumentative;⁵⁵—as where it sets up a different price,⁵⁶ or relies upon another contract.⁵⁷ Should the distinct admissions made by the defendant's answer suffice to establish the plaintiff's *prima facie* case,⁵⁸ the burden of proof is upon the defendant as to any matter relied upon in avoidance of the effect of these admissions.⁵⁹

48. *Bufford v. Raney*, 122 Ala. 565, 26 So. 120 (1898); *Atlantic Trust Co. v. Crystal Water Co.*, *supra*; 2 Chamb., Ev., § 949, note 9, and cases cited.

49. *Delachaise v. Maginnis*, 44 La. Ann. 1043, 11 So. 715 (1892); *Thayer v. Viles*, 23 Vt. 494 (1851).

Administrative Details.—In many jurisdictions, the right to "open and close the case itself" rest upon the party having the burden of proof. *New Ellerslie Fishing Club v. Stewart*, 29 Ky. L. Rep. 414, 93 S. W. 598 (1906).

50. *Pusey v. Wright*, 31 Pa. St. 387 (1859); *Pritchard v. Pritchard*, 2 Tenn. Cr. App. 294 (1902); *Cochran v. Blount*, 161 U. S. 350, 16 S. Ct. 454, 40 L. ed. 729 (1895). But see *Huston v. Harrison*, 168 Pa. St. 136, 31 Atl. 987 (1895).

51. *Pusey v. Wright*, *supra*; *Clifton v. Weston*, 54 W. Va., 250, 46 S. E. 360 (1903); 2 Chamb., Ev., § 951, note 3, and cases cited.

52. *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 398 (1893); *Clements v. Moore*, 6 Wall. (U. S.) 299, 315, 18 L. ed. 786

(1867). It is an established rule of evidence in equity, that where an answer which is put in issue, admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved: otherwise the admission stands as if the fact in avoidance had not been averred. *Id.*

53. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516, 83 N. W. 729 (1900).

54. *Carver v. Eads*, 65 Ala. 100 (1880); *Woodson Mach. Co. v. Morse*, 47 Kan. 429, 28 Pac. 152 (1891).

55. *Homire v. Rodgers*, 74 Iowa 395, 37 N. W. 572 (1888).

56. *Connolly v. Clark*, 20 Misc. (N. Y.) 415, 45 N. Y. Supp. 1042 (1897).

57. *Mott v. Baxter*, 29 Colo. 418, 68 Pac. 220 (1920); *Phipps v. Mahon*, 141 Mass. 471, 5 N. E. 835 (1886); *Consumers' Brewing Co. v. Lipot*, 21 Misc. (N. Y.) 532, 47 N. Y. Supp. 718 (1897); 2 Chamb., Ev., § 952, note 5, and cases cited.

58. § 409, *infra*; 2 Chamb., Ev., § 992.

59. *Hunter v. Sanders*, 113 Ga. 140, 38 S.

Where the plaintiff files a replication, or the law files one for him, he has the burden of proof as to any new matter which is set up.⁶⁰ This looseness of pleading frequently causes a change of legal situation which strongly resembles a shifting of the burden of proof, which is said to take place. This, in reality, is impossible.⁶¹ A party, being at liberty, at the trial, to bring out in his evidence what, under a more scientific system of pleading, would be matter of an affirmative plea, although his position is still, on the record, merely that of denying the allegations of his antagonist, the burden of proof, being upon him as to this affirmative plea, this burden is said to have shifted. "The simple fact is, that under this mode of pleading, as compared with a strictly accurate mode, the time fixed for setting up the affirmative case is different; instead of requiring that it be disclosed before the pleadings are ended, it is allowed to be made known during the progress of the trial."⁶² Some slight color of principle is given this process by the fact, above referred to,⁶³ that many defences which, under common law pleading were affirmative, e.g., infancy, coverture and the like, really show that the other party never had a cause of action.⁶⁴ Of these the defendant in a trial conducted under statutory pleading may properly avail himself, though his only statement is a general denial of the plaintiff's case.⁶⁵

Counterclaim or Set-Off.—The filing of a counterclaim or set-off does not affect the burden of proof in the main action.⁶⁶ It merely amounts to a cross-action, in which the burden of proof is as it would have been if that suit had been brought as an independent proceeding. As to all allegations in his declaration, or affirmative replication which are denied, the plaintiff in set-off or counterclaim has this burden of proof.⁶⁷ including the allegation of damages.⁶⁸ As to any affirmative plea, either in answer.⁶⁹ or rejoinder, the de-

E. 406 (1901); Chapman v. Meiling, 147 Ill. App. 411 (1909); Pierce v. Stolhand, 141 Wis. 286, 124 N. W. 259 (1910); 2 Chamb., Ev., § 952, note 7, and cases cited.

60. Gatlin v. Vaut, 6 Ind. Terr. 254, 91 S. W. 38 (1901).

61. §§ *et seq.*; 2 Chamb., Ev., §§ 938 *et seq.*; Tarbox v. Eastern Steamboat Co., 50 Me. 339 (1862); Brown v. King, 5 Metc. (Mass.) 173 (1842).

62. 2 Chamb., Ev., § 953; Thayer, Prelim. Treat. Ev., 379.

63. § 396, note 41; 2 Chamb., Ev., § 947, note 1.

64. Starratt v. Mullen, 148 Mass. 570, 20 E. 178, 2 L. R. A. 697 (1889).

65. "When a general denial is pleaded, all defences may be proved under the issues just named, except a set-off or a counterclaim." *Lockey v. Davis*, 8 Ind. App. 190 (1893). A further example of this anomalous method

of pleading may be found in the defence of contributory negligence, Indianapolis, etc., R. R. v. Horst, 93 U. S. 291 (1876); which the common law frequently required should be taken by affirmative plea. *Stone v. Hunt*, 94 Mo. 475 (1887).

66. *Gile v. Sawtelle*, 94 Me. 46, 46 Atl. 786 (1900).

67. *Wetherell v. Hollister*, 73 Conn. 622, 48 Atl. 826 (1901); *Holmes v. McKennan*, 120 Ill. App. 320 (1905); *Murphy v. Cooper*, 41 Mont. 72, 108 Pac. 576 (1910); *Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co.*, 178 N. Y. 219, 70 N. E. 501 (1904); *Davis-Colby Ore Roaster Co. v. Rogers*, 191 Pa. St. 229, 43 Atl. 567 (1899); 2 Chamb., Ev., § 954, n. 2, and cases cited.

68. *Pocono Spring Water Ice Co. v. American Ice Co.*, 214 Pa. 640, 64 Atl. 398 (1906).

69. *Rumbough v. Southern Imp. Co.*, 109 N. C. 703, 14 S. E. 314 (1891).

fendant in set-off or counterclaim has the burden of proof. The same rule applies when cross bills in equity or cross complaints at the law are tried together. Each of the contending parties has the same burden as if the suit, as to which the inquiry is made, had presented the sole issue for trial.⁷⁰

§ 399. [Position of Burden of Proof]; Actions in Rem, etc.—Where there are no common law pleadings, as where one intervenes in a pending proceeding as claimant,⁷¹ the burden of proof is placed by procedure or administration in accordance with the natural rule upon the defendant, claimant or party seeking affirmative action. So, where one institutes an action *in rem*, seeking affirmative action in his own behalf;—as for the probate of a will,⁷² or seeks relief in any other special proceeding as where the party appeals from an order,⁷³ or sues to condemn land,⁷⁴ or to recover damages arising from the exercise of the right of eminent domain,⁷⁵ the burden of proof is upon him. So also, where a petitioner asks to be declared elected to an office.⁷⁶ An intervenor who fails to support his claim by proof will be defeated.⁷⁷

§ 400. [Position of Burden of Proof]; Criminal Cases; Burden on Prosecution.—The rules regulating the burden of proof in either of its dual senses, are the same in criminal as in civil cases. Where no statutory regulation exists to the contrary,⁷⁸ the burden of proof is upon the government to establish beyond a reasonable doubt,⁷⁹ every material allegation necessary to the existence of the offence charged,⁸⁰ including that alleging any specific intent necessary to constitutes the offence,⁸¹ or any mental state, such as knowledge,⁸² required by

70. *Fitzgerald v. Goff*, 99 Ind. 28 (1884); *Muir v. Kalamazoo Corset Co.*, 155 Mich. 441, 119 N. W. 589, 15 Detroit Leg. N. 1074 (1909).

71. *Eastmore v. Bunkley*, 113 Ga. 637, 39 S. E. 105 (1901); *Miller v. Pryse*, 20 Ky. L. Rep. 1544, 49 S. W. 776 (1899); 2 Chamb., Ev., § 955, n. 1, and cases cited.

72. *Ware v. Ware*, 8 Greenl. (Me.) 42 (1831); *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524 (1854); 2 Chamb., Ev., § 955, n. 2, and cases cited.

73. *Lloyd v. Trimleston*, 2 Molloy 81 (1829).

74. *Neff v. Reed*, 98 Ind. 341 (1884).

75. *Montgomery Southern R. Co. v. Sayre*, 72 Ala. 443 (1882); *Williams v. Macon, etc., R. Co.*, 94 Ga. 709, 21 S. E. 997 (1894).

76. *In re Stanstead Election Case*, 20 Can. Supreme Ct. 12 (1891).

77. *Campbell v. J. I. Campbell Co.*, 117 La. 402, 41 So. 696 (1906).

78. *Sanders v. State*, 94 Ind. 147 (1883); *Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420 (1874); *Revoir v. State*, 8 Wis. 295, 52

N. W. 84 (1892); 2 Chamb., Ev., § 956, n. 1, and cases cited.

79. *Dorsey v. State*, 110 Ga. 331, 35 S. E. 651 (1900); *Schintz v. People*, 178 Ill. 320, 52 N. E. 903 (1899); *State v. Scheve*, 65 Neb. 853, 93 N. W. 169, 59 L. R. A. 927 (1903); *People v. Baker*, 96 N. Y. 340 (1884); *Agnew v. U. S.*, 165 U. S. 36, 17 S. Ct. 235 (1896); 2 Chamb., Ev., § 956, n. 2, and cases cited.

80. *Fitch v. People*, 45 Colo. 298, 100 Pac. 1132 (1909); *Jones v. State*, 113 Ga. 271, 38 S. E. 851 (1901); *State v. Grimstead*, 62 Kan. 593, 64 Pac. 49 (1901); *People v. Downs*, 123 N. Y. 558, 25 N. E. 988 (1890); *Gustavenson v. State*, 10 Wyo. 300, 68 Pac. 1006 (1902); 2 Chamb., Ev., § 956, n. 3, and cases cited.

81. *Com. v. McKie*, 1 Gray (Mass.) 61, 61 Am. Dec. 410 (1854); *State v. Judd*, 20 Mont. 420, 51 Pac. 1033 (1898); *Jones v. State*, 51 Ohio St. 331, 38 N. E. 79 (1894); 2 Chamb., Ev., § 956, n. 4, and cases cited.

82. *Binkley v. State*, 51 Tex. Cr. R. 54, 100 S. W. 780 (1907).

substantive law to prove the criminal liability of the accused.⁸³ The truth of all such allegations is put in issue by the general negative plea of not guilty.⁸⁴

Presumption of Innocence.—The procedural rule of the burden of proof upon the prosecution is stated in the reverse form, i.e., in terms of the defendant's right to insist upon the more affirmative rule. Thus, "all persons are presumed to be absolutely innocent of the crime charged against them, in its entirety and in all its material parts, until the jury finds to the contrary, on proper instructions, based on competent and relevant testimony."⁸⁵

Corpus Delicti.—The affirmative proof logically and therefore legally⁸⁶ involves, in a criminal case, two main propositions;—(1) The crime charged was committed; (2) It was committed by the accused. Proof that some one has committed the offence charged, i.e., that the *corpus delicti*, the body of the offence, or the offence itself, must be clearly established,⁸⁷ as a necessary preliminary in order that the attention of the tribunal should be directed to the second proposition, i.e., that the accused committed it.⁸⁸

Competency of Evidence.—It is the duty of the state to show affirmatively that its evidence is competent, that its witnesses are qualified by knowledge and otherwise, to testify, that no privilege exists in the matter. The state must show, if objection is made, that it is not valid. In case of documentary evidence, it must show that it is admissible. Thus, a confession⁸⁹ must be affirmatively shown to have been voluntary.⁹⁰

Negative Allegations.—Where proof of the offence charged involves showing negative allegations, the state's burden of proof may require, that so far as reasonably capable of proof, these should be established by the prosecution. And where the legislature or judiciary has established certain exceptional states of fact under which the penalties prescribed by law do not attach, it is the duty of the state to negative the existence of these both in allegation and proof.⁹¹ So where the observance of a particular procedural requirement, e.g., corroboration,⁹² is made a proviso upon the operation of a statute, the burden is on the prosecution to show compliance with the condition.

Offence Not Outlawed, etc.—The state is compelled of necessity to show

83. *State v. Lax*, 71 N. J. L. 386, 59 Atl. 18 (1904).

84. *Cooper v. State*, 2 Ga. App. 730, 59 S. E. 20 (1907); *State v. Pressler*, 16 Wyo. 214, 92 Pac. 806 (1907). Special pleas in bar are not, as a rule, required, and affirmative pleas by way of confession and avoidance are but seldom required.

85. *Cook v. State*, 85 Miss. 738, 749, 38 So. 110 (1905). See *United States v. Heike* (N. Y. 1910), 175 Fed. 852, 2 Chamb., Ev., § 957.

86. 2 Chamb., Ev., §§ 385 *et seq.*

87. *Younkins v. State*, 2 Cold. (Tenn.) 219 (1865); 2 Chamb., Ev., § 958.

88. *U. S. v. Searcey*, 26 Fed. 435 (1885).

89. 2 Chamb., Ev., §§ 959, 1472 *et seq.*

90. *Smith v. State*, 74 Ark. 397, 85 S. W. 1123 (1905).

91. *Ferguson v. State*, 1 Ga. App. 841, 58 S. E. 57 (1907); 2 Chamb., Ev., § 960.

92. *State v. Connor*, 142 N. C. 700, 55 S. E. 787 (1906). Certain distinctions are, however, to be taken. See *Richardson v. State*, 77 Ark. 321, 91 S. W. 758 (1905); *State v. Mills*, 182 Mo. 370, 81 S. W. 867 (1904).

that the alleged acts were done at a *time* when it was unlawful to do them,⁹³ i.e., after the passage of a statute prohibiting the doing of the acts in question,⁹⁴ before the finding of the indictment,⁹⁵ and also that the prosecution is not barred by any general or special statute of limitation.⁹⁶

Sanity.—Within this burden is that of showing that the act alleged was committed by a person mentally responsible, in a legal sense;⁹⁷—that is, that the accused was sane at the time he did the act in question to an extent which makes him amenable to its legal consequences. The defence of insanity, therefore, merely raises a question as to the position of the burden of evidence.⁹⁸ It is not an affirmative defence.⁹⁹ Evidence with regard to it may be given under a general plea of not guilty,¹ and should a reasonable doubt as to the prisoner's sanity be found by the jury he is entitled to be adjudged not guilty by reason of insanity. As in civil cases,² and actions *in rem*, e.g., proceedings involving the probate of a will,³ the presumption of law as to sanity⁴ has no effect upon the burden of *proof*;⁵—however strongly it may sustain or “shift” the burden of *evidence*.⁶

Venue.—The government's proof must meet the requirements of *place*, as well as those of *time*. The offence must be shown to have been committed in the county alleged in the indictment, i.e., the proper *venue* must be established.⁷ Thus, on an indictment in the Federal courts it must be shown by the state, if the offence was committed on land that the particular place was within the jurisdiction of the United States. If on the high seas, the proof is that it was committed on a vessel belonging to a citizen of the country.⁸

§ 401. [Position of Burden of Proof]; Affirmative Defences.—The prosecution's burden of proof in criminal cases requires from it ultimate proof of

93. *State v. Newton*, 39 Wash. 491, 81 Pac. 1002 (1905).

94. *Lawrenceville v. Crawford*, 60 Ga. 162 (1878).

95. *Com. v. Graves*, 112 Mass. 282 (1873); *State v. Hughes*, 82 Mo. 86 (1884); 2 Chamb., Ev., § 961, n. 3, and cases cited.

96. *Askew v. State*, 3 Ga. App. 79, 50 S. E. 311 (1907); *State v. Schuerman*, 70 Mo. App. 518 (1897); *State v. Carpenter*, 74 N. C. 230 (1876); 2 Chamb., Ev., § 961, n. 4, and cases cited.

97. *State v. Crawford*, 11 Kan. 32 (1873); *Fife v. Com.*, 29 Pa. 429 (1857); 2 Chamb., Ev., § 962, n. 1.

98. § 404: 2 Chamb., Ev., § 974.

99. *State v. Pressler*, *supra*.

1. *State v. Speyer*, 207 Mo. 540, 106 S. W. 505 (1907).

2. See *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 326 (1897).

3. *Baxter v. Abbot*, 7 Gray (Mass.) 71 (1856).

4. § 424, *infra*; 2 Chamb., Ev., § 1053.

5. *Dacey v. People*, 116 Ill. 555 (1886); *People v. Garbutt*, 17 Mich. 9 (1868); *Brotherton v. People*, 75 N. Y. 159 (1878).

6. *Com. v. Heath*, 11 Gray (Mass.) 303 (1858); 2 Chamb., Ev., § 962, n. 9, and cases cited. See also *Davis v. U. S.*, 160 U. S. 469, 485 (1895).

7. *Barnes v. State*, 134 Ala. 36, 32 So. 670 (1901); *People v. Tarpey*, 59 Cal. 371 (1881); *Jones v. State*, 113 Ga. 271, 38 S. E. 851 (1901); *Huston v. People*, 53 Ill. App. 501 (1893); *State v. Tosney*, 26 Minn. 262, 3 N. W. 345 (1879); *State v. Young*, 99 Mo. 284, 12 S. W. 642 (1889); *Larkin v. People*, 61 Barb. (N. Y.) 226; 2 Chamb., Ev., § 963 and cases cited.

8. *U. S. v. Imbert*, 26 Fed. Cas. No. 15,438, 4 Wash. 702 (1827).

propositions which may be negative in form; — as the non-existence of justification,⁹ mitigating circumstances¹⁰ and the like. The burden of *evidence*, however, is frequently transferred to the defendant, in respect to these matters, whenever the government succeeds in establishing a *prima facie* case,¹¹ i.e., by proof beyond a reasonable doubt. Even in the case of an affirmative defence, there is, however, no burden of *proof* upon the defendant in a criminal case. "It is a prisoner's burden, the only burden ever put upon him by law, that of satisfying the jury that there is a reasonable doubt of his guilt."¹²

Insanity.— In large part by reason of the confusion between burden of proof and burden of evidence, a rule, entirely indefensible in point of principle, has, in several jurisdictions, been adopted to the effect that where the defendant relies on the defence of insanity the burden of proof is on him to establish it by a "fair preponderance of the evidence"¹³— or "to the satisfaction of the jury by a preponderance of the evidence."¹⁴ Until the preponderance of evidence is furnished, the government's presumption of sanity¹⁵ is said to be a "full equivalent" of express proof of sanity.¹⁶ The proposition actually announced is that insanity, in a criminal case, is an affirmative defence.

9. *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 122 (1877); *State v. Hirsch*, 45 Mo. 429 (1870).

10. *Wharton v. State*, 73 Ala. 366 (1883); *Agnew v. U. S.*, 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624 (1896); 2 Chamb., Ev., § 965, n. 2, and cases cited.

11. § 409, *infra*; 2 Chamb., Ev., § 992.

12. *Com. v. York's Case*, 9 Metc. (Mass.) 93, 98 (1845). And see *State v. Schweitzer*, 57 Conn. 532 (1889), as to the proper relations between the two burdens of "proof" and "evidence."

13. *People v. Willard*, 150 Cal. 543, 89 Pac. 124 (1907); *State v. Porter*, 213 Mo. 43, 111 S. W. 529 (1908); *State v. Austin*, 71 Ohio

St. 317, 73 N. E. 218 (1905); 2 Chamb., Ev., § 966, n. 1, and cases cited.

14. *Fults v. State*, 50 Tex. Cr. R. 502, 98 S. W. 1057 (1906). A closer approximation to the true rule is reached when the statement is made that the burden of proof is on the defendant in a criminal case to raise a reasonable doubt as to his sanity. *Johnson v. State*, 57 Fla. 18, 49 So. 40 (1909). See *State v. Craig*, 52 Wash. 66, 100 Pac. 167 (1909), the state has not the burden of removing such doubt by a preponderance of evidence.

15. *Infra*, § 404; 2 Chamb., Ev., § 974.

16. *State v. Austin*, *supra*. See 2 Chamb., Ev., § 966.

CHAPTER XII.

BURDEN OF EVIDENCE.

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§ 402. **Burden of Evidence.**—The burden of evidence presents radical differences both in quality and position from the burden of proof. *In position*, the burden of proof is unchanging; once imposed, it remains. The burden of evidence may “shift” to any extent, alternating between the parties according to the exigencies of the trial. The position of the burden of proof is determined by the pleadings. That of the burden of evidence has no necessary or invariable connection with them.¹ *In quality*, the burden of proof is a *forensic* necessity. The burden of evidence is a *logical necessity*.²

§ 403. **Position of Burden of Evidence.**—The incidence of the burden of evidence at the beginning of the trial is upon the party having the burden of proof, i.e., upon the actor, until he shall have established a *prima facie* case in his favor as to the truth of every material allegation embraced in his affirmative case.³ As soon as the party having the burden of proof establishes these facts the burden of evidence, so far as he is concerned, is discharged,⁴ and is

1. 2 Chamb., Ev., § 967. See *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354, 359, 39 N. E. 358 (1895).

2. 2 Chamb., Ev., §§ 967, 968. and cases cited.

3. *Peck v. Sciville Mfg. Co.*, 43 Ill. App. 360 (1891); *Sun L. Ins. Co. v. Seigler*, 19 Ky. L. Rep. 1227 (1897), 42 S. W. 1137; *Starratt v. Mullen*, 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697 (1889); 2 Chamb., Ev., § 969, n. 1, and cases cited. The party having the

burden of evidence may establish his *prima facie* case entirely by adducing evidence, or he may establish a *prima facie* inference or presumption of law, as it is called. 2 Chamb., Ev., §§ 969, 1085 *et seq.*; 1184 *et seq.*

4. *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380 (1899); *Turner v. Wells*, 64 N. J. L. 269, 45 Atl. 641 (1900); *Heineman v. Heard*, 62 N. Y. 448 (1875); 2 Chamb., Ev., § 969, n. 5, and cases cited.

transferred to his adversary, the *reus* or actor, and remains with him so long as the actor's original case continues to retain its *prima facie* quality.⁵ The position of the burden of proof in the meantime stands in no way affected.⁶ The burden of evidence may, and frequently does, vibrate between the parties;— and is a necessary and usual incident of any contest to be determined by the use of facts, as the establishment of a *prima facie* case presents to a party the alternative of producing evidence to meet it or of being defeated in the action.⁷

§ 404. [Position of Burden of Evidence]; Criminal Cases.— The burden of proof, in point of principle, never rests in a criminal case anywhere save upon the government. All the accused need do in any event, whether he is directly assailing the constituent facts of the government's case or setting up new facts inconsistent with it, is to raise a reasonable doubt.⁸ While there is no affirmative plea in criminal cases in the sense of a shifting of the burden of proof, there is an affirmative defense under the general negative traverse of not guilty which resembles an affirmative plea in so far as the burden of evidence as to it is on the defendant,⁹ the accused at the same time being, of course, at liberty to use any facts favorable to his contention which have developed during the proof of the government's original case.¹⁰

5. *Jones v. Malvern Lumber Co.*, 58 Ark. 125, 23 S. W. 679 (1893); *Whitney v. Morrow*, 50 Wis. 197, 6 N. W. 494 (1880).

6. *Phipps v. Mahon*, 141 Mass. 471, 5 N. E. 835 (1886); *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282 (1872); *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5, 13, 31 N. W. 164 (1887); 2 Chamb., Ev., § 969, n. 1, and cases cited. As to Difficulty of Proof, see 2 Chamb., Ev., § 970, and cases cited.

7. *Carroll v. Boston Elevated Ry. Co.*, 200 Mass. 527, 86 N. E. 793 (1909); *Berger v. St. Louis Storage & Commission Co.*, 136 Mo. App. 36, 116 S. W. 444 (1909); *Toube v. Rubin-Blankfort Co.*, 63 Misc. 298, 116 N. Y. Supp. 673 (1909); 2 Chamb., Ev., § 971, and cases cited. In an action against a bailee to recover for loss of goods when the loss is established, the burden then rests on the defendant to establish a defence, but when he proves that the loss took place through fire, robbery or theft or by any other means which would seem to be unavoidable, the burden of proving negligence then shifts to the plaintiff, but on the whole case the burden of proving the facts essential to recovery rests on the plaintiff. *Stone v. Case*, 34 Okla. 5, 124 Pac. 960, 43 L. R. A. (N. S.) 1168 (1912). In an action for leaving a sponge in a patient after

an operation the surgeon has the burden of proving that he used due care after evidence is introduced that the sponge was left and he does not meet this burden by showing that the nurses reported to him that the sponges had all been removed, as it may have been his duty to count the sponges or investigate personally, and there should be some evidence showing why he did not or could not do this. *Davis v. Kerr*, 239 Pa. 351, 86 Atl. 1007, 46 L. R. A. (N. S.) 611 (1913).

8. *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549 (1889); *State v. Beasley*, 84 Iowa 83, 50 N. W. 570 (1891); *State v. Howell*, 100 Mo. 628, 14 S. W. 4 (1890); *People v. Riordan*, 117 N. Y. 71, 22 N. E. 455 (1889); 2 Chamb., Ev., § 972, n. 2, and cases cited.

9. *Rayburn v. State*, 69 Ark. 177, 63 N. W. 356 (1901); *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125 (1889); *Pierce v. State*, 53 Ga. 365 (1874); *Williams v. People*, 121 Ill. 84, 11 N. E. 881 (1887); *State v. Wright*, 134 Mo. 404, 35 S. W. 1145 (1896); *Com. v. Zelt*, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602 (1891); *Agnew v. U. S.*, 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624 (1896); 2 Chamb., Ev., § 972, n. 3, and cases cited.

10. *Leslie v. State*, 35 Fla. 171, 17 So. 555 (1895); *Dacey v. People*, 116 Ill. 555, 6 N. E.

Alibi.—Prominent among these defences is that of *alibi*. It is not an affirmative defense as to which the defendant has assumed the burden of proof.¹¹ In a majority of jurisdictions, the correct rule is adopted; — that it is a necessary part of the government's case to show, when disputed, that the defendant was present at the scene of the doing of the alleged act at the time when he is claimed to have done it. Consequently, it has been held that while the burden is on the defendant to introduce evidence sufficient to raise a reasonable doubt that the burden of proof still continues to be on the prosecution as to this necessary element of its case, and that, if a reasonable doubt is left in the minds of the jury as to whether the accused actually was present at the scene of the crime at the time when he must have been there in order to have committed it, he is entitled to an acquittal.¹²

Insanity.—The same rule is to be applied in cases where the defence is that the defendant is not responsible by reason of idiocy or insanity. The burden of proof upon the state in a criminal case extends to establishing the proposition that the defendant, at the time of committing the offense, was not rendered irresponsible by reason of inability to recognize the nature and consequences of his act; — otherwise stated, for legal purposes, that he is of sound mind.¹³ In other words, the burden of proof is on the government to prove defendant's sanity beyond a reasonable doubt.¹⁴

Presumption of Sanity.—As experience shows that men in general possess this degree of mental capacity, it will be inferred that the defendant in any particular case was sane.¹⁵ Upon this, so-called "presumption of sanity" the government may rest this particular portion of its *prima facie* case; and, if on the whole case, whether the inferences are drawn from facts presented by the government or from those submitted by the defendant, the latter succeeds in creating a reasonable doubt, he should be acquitted.¹⁶ But until a reasonable doubt appears the burden of evidence is upon the accused to create one.¹⁷

165 (1886); 2 Chamb., Ev., § 972, n. 4, and cases cited.

11. *Com. v. Choate*, 105 Mass. 451 (1870); *Briceland v. Com.*, 74 Pa. 463 (1873); 2 Chamb., Ev., § 973 and cases cited.

12. *McNamara v. People*, 24 Colo. 61, 48 Pac. 541 (1897); *Harrison v. State*, 83 Ga. 129, 9 S. E. 242 (1889); *State v. Conway*, 55 Kan. 323, 56 Kan. 582, 40 Pac. 661 (1895); *People v. Pichette*, 111 Mich. 461, 69 N. W. 739 (1897); *Sherlock v. State*, 60 N. J. L. 31, 37 Atl. 435 (1897); *Walters v. State*, 39 Ohio St. 215 (1883); *Glover v. U. S.*, 147 Fed. 426, 77 C. C. A. 450 (1906); 2 Chamb., Ev., § 973, n. 2, and cases cited. Other courts treat *alibi* as if it were an affirmative defense in a civil action on which the accused has the burden of proof. *Bacon v. State*, 22

Fla. 51 (1886); *Klein v. People*, 113 Ill. 596 (1885); *State v. Fenlason*, 78 Me. 495, 7 Atl. 385 (1886); 2 Chamb., Ev., § 973, notes 3 and 4, and cases cited.

13. A deaf and dumb defendant must be shown to have been sane. *State v. Draper*, *Houston Cr. Cas. (Del.)* 291 (1868); 2 Chamb., Ev., § 974.

14. *State v. Crawford*, 11 Kan. 32 (1873); *Com. v. Eddy*, 7 Gray (Mass.) 583 (1856); *People v. Garbutt*, 17 Mich. 9 (1868); *State v. Jones*, 50 N. H. 369, 400 (1871); 2 Chamb., Ev., § 974, notes 2 and 3.

15. *Sutton v. Sadler*, 3 C. B. N. S. 87 (1857); *Baxter v. Abbot*, 7 Gray (Mass.) 71 (1856); 2 Chamb., Ev., § 974, n. 4, and cases cited.

16. *Montag v. People*, 141 Ill. 75, 30 N. E.

Continuance of Mental State.— There is an inference from experience that when a permanent type of insanity has been shown to exist it will continue until shown to have ceased. Where it is the claim of the government that the mental derangement has ceased, or that, notwithstanding its continuance, the act in question was done in an interval of mental lucidity, the burden of evidence is upon the government. This is commonly stated thus; — that where a permanent state of insanity is shown to exist, the *burden of proof* is upon the state to show that the offense was committed during a lucid interval.¹⁸ Likewise, it is said that in a case of temporary insanity, the burden of proof is not upon the government to establish that the act was done during a lucid interval,¹⁹ or that, where the accused is shown to have had lucid intervals, it will be presumed that the offense was committed during one of them.²⁰

Contrary Views.— It has proved easy to turn the rule that the burden of evidence is on the defendant in a criminal case to introduce evidence of his insanity, if such evidence does not already appear in the case of the prosecution, into a statement that the *burden of proof* is on the defendant to establish his insanity by preponderance of the evidence;²¹ or, as is said, with nearly equal frequency, to the satisfaction of the jury.²²

Intoxication.— While intoxication is not a defence to crime by way of justification or excuse, still, where the existence of a specific intent is a constituent part of the offence charged and is part of the state's burden of proof, the accused may show that at the time of the commission of the offense he was incapacitated from mentally forming that intent by reason of *intoxication*. As to this he has the burden of evidence. This has been stated in the cases to

337 (1892); *Com. v. Gilbert*, 165 Mass. 45, 42 N. E. 336 (1895); *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. Rep. 78 (1899); *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275 (1893); 2 Chamb., Ev., § 974, n. 6, and cases cited.

17. *People v. Hettick*, 126 Cal. 425, 58 Pac. 918 (1899); *Keener v. State*, 97 Ga. 388, 24 S. E. (1895); *State v. Jones*, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470 (1884); *State v. Lawrence*, 57 Me. 574 (1870); *State v. Peel*, 23 Mont. 359, 59 Pac. 169, 75 Am. St. Rep. 520 (1899); *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379 (1882); *Maas v. Territory*, 10 Okla. 714, 63 Pac. 960, 53 L. R. A. 814 (1901); *Revois v. State*, 82 Wis. 205, 52 N. W. 84 (1892); 2 Chamb., Ev., § 974, n. 7, and cases cited.

18. *Armstrong v. State*, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484 (1892); *People v. Montgomery*, 13 Abb. Pr. (N. S.) (N. Y.) 207 (1872); *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372 (1878); 2 Chamb., Ev., § 975, n. 2, and cases cited.

19. *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204 (1895); *Montgomery v. Com.*, 89 Ky. 509, 11 S. W. 475, 11 Ky. L. Rep. 40 (1889); *Hunt v. State*, 33 Tex. Cr. 252, 26 S. W. 206 (1894); 2 Chamb., Ev., § 975, n. 3, and cases cited.

20. *Ford v. State*, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117 (1896); *U. S. v. Ridgeway*, 31 Fed. 144 (1887); 2 Chamb., Ev., § 975 and cases cited.

21. *Cavaness v. State*, 43 Ark. 331 (1884); *People v. Hettick*, 126 Cal. 425, 58 Pac. 918 (1899); *State v. Davis*, 109 N. C. 780, 14 S. E. 55 (1891); *State v. Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296 (1894); *Roswell v. Com.*, 20 Gratt. (Va.) 860 (1871); 2 Chamb., Ev., § 976, n. 1 and cases cited.

22. *State v. Cole*, 2 Pennw. (Del.) 344, 45 Atl. 391 (1899); *State v. Scott*, 49 La. Ann. 253, 21 So. 271, 26 L. R. A. 721 (1897); *Ortwein v. Com.*, 76 Pa. 414, 18 Am. Rep. 420 (1874); 2 Chamb., Ev., § 976, n. 2 and cases cited.

the effect that the accused has the *burden of proof* to establish the fact of intoxication by a fair preponderance of the evidence,²³ or even, it is said, beyond a reasonable doubt.²⁴

Self-defence.—The burden of evidence to establish facts showing action in self-defence may rest upon the accused.²⁵ It has however been ruled to the effect that where the accused relies upon evidence of self-defence, he must establish the truth of that proposition by a fair preponderance of the evidence.²⁶

§ 405. **Same; Facts Known to Adverse Party.**—The circumstance that one's opponent possesses peculiarly full and complete knowledge relating to a fact, does not, in and of itself, *proprio vigore*, shift the burden of evidence upon him.²⁷ It is often said that facts which are especially within the knowledge of a party must be proved by him.²⁸ This rule is especially applied where the fact particularly well known to the other side presents the further difficulty in the way of adequate proof that it is negative. Under these circumstances, it occurs with special frequency that the other party is called upon to prove it.²⁹

23. *State v. Kavanaugh*, 4 Pen. (Del.) 131, 53 Atl. 335 (1902); *State v. Sparegrove*, 134 Iowa 599, 112 N. W. 83 (1907); *Com. v. McNamee*, 112 Mass. 285 (1873); *State v. Grear*, 29 Minn. 221, 13 N. W. 140 (1882); 2 Chamb., Ev., § 977, n. 2 and cases cited.

24. *State v. Spencer*, 21 N. J. L. 196 (1846).

25. *State v. Lee*, 1 Boyce's (24 Del.) Rep. 18, 74 Atl. 4 (1909); 2 Chamb., Ev., § 977a.

26. *People v. Schryver*, 42 N. Y. L. (1870); *State v. Lee*, *supra*.

27. *Anderson v. Suggs*, 42 Ga. 265 (1871); *Colorado Coal, etc., Co. v. U. S.* 307, 8 S. Ct. 131, 31 L. ed. 182 (1887); 2 Chamb., Ev., § 978, n. 2 and cases cited.

28. *Dirks v. California Safe Deposit, etc., Co.*, 136 Cal. 84, 68 Pac. 487 (1902); *Swinhart v. St. Louis & S. Ry. Co.*, 207 Mo. 423, 105 S. W. 1043 (1907); *Brooks v. Garner*, 20 Okla. 236, 94 Pac. 694, 97 Pac. 995 (1908); *Fleming v. People*, 27 N. Y. 329 (1863); 2 Chamb., Ev., § 978, n. 4 and cases cited.

29. *Holmes v. Warren*, 145 Cal. 457, 78 Pac. 954 (1904); *Fulwider v. Trenton Gas, Light & Power Co.*, 216 Mo. 582, 116 S. W. 508 (1909); 2 Chamb., Ev., § 978, n. 5 and cases cited. See also, §§ 406, n. 30, n. 47, *infra*. In an indictment for an assault with a deadly weapon where there is evidence that the defendant pointed a pistol at the complainant the burden of showing that the pistol was not loaded is upon the defendant. The court remarks that it would be impossible in most cases to prove this by the state

and that a technical rule should not be allowed to be set up in such a case. It would seem that the usual rule might apply that where the evidence is in the possession of a party and he does not produce it this raises a presumption against him. *Territory v. Gomez*, 14 Ariz. 139, 125 Pac. 702, 42 L. R. A. (N. S.) 975 (1912).

Agency.—Where an automobile which does damage belongs to the defendant this is *prima facie* evidence that the driver was the servant of the owner and was driving for the owner and the burden is upon the defendant to overcome this presumption by competent evidence. *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59 (1913).

30. *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402 (1898); *Williams v. People*, 121 Ill. 84, 11 N. E. 881 (1887); *People v. Nyce*, 34 Hun (N. Y.) 298 (1884). See § 405, n. 29, *supra*, 2 Chamb., Ev., § 979, n. 1 and cases cited. Where a former conviction is shown by the judgment roll the burden then falls on the other side to show that the judgment has been reversed. *State v. Findling*, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. (N. S.) 449 (1913).

Exceptions in Insurance Policy.—In an action on an insurance policy the burden is on the company to show that death occurred from a cause excepted from liability by the policy. *Red Men's Fraternal Ass'n. v. Rippey*, 181 Ind. 454, 103 N. E. 345, 50 L. R. A.

§ 406. [Position of Burden of Evidence]; Negative Facts.—A special and peculiarly forcible instance of the application of these rules regarding discharge of the burden of evidence concerning facts which are within the knowledge or control of the other party is afforded where the fact or proposition to which the burden relates is in substance negative.³⁰ The rule that the party to whose contention in the cause a fact is essential has the burden of evidence in regard to it is in no way displaced by the circumstance.³¹ It is still part of the litigant's burden of evidence to prove the negative proposition of fact; —as that a certain quality does not exist in a process,³² thing,³³ or person.³⁴ He may properly be required to prove that a certain event has not happened,³⁵ that a fact did not exist,³⁶ or that a given person has not done a certain thing.³⁷ Mere difficulty of making proof does not prevent the tribunal from requiring him to show, as best he may, that a designated individual does not possess a certain thing.³⁸

Quantum of Evidence Required.—But the *quantum* of evidence to be demanded from him is conditioned, by way of limitation, by the well recognized logical difficulty of affirmatively establishing a negative proposition;³⁹ —which though not, as has been intimated,⁴⁰ a “maxim of law,” still presents a logical difficulty which usually increases in proportion to the universality of the negation.⁴¹ The amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slight evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into.⁴²

Methods of Proving a Negative.—Frequently all that is practically possible, in the absence of direct evidence, is the introduction of testimony establishing

(N. S.) 1006 (1913). Where an insurance policy excepts accidental injuries the burden is on the insurer to show that a wound from a burglar's revolver was not accidental but was intentional. *Allen v. Travellers' Protective Asso.*, 163 Iowa 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600 (1913).

31. *Pollak v. Winter*, 166 Ala. 255, 51 So. 998 (1910); *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 122 (1871); *State v. Read*, 12 R. I. 135 (1878); 2 Chamb., Ev., § 979, n. 2 and cases cited.

32. *Kelley v. Owens*, 95 Cal. xvii, 30 Pac. 596 (1892).

33. *State v. Hirsch*, 45 Mo. 429 (1870).

34. *Lenig v. Eisenhart*, 127 Pa. 59, 17 Atl. 684 (1889); *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307, 317, 8 S. Ct. 131, 31 L. ed. 182 (1887).

35. *Weaver v. State*, 89 Ga. 639, 15 S. E. 840 (1892); *Boulden v. McIntire*, 119 Ind.

574, 21 N. E. 445, 12 Am. St. Rep. 453 (1889); 2 Chamb., Ev., § 979, n. 6 and cases cited.

36. *Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430, 32 N. E. 239 (1892).

37. *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164 (1902); *Little v. Thompson*, 2 Me. 228 (1823); 2 Chamb., Ev., § 979, n. 8 and cases cited.

38. *Beardstown v. Virginia*, 76 Ill. 34 (1875); *Com. v. Locke*, 114 Mass. 288 (1873); *People v. Pease*, 27 N. Y. 45, 63, 84 Am. Dec. 242 (1863); 2 Chamb., Ev., § 979, n. 9 and cases cited.

39. 2 Chamb., Ev., §§ 50, 980.

40. *Colorado Coal, etc., Co. v. U. S.*, *supra*.

41. 2 Chamb., Ev., § 980, n. 3.

42. *Kelly v. Owens*, *supra*; *Succession of Delachaise v. Maginnis*, 44 La. Ann. 1043 (1892).

some particular fact inconsistent with the converse affirmative proposition.⁴³ In many ways, analogous in nature, the negative proposition may be established by the inference arising from circumstantially probative facts inconsistent with the affirmative proposition of which the negative is proposed for proof.⁴⁴ This has been held to be *prima facie* sufficient.⁴⁵ Naturally, proof to the point of demonstration is not required.⁴⁶

Burden of Evidence Not Shifted.—The probative force of evidence of this nature may be, when produced, inconclusive; conclusiveness, however, may be added by the failure of the other party to produce the more conclusive or affirmative evidence which is within his control.⁴⁷ It is sound administration, therefore, to hold that where one who has the burden of evidence to prove a negative proposition produces any proof which renders its existence probable, such evidence shall, where the conclusive facts are within the knowledge of the other party, be regarded as a *prima facie* case.⁴⁸

Modern Instances.—The rule that he who has the better knowledge, especially if he can with it make affirmative proof, is under the burden of evidence, has been widely accepted both in England and America. It has often been held that “when a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact whether the proposition be affirmative or negative.”⁴⁹ Thus, where one is accused of doing an act which would be unlawful unless the doer has received a special authority by permission of law, the government may properly allege that he has done the act — e.g., that he has operated a ferry,⁵⁰ practiced medicine,⁵¹ sold intoxicating liquor⁵² or the like without license or authority in law. When the act itself is proved, it may then be required of the defendant that he then himself exhibit and prove his license and authority;⁵³ — the burden of evidence being shifted to him for that purpose. The short reason for this requirement is that

43. For example, the statement being that A. did *not* hear a certain sound, evidence of conduct on his part inconsistent with his probable action if he had heard it, is competent. *Young v. Stephens*, 9 Mich. 500 (1862), 2 Chamb., Ev., § 981.

44. *Com. v. Locke*, 114 Mass. 288 (1873). *Viles*, 23 Vt. 494 (1851).

45. *Young v. Stephens*, *supra*; *Thayer v.*

46. *Kelley v. Owens*, *supra*; *Vigus v. O'Bannon*, 118 Ill. 334 (1886); *Bastrop State Bank v. Levy*, *supra*; 2 Chamb., Ev., § 981, n. 5 and cases cited.

47. 2 Chamb., Ev., §§ 982, 1070 *et seq.*

48. *Kelley v. Owens*, *supra*; *Vigus v. O'Bannon*, *supra*; *Boulden v. McIntire*, *supra*; *State v. Hirsch*, *supra*; 2 Chamb., Ev., § 982, n. 4 and cases cited.

49. *Robinson v. Robinson*, 51 Ill. App. 317 (1893); 2 Chamb., Ev., § 983. See also, *Clapp v. Ellington*, 87 Hun (N. Y.) 542 (1895).

50. *Wheat v. State*, 6 Mo. 455 (1840).

51. *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402 (1898); *Williams v. People*, 121 Ill. 84 (1887).

52. *State v. Shaw*, 35 N. H. 217 (1857). In civil cases the licensee must prove his license whenever the fact is essential to his case. *Solomon v. Dreachler*, 4 Minn. 278 (1860). But see *Wilson v. Melvin*, 13 Gray (Mass.) 73 (1859), 2 Chamb., Ev., § 983, n. 5 and cases cited.

53. *Shearer v. State*, 7 Blackf. (Ind.) 99 (1844); *State v. Crowell*, 25 Me. 171 (1845); 2 Chamb., Ev., § 983, n. 6 and cases cited.

license or authority is a fact easy for him to prove and difficult for the prosecution to disprove.⁵⁴

The Sounder View.—But such is not, in point of principle, in accordance with the rules of evidence at common law. The burden of evidence as to a particular fact is always, properly, on the party to whose case it is essential. The quantum of proof required to produce a *prima facie* case is, however, materially affected by the relative knowledge of the parties regarding the existence of a particular fact or the truth of a given proposition.⁵⁵

§ 407. Scope of Burden of Evidence.—The actor in the first instance and either party at any subsequent stage when he has the burden of evidence must, in order to relieve himself of this *onus* and cast it upon his opponent, show the existence of every fact essential to the proof of his allegations;⁵⁶—including all probative facts necessary to the admissibility of those which are *res gestae* or constituent.⁵⁷

Media of Proof.—The actor or other party having the burden of evidence will be logically required to establish the truth of the facts stated by his witnesses showing their credibility.⁵⁸ He must establish, against all counter proof, the genuineness, character,⁵⁹ and legal validity⁶⁰ of the documents introduced by him in evidence;—although, where a writing free from suspicion and apparently genuine is produced,⁶¹ its authenticity may be, in many cases, assumed as a matter of administration.

§ 408. [Scope of Burden of Evidence]; Quantum of Proof Required; Num-

54. 2 Chamb., Ev., § 983, n. 7 and cases cited.

55. See discussion of this view, 2 Chamb., Ev., § 984 and notes.

56. *Penitentiary Co. No. 2 v. Gordon*, 85 Ga. 159, 11 S. W. 584 (1890); *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684 (1886); *Whitney v. Morrow*, 50 Wis. 197, 6 N. W. 494 (1880); 2 Chamb., Ev., § 985, n. 1 and cases cited.

Conditional Promise.—In an action on a promise to pay a debt when able the burden rests on the plaintiff to show that the defendant was able to pay. *Van Buskirk v. Kuhns*, 164 Cal. 472, 129 Pac. 587, 44 L. R. A. (N. S.) 710 (1913).

57. § 838, *infra*. *State v. Swift*, 57 Conn. 496, 18 Atl. 664 (1889); *Grimes v. Hilliary*, 150 Ill. 141, 36 N. E. 977 (1894); *Hansen v. American Ins. Co.*, 57 Iowa 741, 11 N. W. 670 (1882); 2 Chamb., Ev., § 985, n. 2 and cases cited.

Jurisdiction.—The actor may also be called upon to establish all facts essential to the

jurisdiction of the court. *Shaw v. Cartier*, 2 Montreal Super. Ct 282 (1886); *Rosenthal v. Rosenthal*, 151 Mich. 493, 14 Detroit Leg. N. 998, 115 N. W. 729 (1908).

58. *Higgins v. Robillard*, 12 L. C. Rep. 3 (1861); *Elliott v. Bussell*, 19 Ont. 413 (1890); 2 Chamb., Ev., § 986.

59. *Ross v. Gould*, 5 Me. 204 (1828).

60. *Kitner v. Whitlock*, 88 Ill 513 (1878); *Burnham v. Allen*, 1 Gray (Mass.) 496 (1854); *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354, 39 N. W. 358 (1895); 2 Chamb., Ev., § 986, n. 3 and cases cited.

61. *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324 (1876); *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140 (1887); *Farmers' L. & T. Co. v. Siefke*, *supra*; *Newlin v. Beard*, 6 W. Va. 110 (1873); 2 Chamb., Ev., § 986, n. 4 and cases cited. The proponent of the evidence must also, as a part of the burden of evidence, show that the evidence was not obtained by an illegal search of one's person. *Sherman v. State*, 2 Ga. App. 148, 58 S. E. 393 (1907).

ber of Witnesses.⁶²— In civil cases, a fair preponderance of the evidence is needed; in criminal cases, preponderance to a moral certainty or beyond a reasonable doubt is required. The English law of evidence has so far evolved out of the stage of formalism, into that of reason as to eliminate *number*;— except as an element of probative weight,⁶³ i.e., of *belief*.⁶⁴ No numerical, or other physical tests for truth⁶⁵ obtain, as a rule, in the English law of evidence. Few propositions are presented for judicial determination which may not be satisfactorily established by the evidence of a single witness.⁶⁶ A mere numerical preponderance in witnesses produced by one side as to a given point over those produced by the other side can no longer automatically control the decision of a court. A jury may reasonably and properly credit a single witness against many. Nor, on the contrary, is a witness who is uncontradicted and not directly impeached, entitled, as of right, to be believed.⁶⁷

§ 409. Scope of Burden of Evidence; Prima Facie Case.⁶⁸— A *prima facie* case is such a collection of facts as will suffice, as a matter of logic, to overcome the inertia of the court. Such a case as a court or jury might reasonably act upon is a *prima facie* case.⁶⁹ A ruling that such a *prima facie* case has been made out has several important consequences. (1) It shifts

62. 2 Chamb., Ev., § 987.

63. 2 Chamb., Ev., § 988. See Callanan v. Shaw, 24 Iowa 441, 445 (1868). Number in witnesses, however, may furnish corroboration and so be an element in inducing belief where the effort is made to decide disputed propositions by the use of reason. West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718 (1902); People v. Tuczke-witz, 149 N. Y. 240, 43 N. E. 549 (1896).

64. See Belief Induced by Reason, 2 Chamb., Ev., § 989.

65. Callanan v. Shaw, *supra*; 2 Chamb., Ev., § 991, n. 1. "It is impossible to prescribe any fixed rule by which the credibility of the witness is to be tested or which shall bind the conscience of the court as to the conclusiveness of the evidence in a given case." U. S. v. Lee Huen, 118 Fed. 442, 457 (1902).

66. Fengar v. Brown, 57 Conn. 60, 17 Atl. 321 (1889); Gould v. Safford, 39 Vt. 498, 505 (1866). "The evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded." Bourda v. Jones, 110 Wis. 52, 60, 85 N. W. 671 (1901). California follows the same rule. Lee Sing Far v. U. S., 35 C. C. A. 327, 94 Fed. 834, 839 (1899); 2 Chamb., Ev., § 991, n. 2 and cases cited. As to *Basis of the Earlier Rule* requiring more than one witness

for affirmative action on the part of the court, see 2 Chamb., Ev., § 990.

67. "Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts—testimony which no sensible man can believe—goes for nothing." Bourda v. Jones, *supra*. Nevertheless, there seems to be a feeling, which occasionally manifests itself in the jury box, that, by virtue of some legal necessity, uncontradicted evidence, free from inherent improbability, when given by even "a disinterested witness, who is in no way discredited," must, as by some compulsion be given probative weight according to its face value. This is but a recrudescence of the ancient formalism. Quock Ting v. U. S., 140 U. S. 417, 11 S. Ct. 734 (1891); U. S. v. Lee Huen, 118 Fed. 442, 457 (1902). Occasionally, it has been said that the rule of law was to that effect. Southwest Va. M. Co. v. Chase, 95 Va. 50, 27 S. E. 826 (1897). This is obviously an error.

68. 2 Chamberlayne, Evidence, §§ 992–996h.

69. Catlett v. St. Louis, etc., R. Co., 57 Ark. 461, 21 S. W. 1062 (1893) ("evidence legally sufficient to warrant a verdict"); Ohio & M. R. Co. v. Dunn, 138 Ind. 18, 27, 26 N. E. 702, 37 N. E. 546 (1893) (evidence warranting a finding if undisputed); 2 Chamb., Ev., § 992, n. 1 and cases cited. "Evidence which if un-

the burden of evidence. (2) It states, in many cases, a rule of substantive law as to what is reasonable regarding a certain state of facts in connection with a rule of substantive law. (3) It enables the presiding judge, at the same time, to expedite the trial and perfect the substantive law. While the judge may rule as what facts constitute a *prima facie* case, in any given instance, it is the province of the jury to determine whether such a case has actually been established by the evidence.⁷⁰ This power on the part of the jury is still, however, subject to the right upon the part of the judge, to insist upon the use of sound logical⁷¹ and legal reasoning, including the effect of presumptions of law, and to withdraw the case from the jury if he would set aside their verdict on it as against the overwhelming weight of the evidence.⁷²

Inertia of Court.— Nothing less probative than a *prima facie* case overcomes the court's inertia. This is a matter of definition;⁷³— a scintilla not being regarded as sufficient.⁷⁴

Not a Question of Evidence.— A ruling as to the existence of a *prima facie* case is merely provisional and temporary. Until the end of the case such a rule affects merely the position of the burden of evidence and is not final as to the discharge of the burden of proof. These rules, regulating the existence of a *prima facie* case in any given controversy, while they are rules of law,⁷⁵ are not rules in the law of evidence.

Statutory Requirement.— The legislature may determine that certain facts shall be taken by the tribunals of the jurisdiction to be *prima facie* evidence of others. Thus, in civil cases, the findings of fact by an auditor, referee⁷⁶

rebutted or unexplained is sufficient to maintain the proposition and 'warrant the conclusion to support which it is introduced.'" *Emmons v. Westfield Bank*, 97 Mass. 230, 243 (1867); *Crane v. Morris*, 6 Pet. (U. S.) 598, 611 (1882).

70. See *Buswell v. Fuller*, 89 Me. 600, 36 Atl. 1059 (1897).

71. *Benoit v. Troy & L. R. Co.*, 154 N. Y. 223, 48 N. E. 524 (1897); *State v. Couper*, 32 Or. 212, 49 Pac. 959 (1897); 2 Chamb., Ev., § 992, n. 3 and cases cited.

72. *Fornes v. Wright*, 91 Iowa 392, 59 N. W. 51 (1894); *Holland v. Kindregan*, 155 Pa. 156, 25 Atl. 1077 (1893); *Fitzgerald v. New York Cent., etc., R. Co.*, 154 N. Y. 263, 48 N. E. 514 (1897); *Elliot v. Chicago, M. & St. P. R. Co.*, 150 U. S. 245, 14 S. Ct. 85 (1893); 2 Chamb., Ev., § 992, n. 4 and cases cited.

73. *Louisville, etc., R. Co. v. Malone*, 109 Ala. 509, 20 So. 33 (1895) ("tendency" insufficient); *Turner v. Wells*, 64 N. J. L. 269, 45 Atl. 641 (1900) (mere failure to comply

with rules of practice not sufficient), 2 Chamb., Ev., § 993, n. 1 and cases cited.

74. *Offutt v. Expos. Co.*, 175 Ill. 472, 51 N. E., 650 (1898) (evidence "tending to prove" sufficient); *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502 (1900); *Ketterman v. R. Co.*, 48 Va. 606, 37 S. E. 683 (1900); 2 Chamb., Ev., § 993, n. 2 and cases cited.

75. "What is *prima facie* evidence of a fact? It is such as in judgment of law is sufficient to establish the fact; and if not rebutted remains sufficient for the purpose." *Kelly v. Morris*, 6 Pet. (U. S.) 622, 632, 8 L. ed. 523 (1832), per Story, J. The burden of proof is not affected in position by such a rule of law nor by a statutory requirement that a certain fact shall be taken as *prima facie* evidence. *Inhabitants of Cohasset v. Moors*, 204 Mass. 173, 90 N. E. 978 (1910). See 2 Chamb., Ev., § 994.

76. *Blodgett v. Cummings*, 60 N. H. 115 (1880); *Brewer v. Housatonic R. R. Co.*, 104 Mass. 593 (1870); 2 Chamb., Ev., § 995.

or appraisers⁷⁷ may by statute be accorded a *prima facie* force. In offences against the laws regulating the sale of intoxicating liquor proof of certain acts⁷⁸ is frequently declared sufficient to sustain the state's burden of evidence in the original instance, i.e., to call upon the defendant to show a justification or excuse.

"*By a Fair Preponderance of the Evidence.*"—It is customary to lay down the rule as to *quantum* of proof in civil cases by saying that it is the duty of the actor,⁷⁹ of the party having the burden of proof, to establish the truth of his contention "by a fair preponderance of the evidence";⁸⁰—the necessary result being that where the evidence is evenly balanced, the actor loses.⁸¹ To discharge the burden of proof, by the creation of a *prima facie* case, it is, first of all, necessary that the actor establish, either by proof, or by some administrative substitute for it by way of assumption, presumption or the like, a *prima facie* case, i.e., such a *quantum* of evidence that the tribunal in view of the subject-matter and other salient circumstances, might reasonably act in accordance.⁸² When the truth of any material portion of this case is controverted by the other side, it is the duty of the actor to maintain it, against all assaults, "by a fair preponderance of the evidence."⁸³

"*Beyond a Reasonable Doubt.*"—In criminal cases it is customary to charge that it is the duty of the state to satisfy the jury "beyond a reasonable doubt"⁸⁴ as to the truth of every material⁸⁵ fact, i.e., proposition of fact alleged in the indictment. A mere preponderance of evidence is not sufficient.⁸⁶ The requirement applies to criminal prosecutions for misdemeanor as well as for felony.⁸⁷ The jury are not required to acquit the accused merely because one

77. *Railroad v. Crider*, 91 Tenn. 489 (1892).

78. *Com. v. Minor*, 88 Ky. 422 (1889).

79. § 156, *supra*.

80. *Chicago Transit Co. v. Campbell*, 110 Ill. App. 366 (1903); *Nash v. Cooney*, 108 Ill. App. 211 (1903); *Sufferling v. Heyl & Patterson*, 139 Wis. 510, 121 N. W. 251 (1909); 2 Chamb., Ev., § 996.

81. *Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201 (1904).

82. *Peat v. Chicago, M & St. P. Ry. Co.*, 128 Wis. 86, 107 N. W. 355 (1906).

83. 2 Chamb., Ev., § 996.

84. *McDonald v. State*, 56 Fla. 74, 47 So. 485 (1908); *State v. McQueen*, 69 N. J. L. 522, 55 Atl. 1006 (1903); *U. S. v. Breese*, 131 Fed. 915 (1904); 2 Chamb., Ev., § 996a, n. 1 and cases cited. The presence of some proof, not sufficient to establish guilt beyond a reasonable doubt, as required by Code Cr. Proc., § 389, is not sufficient to warrant the submission of a criminal case to the jury. *People v. Gluck*, 188 N. Y. 167, 80 N. E.

1022 (1907). The phrases "to a moral certainty" and "beyond a reasonable doubt" are synonymous. *People v. Bonifacio*, 190 N. Y. 150, 82 N. E. 1098 (1907).

85. *State v. Fisk*, 170 Ind. 166, 83 N. E. 995 (1908); *State v. Reeder*, 72 S. C. 223, 51 S. E. 702 (1905); 2 Chamb., Ev., § 996a, n. 2 and cases cited.

86. *Glover v. State*, 114 Ga. 828, 40 S. E. 998 (1902); *Marlatt v. People*, 104 Ill. 364 (1882); *State v. Porter*, 64 Iowa 237, 20 N. W. 168 (1884); *Atkinson v. State*, 58 Neb. 356, 78 N. W. 621 (1899); *People v. Shanley*, 30 Misc. (N. Y.) 290, 62 N. Y. Supp. 389, 14 N. Y. Cr. 263 (1899); *Munden v. State*, 37 Tex. 353 (1896); *Goldman v. Com.*, 100 Va. 865, 42 S. E. 923 (1902); *U. S. v. Jackson*, 29 Fed. 503 (1886); 2 Chamb., Ev., § 996a, n. 3 and cases cited.

87. *State v. King*, 20 Ark. 166 (1859); *Stewart v. State*, 44 Ind. 237 (1873); *Com. v. Certain Intoxicating Liquors*, 115 Mass. 142, 105 Mass. 595 (1874); *People v. Davis*, 1

of the jurors knows that a 'doubt' is a fluctuation or uncertainty of mind arising and that a probability of innocence requires the acquittal of the defendant.⁸⁹

Definition of "Reasonable Doubt."—A satisfactory definition of "reasonable doubt" seems difficult of procurement; attempts at explanation tend rather to confuse and bewilder than to clarify. "Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a 'doubt' is a fluctuation or uncertainty of mind arising from defect of knowledge or of evidence, and that a doubt of the guilt of the accused, *honestly entertained*, is a 'reasonable doubt.'"⁹⁰ Conjecture,⁹¹ whim⁹² or surmises as to possibilities⁹³ do not constitute reasonable doubt.⁹⁴ It must, on the contrary, be a substantial doubt—one with something to rest upon⁹⁵ in connection with the evidence or lack of it.⁹⁶ It is a fair doubt, one which a reasonable man, who was desirous of ascertaining the exact truth and doing his full duty between the accused and society, might reasonably entertain. A firm and abiding conviction conscientiously held is belief beyond a reasonable doubt.⁹⁷

In other words, a reasonable doubt is such a mental hesitancy to act as a conscientious and resolute man might reasonably entertain.⁹⁸

Quantum in Civil and Criminal Cases Contrasted.—In a civil case the

Wheel. Cr. 235 (1828); Fuller v. State, 12 Ohio St. 433 (1861); 2 Chamb., Ev., § 996a, n. 3 and cases cited.

Burden of proof.—In an action for violation of ordinance the evidence must prove a violation by a preponderance only and such proof need not be direct but it may consist of a reasonable inference only. Portland v. Western Union Telegraph Co., 75 Or. 37, 146 Pac. 148, L. R. A. 1915 D 260 (1915).

88. Teague v. State, 144 Ala. 42, 40 So. 312 (1906).

89. Gainey v. State, 141 Ala. 72, 37 So. 355 (1904); Nelms v. State, 58 Miss. 362 (1904).

90. People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883 (1886).

91. Fletcher v. State, 90 Ga. 468, 17 S. E. 100 (1892). A vague, fanciful or speculative doubt is not a reasonable one. State v. Adams, 6 Pen. (Del.) 178, 65 Atl. 510.

92. State v. Bodekee, 34 Iowa 520 (1872); Com. v. Drum, 58 Pa. 9 (1868); 2 Chamb., Ev., § 996b, n. 4 and cases cited.

93. Way v. State, 155 Ala. 52 (1908); State v. Briscoe, 6 Pen. (Del.) 401 (1907); State v. Levy, 9 Ida. 483, 75 Pac. 227 (1904); State v. Wells, 111 Mo. 533, 20 S. W. 232

(1892); 2 Chamb., Ev., § 996b, n. 5 and cases cited.

94. Giles v. State, 6 Ga. 276 (1849); Toops v. State, 92 Ind. 13 (1883); State v. Bridges, 29 Kan. 138 (1883); McGuire v. People, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265 (1889); Lawhead v. State, 46 Neb. 607, 65 N. W. 779 (1895); People v. Hughes, 137 N. Y. 29, 32 N. E. 1105 (1893); Miles v. U. S., 103 U. S. 304, 26 L. ed. 481 (1880); 2 Chamb., Ev., § 996b, n. 6 and cases cited.

95. Fletcher v. State, 90 Ga. 468, 17 S. E. 100 (1892); U. S. v. Richards, 149 Fed. 443 (1906); State v. Abbott, 64 W. Va. 411, 62 S. E. 693 (1908); 2 Chamb., Ev., § 996b, n. 7 and cases cited.

96. Wood v. State, 31 Fla. 221, 12 So. 539 (1893); State v. Davidson, 44 Mo. App. 513 (1891); People v. Barker, 153 N. Y. 111, 47 N. E. 31 (1897); State v. McCune, 16 Utah 170, 51 Pac. 818 (1898); People v. Ross, 115 Cal. 233, 46 Pac. 1059 (1896); 2 Chamb., Ev., § 996b, n. 8 and cases cited.

97. Harrison v. State, 144 Ala. 20, 40 So. 568 (1906); 2 Chamb., Ev., § 996b, n. 9 and cases cited.

98. State v. Stewart, 6 Pen. (Del.) 435, 67 Atl. 786 (1907); Miller v. State (Miss. 1904), 35 So. 690.

party having the burden of proof must, for affirmative action by the tribunal, produce what constitutes *relatively* to his opponent, a fair preponderance of the evidence and *absolutely* and intrinsically one such that a jury can rationally act in accordance with it.⁹⁰ In criminal proceedings, the prosecution must produce a case clear beyond a reasonable doubt.¹ In the civil proceeding, the actor need furnish only a case in accordance with which men *may* reasonably act. In a criminal one, on the contrary, such an amount of evidence must be produced that a reasonable man *must* act in accordance with it,—i.e., that he can rationally act in no other way.

Scope of Requirement.—It is obviously unnecessary and, indeed, practically impossible, that each *res gestae* or probative fact should itself be established beyond a reasonable doubt.² It is sufficient should the evidence adduced for affirmative action on the part of the tribunal establish a conviction of guilt to that extent. It is the entire contents of the scale which must preponderate to the designated extent.³ Failure to prove a single one among such probative facts beyond a reasonable doubt cannot be a satisfactory ground for refusing to follow an affirmative case which, as a whole, excludes any doubt whatever.⁴ It has, however, been very properly held that all propositions essential to or component of the liability of the accused must be established beyond a reasonable doubt.⁵ In other words, collateral or subsidiary facts or propositions of fact need not be proved to the same degree of mental certainty.⁶

90. 2 Chamb., Ev., § 996c; 1 Chamb., Ev., § 385.

1. Jurors should doubt in their judicial capacity what they would doubt in their private relations. *U. S. v. Heath*, 20 D. C. 272 (1891); *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 (1889); *State v. Rounds*, 76 Me. 123 (1884); 2 Chamb., Ev., § 996c, n. 2.

2. *Butt v. State*, 81 Ark. 173, 98 S. W. 723 (1906); *Olson v. People*, 125 Ill. App. 460 (1906).

3. *Pitts v. State*, 140 Ala. 70, 37 So. 101 (1904); *State v. Skillman*, 76 N. J. L. 464, 70 Atl. 83 (1908); *Territory v. Tais*, 14 N. Mex. 399, 94 Pac. 947 (1908); 2 Chamb., Ev., § 996d, n. 2 and cases cited.

4. *Houser v. State*, 58 Ga. 78 (1877); *Kasakowski v. People*, 177 Ill. 563, 53 N. E. 115 (1898); *State v. Hayden*, 45 Iowa 11 (1876); *State v. Schoenwald*, 31 Mo. 147 (1860); *Rudy v. People*, 128 Pa. 500, 18 Atl. 344 (1889); *Barr v. State*, 10 Tex. App. 507 (1881); 2 Chamb., Ev., § 996d, n. 5 and cases cited.

5. *People v. Ah Chung*, 54 Cal. 398 (1879); *Gavin v. State*, 42 Fla. 553 29 So. 405 (1900);

State v. Maher, 25 Nev. 465, 62 Pac. 236 (1899); *State v. Snell*, 5 Ohio Dec. 670 (1895); *Hodge v. Territory*, 12 Okl. 108, 69 Pac. 1077 (1902); 2 Chamb., Ev., § 996d, n. 7 and cases cited.

6. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (1897); *State v. Jackson*, 90 Mo. 156, 2 S. W. 128 (1886); *People v. Davis*, 21 Wend. (N. Y.) 309 (1839); *State v. Turner*, 119 N. C. 841, 25 S. E. 810 (1896); *Golonbieski v. State*, 101 Wis. 333, 77 N. W. 189 (1898); 2 Chamb., Ev., § 996d, n. 8 and cases cited. *Corroboration* may in like manner be proved by evidence which, in itself considered, admits of the existence of a reasonable doubt. *Lasater v. State*, 77 Ark. 468, 94 S. W. 59 (1906).

Good Character.—On the other hand, the proof of a good character may in itself establish a reasonable doubt, *Teague v. State*, 144 Ala. 42, 40 So. 312 (1906); *Sweet v. State*, 75 Neb. 263, 106 N. W. 31 (1905); but it is not error to refuse to charge in a case dependent on circumstantial evidence that proof of good character is in and of itself sufficient to create a reasonable doubt to which the defendant is entitled. *U. S. v. Cohn*, 128

Criminal Capacity.—The capacity of the accused to commit the crime in question is so far a material part of the case of the prosecution that it must be established beyond a reasonable doubt.⁷

Grade of Offense.—Where the offense charged in the indictment may be established in one of several grades, it is a necessary corollary of the rules relating to reasonable doubt that should the jury entertain such a doubt as to the grade of the defendant's offense but experience none that he is guilty of the offense itself, they should convict him of the less serious degree of the crime.⁸

Identity of Accused.—It is necessary that the identity of the defendant with the doer of the acts charged in the indictment should be established by the prosecution beyond a reasonable doubt.⁹ The element of inference is, however, present in all cases to a greater or less extent. Still, a witness who declares his "belief" that the accused was the person whom he saw commit the crime in question may well be regarded as furnishing evidence which would justify the jury in acting upon it.¹⁰

Psychological Constituents.—Where a mental state is a necessary part of the liability of the accused, the prosecution must establish its existence beyond a reasonable doubt.¹¹ This proof, in the absence of an admission,¹² must be by establishing probative facts, including those of manifestation.¹³

§ 410. Scope of Burden of Evidence; Special Inertia of the Court; Civil Cases.

—In order that a *prima facie* case may be produced, such as would reasonably overcome the inertia of the tribunal, the rules of procedure require in civil cases merely that a fair preponderance of the evidence shall appear in favor of the person having the burden of proof. Such a preponderance alone is sufficient to justify the affirmative action of the court, and, when produced, reason is satisfied.¹⁴ Proof of the necessary facts "beyond a reasonable

Fed. 615 (1904); *U. S. v. Browne*, 126 Fed. 766 (1903). See also *Com. v. Miller*, 31 Pa. Super. Ct. 309 (1906).

7. *Wilcox v. State*, 32 Tex. Cr. 284, 22 S. W. 1109 (1893). See also, *Foltz v. State*, 33 Ind. 215 (1870); *State v. Congot*, 121 Mo. 458, 26 S. W. 566 (1893); 2 Chamb., Ev., § 996e.

8. *Newport v. State*, 140 Ind. 299, 39 N. E. 926 (1894); *People v. Cahoon*, 88 Mich. 456, 50 N. W. 384 (1891); *People v. Lamb*, 2 Abb. Pr. (N. S.) (N. Y.) 148 (1866); 2 Chamb., Ev., § 996f, n. 1 and cases cited.

9. *Com. v. Cunningham*, 104 Mass. 545 (1870); *State v. Jones*, 71 Mo. 591 (1879); *People v. Smith*, 7 N. Y. Supp. 841, 7 N. Y. Cr. 425 (1889); *Bill v. State*, 5 Humphr. (Tenn.) 155 (1844); 2 Chamb., Ev., § 996g, n. 1 and cases cited. In a case of conspir-

acy, for example, if it is uncertain on the evidence which one of several persons was the particular person who committed the act, all must be acquitted. *People v. Woody*, 45 Cal. 289 (1872); *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49 (1854).

10. *Com. v. Cunningham*, *supra*; *State v. Franke*, 159 Mo. 535, 60 S. W. 1053 (1900).

11. *State v. Seymour*, Houston Cr. (Del.) (1877); *State v. Porter*, 34 Iowa 131 (1871); *Roberts v. People*, 19 Mich. 401 (1870); 2 Chamb., Ev., § 996h, n. 1 and cases cited.

12. See Admissions Defined, § 499, *infra*; 2 Chamb., Ev., § 1233.

13. *People v. Hittel*, 131 Cal. 577, 63 Pac. 919 (1900); *Roberts v. People*, 19 Mich. 401 (1870); 2 Chamb., Ev., § 996h, n. 3 and cases cited.

14. *Shinn v. Tucker*, 37 Ark. 580 (1881);

doubt" is not required in civil cases,¹⁵ even where such an action involves proof of facts sufficient to constitute a criminal offense.¹⁶

Allegations of Crime.—It is not material whether facts constituent of crime are part of the affirmative case. Only the civil preponderance is required in cases where divorce is sought on the ground of adultery,¹⁷ or a civil action is brought for seduction,¹⁸ or to obtain contribution to the support of a bastard child.¹⁹ Even should illegality be claimed as ground for an injunction,²⁰ or other affirmative action, or, is on the contrary, pleaded in defense, as where truth is alleged to defamation of character in charging the commission of a crime,²¹ or arson by the insured is set up by the insurer under a fire insurance contract,²² no variation from the ordinary requirement is permitted.

Suits for Penalties.—The law even follows, in this matter, form rather than substance. It requires only a preponderance of the evidence, provided a *prima facie* case has been established, where the consequences of the court's action are criminal;—provided only that the form of proceeding is civil. Of this nature are suits brought for the recovery of a penalty,²³ multiplied

Scott v. Wood, 81 Cal. 398, 22 Pac. 871 (1889); Anderson v. Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216 (1897); North Chicago St. Ry. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483 (1899); Cottrell v. Piatt, 101 Iowa 231, 70 N. W. 177 (1897); Hoffman v. Loud, 111 Mich. 156, 69 N. W. 231 (1896); Long v. Martin, 152 Mo. 668, 54 S. W. 473 (1899); New York, etc., Ferry Co. v. Moore, 102 N. Y. 667, 6 N. E. 203 (1886); Hodges v. Southern R. Co., 122 N. C. 992, 29 S. E. 939 (1898); Nelson v. Pierce, 18 R. I. 539, 28 Atl. 806 (1894); Evans v. Rugee, 57 Wis. 623, 16 N. W. 49 (1883); U. S. v. Lee Huen, 118 Fed. 442 (1902); 2 Chamb., Ev., § 997, n. 1 and cases cited.

15. Rowe v. Baber, 93 Ala. 422, 8 So. 865 (1859); Schnell v. Toomer, 56 Ga. 168 (1876); Baltimore, etc., R. Co. v. Shipley, 39 Md. 251 (1873); Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544 (1890); Chapman v. McAdams, 1 Lea (Tenn.) 500 (1878); Scott v. Pettigrew, 72 Tex. 321, 12 S. W. 161 (1888); 2 Chamb., Ev., § 997, n. 2 and cases cited.

16. Smith v. Smith, 16 Colo. App. 333, 65 Pac. 401 (1901); McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336 (1895); Sinclair v. Jackson, 47 Me. 102, 74 Am. Dec. 476 (1860); Roberge v. Burnham, 124 Mass. 277 (1878); Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 204 (1897); Dean v. Raplee, 145 N. Y. 319, 39 N. E. 952 (1895); Shaul v. Norman, 34 Ohio St. 157 (1877); Catasaqua

Mfg. Co. v. Hopkins, 141 Pa. 30, 21 Atl. 638 (1891); Weston v. Gravlin, 49 Vt. 507 (1877); New York Acc. Ins. Co. v. Clayton, 59 Fed. 559, 8 C. C. A. 213 (1893); 2 Chamb., Ev., § 997, n. 3 and cases cited.

17. Lenning v. Lenning, 176 Ill. 180, 52 N. E. 46 (1898); Lindley v. Lindley, 68 Vt. 421, 35 Atl. 349 (1896).

18. Nelson v. Pierce, 18 R. I. 539, 28 Atl. 806 (1894).

19. People v. Christman, 66 Ill. 162 (1872); Dukehart v. Coughman, 36 Neb. 412, 54 N. W. 680 (1893); 2 Chamb., Ev., § 998, n. 3 and cases cited.

20. State v. Collins (N. H. 1895), 44 Atl. 495.

21. Hearne v. DeYoung, 119 Cal. 670, 52 Pac. 150 (1898); Ellis v. Buzzell, 60 Me. 209 (1872); 2 Chamb., Ev., § 998, n. 5 and cases cited.

22. Blackburn v. Ins. Co., 116 N. C. 821, 21 S. E. 922 (1895); First Nat. Bank v. Commercial Assur. Co., 33 Or. 43, 52 Pac. 1050 (1898). See *contra*, McConnell v. Ins. Co., 18 Ill. 228 (1856).

23. White v. Farria, 124 Ala. 461, 27 So. 259 (1900); Campbell v. Burns, 94 Me. 127, 46 Atl. 812 (1900); Roberge v. Burnham, 124 Mass. 277 (1878); 2 Chamb., Ev., § 999, n. 1 and cases cited.

Conflicting Views.—The courts of Vermont require proof beyond a reasonable doubt. Riker v. Hooper, 35 Vt. 457, 82 Am. Rep. 646 (1862). In Illinois, a strong case is neces-

damages,²⁴ or for a forfeiture. Proceedings for disbarment,²⁵ for contempt of court,²⁶ or other charges involving the existence of facts tending to establish the commission of a criminal offense,²⁷ stand in the same position.

§ 411. **Scope of the Burden of Evidence; Documents.**—The substantive law of documents lays conspicuous difficulties often amounting to prohibitions in the way of establishing alterations in them by parol evidence or allowing evidence of that class to fill the appropriate office of a formal instrument.²⁸ The substantive law has provided that in case of wills, or conveyances of interests in lands, or agreements to convey such interests, the dispositive instrument or agreement shall be in writing or shown by written evidence; and that in connection with the transfer or personal property above a certain value, and in case of agreements of particular kinds, a writing, or evidence deemed equivalent, should be furnished in order to constitute a *prima facie* case, i.e., sufficient to induce affirmative action by the court.²⁹

Equitable Relief.—The same feeling is manifested in equity;—in cases where its courts, as a rule, while declining to vary the ascertained purport of a definitive document, will relieve a party, in whole or in part, from its effects on the ground that assent was procured to the instrument by fraud, accident or mistake. Equity jurisdiction, moreover, may afford relief when a deed absolute on its face is declared to be a trust or a mere security for an indebtedness. But a *prima facie* case is not readily established;³⁰ evidence of especial clearness and cogency is deemed necessary to secure relief.³¹ *It*

sary. *Ruth v. Abington*, 80 Ill. 418 (1875). A distinction has been attempted to the effect that an action civil in form which is prosecuted by the public and not by a private individual should be treated as a criminal case. *Glenwood v. Roberts*, 59 Mo. App. 167 (1894); *U. S. v. Shapleigh*, 54 Fed. 126, 4 C. C. A. 237 (1903). This demarcation has been expressly repudiated in New York. *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820 (1889).

24. *Munson v. Atwood*, 30 Conn. 102 (1861); *Burnet v. Ward*, 42 Vt. 80 (1869). But see *contra*, *U. S. v. Shapleigh*, *supra*.

25. *Re Wellcome*, 23 Mont. 450, 59 Pac. 445 (1899). But see *contra*, *Re Evans*, 22 Utah 366, 62 Pac. 913 (1900).

26. *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833 (1896).

27. *People v. Briggs*, *supra*; *Deveaux v. Clemens*, 17 Ohio Cir. Ct. 33, 9 Ohio Cir. Dec. 617 (1898); 2 Chamb., Ev., § 999, n. 5 and cases cited.

28. 2 Chamb., Ev., § 1000. In part, this proceeds upon the theory that by these provisions effect may best be given to the intention of the parties; but to a very consid-

erable extent this effort to protect individual rights is reinforced by broad considerations of public policy. These frequently lead to the enactment of statutes which, while they protect the interests of the parties in a particular case, are, to a large extent, designed to safeguard the general interests of the public, irrespective of the relation which an individual may sustain to the document in question. *Id.* See also, *Convention of Parties*, 2 Chamb., Ev., § 1001.

29. See *Considerations of Public Policy*, 2 Chamb., Ev., § 1002.

A misleading form of statement has been employed to represent this inertia of the court when it is said that a preponderance of the evidence is not sufficient. *Sallenger v. Perry*, 130 N. C. 134, 41 S. E. 11 (1902); *Olinger v. McGuffey*, 55 Ohio St. 661, 48 N. E. 1115 (1896); *Dewey v. Spring Valley Land Co.*, 98 Wis. 83, 73 N. W. 565 (1897). A preponderance in any case is sufficient.

30. 2 Chamb., Ev., § 1003. See also, *Relief at Law*, 2 Chamb., Ev., § 1004.

31. 2 Chamb., Ev., § 1005.

is to be observed, however, that all this has no connection with the law of evidence. These questions belong to other branches of the law.

Impeachment.—To impeach the purport³² or refute the *prima facie* effect of a formal instrument,³³ as by annulling a judgment,³⁴ demands clear evidence.

Modification.—For like reasons, to modify a written definitive instrument by parol proof of a collateral agreement,³⁵ the existence of a subsequent parol arrangement,³⁶ or other fact, reasonably demands strong evidence. For the same reasons to control the effect of documents, even of those, which, like receipts,³⁷ are not definitive in their nature, requires cogent and unambiguous proof, frequently referred to in language indicating a necessity for more than a bare preponderance.

Waiver of Rights Under a Valid Instrument.—A parol waiver of rights under a written definitive instrument stands in the same position³⁸ and any disavowal or renunciation of a claim, must be strictly proved,³⁹ though a preponderance of evidence has been held sufficient.⁴⁰

Parol Proof of Contents of Documents; Extention of Evidence.—The contents of an instrument which is illegible,⁴¹ lost, mutilated⁴² or wholly destroyed, may be established by satisfactory⁴³ parol⁴⁴ evidence as to the sub-

32. *Rowe v. Hibernia S. & L. Soc.*, 134 Cal. 403, 66 Pac. 569 (1901).

33. *Dickson v. St. Paul, etc., R. Co.*, 168 Mo. 90, 98, 67 S. W. 642 (1902); *Souverbey v. Arden*, 1 Johns. Ch. (N. Y.) 240 (1814); *Boehm v. Kress*, 179 Pa. 386, 36 Atl. 226 (1897); 2 Chamb., Ev., § 1006, n. 2 and cases cited.

In a suit for infringement of a patent, the defense of lack of novelty must, it is said, be proved beyond a reasonable doubt. *Washburn, etc., Mfg. Co. v. Wiler*, 143 U. S. 275, 12 S. Ct. 450, 36 L. ed. 161 (1891).

34. *Hayes v. Kerr*, 45 N. Y. Supp. 1050, 19 App. Div. 91 (1897); *Chandler v. Hough*, 7 La. Ann. 440 (1852).

35. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613 (1866); *Moore v. Brooklyn Advertising Co.*, 69 Hun (N. Y.) 63, 23 N. Y. Supp. 381 (1893); *In re Sutch*, 201 Pa. 305, 50 Atl. 943 (1902); 2 Chamb., Ev., § 1007, n. 1 and cases cited.

36. *McKinstry v. Runk*, 12 N. J. Eq. 60 (1858); *Gibson v. Vetter*, 162 Pa. 26, 29 Atl. 292 (1894).

37. *Hewett v. Lewis*, 4 Mackey (D. C.) 10 (1885); *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778 (1886); *Rouss v. Goldgraber*, 3 Neb. (Unoff.) 424, 91 N. W. 712 (1902); 2 Chamb., Ev., § 1007, n. 3 and cases cited.

38. *Bergeron v. Pamlico Ins., etc., Co.*, 111 N. C. 45, 15 S. E. 883 (1892); *Woarms v. Becker*, 82 N. Y. Supp. 1086, 84 App. Div. 491 (1903); *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573 (1897); 2 Chamb., Ev., § 1008.

39. *Irby v. McCrae*, 4 Desauss. (S. C.) 422 (1814).

40. *McCord-Brady Co. v. Moneyhan*, 59 Neb. 593, 81 N. W. 608 (1900).

41. *Peart v. Taylor*, 2 Bibb. (Ky.) 556 (1812); *Rhoades v. Selin*, 4 Wash. C. C. 715 (1827).

42. *Foster v. Foster*, 1 Add. 462 (1823).

43. *Camp's Estate*, 134 Cal. 233, 66 Pac. 227 (1901); *Johnson's Will*, 40 Conn. 587 (1874); *Anderson v. Irwin*, 101 Ill. 411 (1882); *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874 (1898); *Dudley v. Wardner*, 41 Vt. 59 (1868); *Thomas v. Ribble* (Va. 1896), 24 S. E. 241.

Certainty of knowledge on the part of the witness is an essential element of satisfactory testimony, *Graham v. Chrystal*, 2 Abb. App. Cas. (N. Y.) 263 (1865) ("thought he might perhaps state" not enough); *Riggs v. Tayloe*, 1 Pet. (U. S.) 591, 600 (1828) ("vague, uncertain recollection" excluded). See 2 Chamb., Ev., § 1009, n. 3 and cases cited.

44. *Abstracts as Evidence.*—Registry copies are, naturally, when available, the usual

stance⁴⁵ or tenor⁴⁶ of the document in all material details.⁴⁷ The rule applies to any document shown to have been executed⁴⁸ so far as the contents are relevant to the issue.⁴⁹

Same; Intension of Evidence.—Absolute reproduction of the exact language is not required⁵⁰ nor would such precision of statement be convincing. That effect should be given to parol evidence of a lost instrument⁵¹ such as a will,⁵² which is required to be in writing, the substantive law requires that the judge should act only upon precise and convincing evidence⁵³ and the provisions are the same where the attempt is made to supply a lost record.⁵⁴

method of proof of lost or mutilated instruments. §§ 1084 *et seq.* When the registry law provides for recording merely an abstract, the court is at liberty to decline receiving it if there is better available evidence or the evidence furnished is not sufficiently clear and complete. *New Jersey R. & T. Co. v. Suydam*, 17 N. J. L. 25, 59 (1839). See also 2 *Chamb., Ev.*, § 1009, n. 4 and cases cited.

45. *Edwards v. Rives*, 35 Fla. 89, 17 So. 416 (1895); *Ross v. Loomis*, 64 Iowa 437, 20 N. W. 749 (1884); *Camden v. Belgrade*, 78 Me. 204, 3 Atl. 652 (1886); *Holmes v. Depert*, 122 Mich. 275, 80 N. W. 1094 (1899); *Strange v. Crowley*, 91 Mo. 287, 2 S. W. 421 (1886); *Edwards v. Noyes*, 65 N. Y. 125 (1875); *U. S. v. McComb*, 5 McLean (U. S.) 286, 298 (1851); *McLeod's Estate*, 23 N. S. 154, 162 (1890); 2 *Chamb., Ev.*, § 1009, n. 5 and cases cited.

46. *Thompson v. Thompson*, 9 Ind. 323, 333 (1857); *Peart v. Taylor*, *supra*. Proof of mere "similarity" is not sufficient. *South Chicago B. Co. v. Taylor*, 205 Ill. 132, 68 N. E. 732 (1903). See 2 *Chamb., Ev.*, § 1009, n. 6 and cases cited.

47. *Potts v. Coleman*, 86 Ala. 94, 100, 5 So. 180 (188); *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175, 179 (1836); *Metcalf v. Van Benthuyzen*, 3 N. Y. 424, 428 (1850); (operative parts of the instrument must be stated in substance). *Whether the affixing of a seal must be affirmatively established*, see *Pease v. Sanderson*, 188 Ill. 507, 50 N. E. 425 (1900); *Strain v. Fitzgerald*, 138 N. C. 396, 38 S. E. 929 (1901); *Williams v. Bass*, 22 Vt. 352 (1850); *Peters v. Reichenbach*, 114 Wis. 209, 90 N. W. 184 (1902); 2 *Chamb., Ev.*, § 1009, n. 7 and cases cited.

48. *Neely v. Carter*, 96 Ga. 197, 23 S. E. 313 (1896); *Montefiore v. Montefiore*, 2 Add. Eccl. 354 (1824).

49. *Dickey v. Malechi*, 6 Mo. 177, 184

(1839); *Sizer v. Burt*, 4 Den. (N. Y. 426 (1847)). It must, however, affirmatively appear that the portions of the instrument not proved to the tribunal do not materially affect or modify the legal purport of these portions of which satisfactory proof is furnished. *Butler v. Butler*, 5 Harr. (Del.) 178 (1849). No more definite rule can well be established. *Roe & McDowell v. Doe & Irwin*, 32 Ga. 39, 50 (1861); *Bell v. Young*, 1 Grant (Pa.) 175 (1854). Less than this would fail to present the certainty necessary to warrant the court in acting. *Perry v. Burton*, 111 Ill. 138 (1884); *Poague v. Spriggs*, 21 Gratt. (Va.) 220, 231 (1871). To require more, would, in many instances, be prohibitory. *Anderson v. Irwin*, 101 Ill. 411, 414 (1882).

50. *Perry v. Burton*, 111 Ill. 138 (1884); *Thompson v. Thompson*, 9 Ind. 323, 333 (1857).

51. *In re Johnson*, 40 Conn. 587 (1874); *Osborne v. Rich*, 53 Ill. App. 661 (1894); *Loftin v. Loftin*, 96 N. C. 94, 1 S. E. 837 (1887); 2 *Chamb., Ev.*, § 1010, n. 2 and cases cited.

52. *Skeggs v. Horton*, 82 Ala. 353, 2 So. 110 (1886); *Kearns v. Kearns*, 4 Harr. (Del.) 83 (1843); *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500 (1901); *Dickey v. Malechi*, 6 Mo. 177, 184 (1839); 2 *Chamb., Ev.*, § 1010, n. 3 and cases cited.

53. *McDonald v. Thompson*, 16 Colo. 13, 26 Pac. 146 (1891); *McCarn v. Rundall*, 111 Iowa 406, 82 N. W. 924 (1900); *Connor v. Pushor*, 86 Me. 300, 29 Atl. 1083 (1894); *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401 (1863); *Edwards v. Noyes*, 65 N. Y. 125 (1875); *McManus v. Commow*, 10 N. D. 349, 87 N. W. 8 (1901); *Van Horn v. Munnell*, 145 Pa. 497, 22 Atl. 985 (1891); 2 *Chamb., Ev.*, § 1010, n. 4 and cases cited.

54. *Com. v. Roark*, 8 Cush. (Mass.) 210

Reformation of Instrument.—The requirement for convincing proof in cases of fraud becomes especially clear where the logical necessity to which reference has above been made,⁵⁵ is reinforced by the caution imposed by the positive, i.e., substantive, law for the protection of written documents. Caution, for example, may well be felt in taking affirmative action where it is proposed to cancel a deed,⁵⁶ land grant,⁵⁷ patent,⁵⁸ release⁵⁹ or other sealed instrument.⁶⁰ Similarly, a strong case must be made out to authorize the court, in the exercise of sound reason, to rescind⁶¹ or vary⁶² a written contract, on account of alleged fraud. This is especially true where the contract has been executed.⁶³ *The reformation of instruments*, in general, will only be ordered upon strong and satisfactory proof,⁶⁴ whether the ground of relief prayed for is fraud⁶⁵ or mutual mistake.⁶⁶ It has been said that a preponderance of evidence is not sufficient⁶⁷ though proof beyond reasonable doubt need not be furnished.⁶⁸

(1851); *Cunningham v. R. Co.*, 61 Mo. 33 (1875); *Mandeville v. Reynolds*, 68 N. Y. 528, 533 (1877); 2 *Chamb., Ev.*, § 1010, n. 5 and cases cited. Proof beyond a reasonable doubt is not required. *Skeggs v. Horton*, *supra*.

55. See § 993, *supra*.

56. *Parlin v. Small*, 68 Me. 289 (1878); *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 116 (1874).

57. *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747 (1888); *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182 (1887).

58. *U. S. v. American Bell Telephone Co.*, 167 U. S. 224, 17 S. Ct. 800, 42 L. ed. 144 (1906) (beyond reasonable doubt).

59. *De Douglas v. Union Traction Co.*, 198 Pa. 430, 48 Atl. 262 (1901).

60. *Pinner v. Sharp*, 23 N. J. Eq. 274 (1872).

61. *Conner v. Groh*, 90 Md. 674, 45 Atl. 1024 (1900); *Bremerch v. Linn*, 101 Mich. 64, 59 N. W. 406 (1894).

62. *Mayberry v. Nichol* (Tenn. Ch. App. 1896), 39 S. W. 881.

63. *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112 (1876).

64. *Cox v. Woods*, 67 Cal. 317, 7 Pac. 722 (1885); *Connecticut Fire Ins. Co. v. Smith*, 10 Colo. App. 121, 51 Pac. 170 (1897); *Muller v. Rhuman*, 62 Ga. 332 (1879); *Sutherland v. Sutherland*, 69 Ill. 481 (1873); *Tufts v. Larned*, 27 Iowa 330 (1869); *German Amer. Ins. Co. v. Davis*, 131 Mass. 316 (1881); *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108 (1894); *Mead v. Westchester F.*

Ins. Co., 64 N. Y. 453 (1876); *Rothschild v. Bell*, 10 Ohio Dec. (Reprint) 176, 19 Cinc. L. Bul. 137 (1887); *Koen v. Kearns*, 47 W. Va. 375, 35 S. E. 902 (1900); 2 *Chamb., Ev.*, § 1011, n. 10 and cases cited.

65. *Keith v. Woodruff*, 136 Ala. 443, 34 So. 911 (1902); *Neal v. Gregory*, 19 Fla. 356 (1882); *Habbe v. Viele*, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1 (1897); *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642 (1894); *Martini v. Cristensen*, 60 Minn. 491, 62 N. W. 1127 (1895); *Nebraska L. & T. Co. v. Ignowski*, 54 Neb. 398, 74 N. W. 852 (1898); *Allison Bros. Co. v. Allison*, 144 N. Y. 21, 38 N. E. 956 (1894); *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874 (1893); *Shattuck v. Gay*, 45 Vt. 87 (1872); *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381 (1897); *Baltzer v. Raleigh, etc., R. Co.*, 115 U. S. 634, 6 S. Ct. 216, 29 L. ed. 505 (1885); 2 *Chamb., Ev.*, § 1011, n. 11 and cases cited.

66. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 317 (1871); *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535 (1900); *Southard v. Curley*, 134 N. Y. 148, 31 N. E. 330 (1892).

67. *Warrick v. Smith*, 36 Ill. App. 619 (1889); *Mikiska v. Mikiska*, 90 Minn. 258, 95 N. W. 910 (1903); *Devereux v. Sun Fire Office*, 4 N. Y. Supp. 655, 51 Hun 147 (1889); 2 *Chamb., Ev.*, § 1011, n. 13 and cases cited.

68. *Miller v. Morris*, 123 Ala. 164, 27 So. 401 (1898); *Crockett v. Crockett*, 73 Ga. 647 (1884); *Southard v. Curley*, *supra*; *Jamaica Sav. Bank v. Taylor*, 76 N. Y. Supp. 790 (1902).

Reformation of Absolute Deed into Trust or Mortgage.—Equity requires that evidence beyond all reasonable controversy be furnished as a basis for turning a deed absolute on its face into a mortgage.⁶⁹ In like manner a parol trust in lands can only be declared upon satisfying the conscience of the court by such evidence as leaves no legitimate doubt in his mind.⁷⁰ Evidence beyond a reasonable doubt will not be required.⁷¹ The rule is the same in relation to a trust in personal property⁷² or to show that a gift of land was encumbered by a trust.⁷³

Specific Performance.—Equity requires that specific performance of a parol contract relating to the sale of lands⁷⁴ which is within the statute of frauds,⁷⁵ should be decreed only upon evidence satisfactory to the conscience of the court. This has been understood as requiring a high degree of probative force. Specific performance of a parol ante-nuptial agreement,⁷⁶ of a parol contract to make a will disposing of real estate⁷⁷ and other parol agreements, such as those to purchase personal property,⁷⁸ to assign choses in action,⁷⁹ to guarantee against fire, death or other casualty⁸⁰ and the like, demands that a clear and satisfactory affirmative case should be submitted.

Substitutes for Documents.—Where the substantive law prescribes that a conveyance of land shall be by deed, strong evidence will be required to give effect to any substitutes for a deed, as where the effort made is to give

69. *Worley v. Dryden*, 57 Mo. 226 (1874); *Wilde v. Homan*, 58 Neb. 634, 79 N. W. 546 (1899); *Sidway v. Sidway*, 7 N. Y. Supp. 421 (1889); *Lance's Appeal*, 112 Pa. 456, 4 Atl. 375 (1886); 2 Chamb., Ev., § 1012, n. 1 and cases cited.

70. *Emfinger v. Emfinger*, 137 Ala. 337, 34 So. 346 (1902); *Rice v. Rigley*, 7 Idaho 115, 61 Pac. 290 (1900); *Moore v. Wood*, 100 Ill. 451 (1881); *Maple v. Nelson*, 31 Iowa 322 (1871); *Burleigh v. White*, 64 Me. 23 (1874); *Brinkman v. Sunken*, 174 Mo. 709, 74 S. W. 963 (1903); *Crouse v. Frothingham*, 97 N. Y. 105 (1884); *Smithsonian Inst. v. Meech*, 169 U. S. 398, 18 S. Ct. 396, 42 L. ed. 793 (1898); 2 Chamb., Ev., § 1012, n. 2 and cases cited.

71. *Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 549 (1900); *Doane v. Dunham*, 64 Neb. 135, 89 N. W. 640 (1902); *King v. Gilleland*, 60 Tex. 271 (1883).

72. *Allen v. Withrow*, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90 (1884).

73. *Lemon v. Wright*, 31 Ga. 317 (1860).

74. *Seitman v. Seitman*, 204 Ill. 504, 68 N. E. 461 (1903); *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220 (1895); *Moore v. Galupo*, 65 N. J. Eq. 194, 55 Atl. 628 (1903); 2 Chamb., Ev., § 1013, n. 1 and cases cited.

75. *Higginbotham v. Cooper*, 116 Ga. 741, 42 S. E. 1000 (1902); *Wright v. Raftree*, 181 Ill. 464, 54 N. E. 998 (1899); *Gibbs v. Whitwell*, 164 Mo. 387, 64 S. W. 110 (1901); *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647 (1901); *Sample v. Horlacher*, 177 Pa. 247, 35 Atl. 615 (1896); *White v. Wansey*, 116 Fed. 345, 53 C. C. A. 634 (1902); *McCully v. McLean*, 48 W. Va. 625, 37 S. E. 559 (1900); 2 Chamb., Ev., § 1013, n. 2 and cases cited.

76. *In re Krug*, 196 Pa. 484, 46 Atl. 484 (1900).

77. *McElvain v. McElvain*, 171 Mo. 244, 71 S. W. 142 (1902); *Gall v. Gall*, 19 N. Y. Supp. 332, 64 Hun 600 (1892); *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455 (1901); *Hennessy v. Woolworth*, 128 U. S. 438, 9 S. Ct. 109, 32 L. ed. 500 (1888); 2 Chamb., Ev., § 1013, n. 4 and cases cited.

78. *Farley v. Hill*, 150 U. S. 572, 14 S. Ct. 186, 37 L. ed. 1186 (1893).

79. *Rockecharlie v. Rockecharlie* (Va. 1898), 29 S. E. 825; *Dalzell v. Dueber Watch-Case Mfg. Co.*, 149 U. S. 313, 13 S. Ct. 886, 37 L. ed. 740 (1893).

80. *McCann v. Aetna Ins. Co.*, 3 Neb. 198 (1874); *Neville v. Merchants', etc., Mut. Ins. Co.*, 19 Ohio 452 (1848).

effect to a parol gift of lands.⁸¹ While the policy of the law limits the general power of an owner of property to make a valid disposition of it to take effect upon his decease to a will executed with certain formalities, it does not exclude certain other special forms of transfer, which attain the same general result. But in cases where the court is asked to carry out such an arrangement, as a *donatio causa mortis*⁸² or a nuncupative will,⁸³ the tribunal is justified and, indeed, as a sound exercise of the reasoning faculty, frequently required, to insist that a satisfactory and convincing case be presented.

Fraud.— In cases involving allegations of fraud, the rule is as stated, viz., that when fraud is involved in a civil case it need be proved only by a fair preponderance of the evidence,⁸⁴ and proof beyond a reasonable doubt is not required.⁸⁵ But in a matter involving honesty and reputation the court, judge and jury alike, will proceed with caution,⁸⁶ a mere suspicion⁸⁷ being insufficient. Clear and convincing proof is, therefore, needed in order to establish fraudulent conduct.⁸⁸ The same idea is, probably, intended to be conveyed in the statement that there is a presumption in favor of honesty and fair dealing,⁸⁹ so far as anything further is intended than a mere reference to pleading on the burden of evidence.⁹⁰

§ 412. Scope of the Burden of Evidence; Criminal Cases.— In criminal cases the familiar rule requires that each material allegation of the government's

81. *Jones v. Tyler*, 6 Mich. 364 (1859); *Erie, etc., R. Co. v. Knowles*, 117 Pa. 77, 11 Atl. 250 (1887). Proof beyond reasonable doubt has been required. *Poullain v. Poullain*, 76 Ga. 420, 4 S. E. 92 (1886).

82. *Woodburn v. Woodburn*, 23 Ill. App. 289 (1886); *Buecker v. Carr*, 60 N. J. Eq. 300, 47 Atl. 34 (1900); *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313 (1872); 2 Chamb., Ev., § 1014, n. 3 and cases cited.

83. *Lucas v. Goff*, 33 Miss. 629 (1857). *The rule has been limited* to a requirement that all circumstances raising legitimate suspicions should be satisfactorily explained. *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141 (1889); *Jamaica Sav. Bank v. Taylor*, 76 N. Y. Supp. 790, 72 App. Div. 567 (1902). It has been required that the evidence should be "free from uncertainty." *Citizens' Sav. Bank v. Mitchell*, 18 R. I. 739, 30 Atl. 626 (1894). "Beyond doubt." *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208 (1899).

84. *Kingman v. Reinemer*, 166 Ill. 208, 46 N. E. 786 (1897); *Gordon v. Parmelee*, 15 Gray (Mass.) 413 (1860); *Gumberg v. Treusch*, 103 Mich. 543, 61 N. W. 872 (1895); *Bauer Grocery Co. v. Sanders*, 74 Mo. App.

657 (1898); *Freund v. Paten*, 10 Daly (N. Y.) 379 (1882); *Young v. Edwards*, 72 Pa. 257 (1872); 2 Chamb., Ev., § 1015, n. 1 and cases cited.

85. *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. 736 (1889); *Turner v. Hardin*, 80 Iowa 691, 45 N. W. 758 (1890); *Sommer v. Oppenheim*, 44 N. Y. Supp. 396, 19 Misc. 605 (1897); *Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69 (1897); 2 Chamb., Ev., § 1015, n. 2 and cases cited.

86. *Watkins v. Wallace*, 19 Mich. 57 (1869).

87. *Toney v. McGehee*, 38 Ark. 419 (1882); *Watkins v. Wallace*, *supra*.

88. *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70 (1887); *Henry v. Henry*, 8 Barb. (N. Y.) 588 (1850); *Dohmen Co. v. Niagara F. Ins. Co.*, *supra*; *King v. Davis*, 16 N. Y. Supp. 427 (1891). But see *Coit v. Churchill*, 61 Iowa 296, 16 N. W. 147 (1883).

89. *Bixby v. Carskaddon*, 55 Iowa 533, 8 N. W. 354 (1881); *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752 (1874); *Kaine v. Weigley*, 22 Pa. 179 (1853); 2 Chamb., Ev., § 1015, n. 6 and cases cited.

90. *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406 (1877).

claim should be established beyond a reasonable doubt⁹¹ though the requirement applies to the case as a whole rather than to its constituent parts, or any particular set of facts.⁹² Serious doubt exists as to whether such a phrase can really be made clearer to the mind by dint of attempted definition and explanation, although many attempts have been made, with greater or less success, to explain that which, so far as intelligible at all seems already well understood.⁹³ "It needs a skillful definer who shall make the meaning of the term 'beyond a reasonable doubt' more clear by the multiplication of words."⁹⁴ The enhanced weight of proof demanded is, as compared to the burden imposed in civil cases,⁹⁵ a concession to the increased inertia which a court may reasonably feel in view of the greater seriousness in consequences of criminal prosecutions as distinguished from civil actions.

Grades of Offenses.— Even among criminal cases, there is an obvious difference in the nature of the consequences which will follow the affirmative action of the court.⁹⁶ The proof must warrant the action asked.⁹⁷

§ 413. *Effect of Presumptions.*— Like the "burden of proof," the presumption of law has both a procedural and an evidentiary aspect. It is the provisional assumption of procedure that an inference of fact has a *prima facie* force. Relating, therefore, as it does, to the evidentiary value of a fact or set of facts, a presumption of law has no effect upon the position of the burden of proof, properly so-called, which is not itself dependent upon logic or the exercise of the reasoning faculty. The sole relation of the presumption of law is with the burden of evidence which, at least provisionally, it operates to discharge as to the point covered by it: This it is the more important to

91. §§ 408, 412, *supra*; 2 Chamb., Ev., §§ 987, 996a, 1016.

92. *Henry v. People*, 198 Ill. 162, 65 N. E. 120 (1902); *State v. Gleim*, 17 Mont. 17, 41 Pac. 998 (1895); *Morgan v. State*, 51 Neb. 672, 71 N. W. 788 (1897); 2 Chamb., Ev., § 1016, n. 2 and cases cited. *Contra*: *State v. Cohen*, 108 Iowa 208, 78 N. W. 857 (1899); *State v. Flemming*, 130 N. C. 688, 41 S. E. 549 (1902).

93. *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 883 (1886); *State v. Sauer*, 38 Minn. 438, 38 N. W. 355 (1888); *Buel v. State*, 104 Wis. 132, 80 N. W. 78 (1899); 2 Chamb., Ev., § 1016, n. 3 and cases cited.

94. *Hoffman v. State*, 97 Wis. 576, 73 N. W. 52 (1897). Failure of proof beyond reasonable doubt has been defined as being "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth

of the charge." *Com. v. Webster*, 5 Cush. (Mass.) 295, 320 (1850). "Proof 'beyond reasonable doubt' is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis, except that which it tends to support. It is proof to a 'moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime the two phrases are synonymous and equivalent." *Com. v. Costley*, 118 Mass. 1 (1875).

95. §§ 408, 409 *supra*; 2 Chamb., Ev., §§ 987, 996.

96. *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406 (1877).

97. The rule has been stated, in a somewhat misleading way, to the effect that "in proportion as the crime imputed is heinous and unnatural, the presumption of innocence grows stronger and more abiding." *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194 (1886).

observe for the reason that it is commonly said that "a presumption of law shifts the burden of proof."⁹⁸

Burden of Proof.—For reasons stated above,⁹⁹ the burden of proof properly so called, is not affected in the least by the creation of a presumption of law.¹

Burden of Evidence.—Upon the burden of evidence, however, the rules of several branches of substantive law requiring that certain definite inferences of fact shall have a *prima facie* quality has of necessity a very important effect. In fact it is the appropriate function of a so-called "presumption of law" to confer this *prima facie* quality upon these inferences of fact.² *Pro tanto*, therefore, the establishment of a presumption of law by proof of facts from which it arises, sustains the burden of evidence and, so far as it extends, shifts it to the opposite side.³

98. *Ficken v. Jones*, 28 Cal. 618 (1865); *Kitner v. Whitlock*, 88 Ill. 513 (1878); *Nicodemus v. Young*, 90 Iowa 423, 57 N. W. 906 (1894); *Rosenthal v. Maryland Brick Co.*, 61 Md. 590 (1883); *State v. Mastin*, 103 Mo. 508, 15 S. W. 529 (1890); *Bayliss v. Cockcroft*, 81 N. Y. 363 (1880); *Maurice v. Devol*, 23 W. Va. 247 (1883); *Lawrence v. Minturn*, 17 How. (U. S.) 100, 58 L. Ed. 58 (1854); 2 Chamb., Ev., § 1017, n. 2 and cases cited.

99. § 395, *supra*; 2 Chamb., Ev., §§ 938 *et seq.*

1. *Pease v. Cole*, 53 Conn. 53, 22 Atl. 681,

55 Am. Rep. 53 (1885); *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836 (1885); *Holmes v. Hunt*, 122 Mass. 505, 514, 23 Am. Rep. 381 (1877); *J. D. Marshall Livery Co. v. McKelvy*, 55 Mo. App. 240 (1893); *Heinemann v. Heard*, 62 N. Y. 448 (1875); 2 Chamb., Ev., 1018, n. 2 and cases cited.

2. *State v. Sattley*, 131 Mo. 464, 33 S. W. 41 (1895); *Smith v. Asbell*, 2 Strobb. (S. C.) 141, 147 (1846); 2 Chamb., Ev., § 1019, n. 1 and cases cited.

3. *Alabama G. E. R. Co. v. Taylor*, 129 Ala. 238, 29 So. 673 (1901).

CHAPTER XIII.

PRESUMPTIONS; INFERENCES OF FACT.

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§ 414. **Presumptions; Classification of.**¹— As an *inference*, a presumption is based upon logic, the experience of mankind; as an *assumption*, it is based upon or regulated by either (1) substantive law or (2) administration.² In other words, under the general term “presumption” are grouped three dis-

1. 2 Chamberlayne. Evidence, § 1026.

2. § 147 *supra*; 1 Chamb., Ev., § 332 et seq.

tinct, though cognate, matters: (1) Inferences of Fact, (2) Presumptions or Assumptions of Law, (3) Assumptions of Administrations. Outside this classification, but receiving the appellation of "presumptions," is a class of maxims, rhetorical paraphrases of rules of law more correctly stated in another form, commonplaces of jurisprudence, and the like, to which the designation of (4) Pseudo-Presumptions seems appropriate.³

§ 415. **Inferences of Fact; Res Ipsa Loquitur.**⁴—When used in its primary and original significance⁵ (and this is the only sense in which it has any proper relation to the law of evidence) all presumptions are of fact.⁶ The relation spoken of as a "presumption" or probable inference of fact is that which exists between a *factum probans* and the *factum probandum*.⁷ As between themselves, the two facts, *factum probans* and *factum probandum*, are said to be probatively or logically *relevant*.⁸ The mental process by which this relevancy is perceived and made effective for purposes of proof is that of *inference*;—which when probable is properly spoken of as a presumption.⁹

3. 2 Chamb., Ev., § 1026.

4. 2 Chamberlayne, Evidence, §§ 1027–1029.

5. In its broad acceptance a presumption is a strong or probable inference. *Douglass v. Mitchell*, 35 Pa. 440, 443 (1860); *Austin v. Bingham*, 31 Vt. 577, 581 (1859).

6. *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 Am. Rep. 699 (1880).

7. § 34, *supra*; 1 Chamb., Ev., § 51. "A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is probability." *Liverpool & L. & G. Ins. Co. v. Southern Pac. Co.*, 125 Cal. 434 (1899). "A presumption of fact is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known." *Roberts v. People*, 9 Colo. 458, 13 Pac. 630 (1886); *Lane v. Missouri Pac. Ry. Co.*, 132 Mo. 4, 33 S. W. 645 (1895); *Hilton v. Bender*, 69 N. Y. 75, 82 (1877); *Home Ins. Co. v. Weide*, 78 U. S. (11 Wall.) 438, 20 L. ed. 197 (1871). "Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction. *U. S. v. Griego*, 11 N. Mex. 392, 72 Pac. 20 (1902); *Dietrich v. Dietrich*, 112 N. Y. Supp. 968, 128 App. Div. 564 (1908). "A presumption of fact is a mere inference from certain evidence, and, as the evidence changes, the presumption necessarily varies." *Chicago, etc., Ry. Co. v. Bryant*, 65 Fed. 969, 13 C. C. A. 249 (1895).

Probative force of inferences of fact.—

"Presumptions of fact have been classified by text writers and judicial decisions as strong, probable and slight. When a fact proved always accompanes a fact sought to be proved, it gives rise to a strong presumption that may control a jury in their investigation. When the fact proved usually accompanies the fact sought to be proved a probable presumption arises. Slight presumptions, which arise from the occasional connection of distinct facts, are generally disregarded by a jury." *U. S. v. Sykes*, 58 Fed. 1000 (1893). See 2 Chamb., Ev., § 1027, n. 3 and cases cited.

8. The term presumption of fact in this connection designates the inference, based upon experience, that an unknown fact exists because another, which usually, in common experience, accompanies or is connected with it, has been shown to exist. *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61 (1895); *Com. v. Frew*, 3 Pa. Co. Ct. 492 (1886); *U. S. v. Searcy*, 26 Fed. 435 (1885). See § 36, *supra*; 1 Chamb., Ev., § 59.

9. *Rodan v. St. Louis Transit Co.*, 207 Mo. 392, 105 S. W. 1081 (1907); 2 Chamb., Ev., § 1027, n. 5 and cases cited. The term "presumption of fact" connotes the idea that the inference is one which naturally or spontaneously suggests itself to the mind. *O'Gara v. Eisenlohr*, 38 N. Y. 296, 299 (1868); *Tanner v. Hughes*, 53 Pa. 289 (1866).

Two facts are *relevant* when the existence of one raises a presumption as to the existence of the other.¹⁰

Of this class are the presumptions of negligence from the results of certain actions usually spoken of as the doctrine of *res ipsa loquitur*.¹¹

10. "Presumptions of facts are, at best, but mere arguments, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments." *Lawhorn v. Carter*, 11 Bush (Ky.) 7 (1874).

Negligence in Meat Market.—There is no presumption of negligence against the owner of a meat market from the fact that the plaintiff slipped on a piece of meat on the floor where there is nothing to show how the meat got there or how long it had been there where the floor was constantly being swept by a man employed for that purpose. *Norton v. Hudner*, 213 Mass. 257, 100 N. E. 546, 44 L. R. A. (N. S.) 79 (1913). The burden of proof is sustained in an action for selling unfit food by showing that the food sold was diseased and caused the death of the decedent and it is not necessary to show knowledge of the defendant of the condition of the food. *State v. Rossman*, 93 Wash. 530, 161 Pac. 349, L. R. A. 1917 B 1276 (1916).

11. **Doctrine of *res ipsa loquitur* applicable.**—The bursting of a water tank in itself proves negligence under the doctrine of *res ipsa loquitur*. *Wigal v. Parkersburg*, 74 W. Va. 25, 81 S. E. 554, 52 L. R. A. (N. S.) 465 (1914).

A presumption of negligence of the employer arises from an unexplained sudden starting of a machine. *Chiuccariello v. Campbell*, 210 Mass. 532, 96 N. E. 1101, 44 L. R. A. (N. S.) 1050 (1912). The fact that the head of a mallet flew off while it was being used as intended in an amusement park shows negligence under the doctrine of *res ipsa loquitur*. *Wodnik v. Luna Park Amusement Co.*, 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N. S.) 1070 (1912). The doctrine of *res ipsa loquitur* applies where the roof of a box car is torn off by a wind not strong enough to prevent a person standing on the top of the moving train. *Ridge v. Norfolk Southern R. Co.*, 167 N. C. 510, 83 S. E. 762, L. R. A. 1914 F 215 (1914). The fact that a wall fell after a fire is *prima facie* evidence of negligence under the doctrine of *res ipsa loquitur*, where the wall was left standing for more than a month

after the fire. *Hall v. Gage*, 116 Ark. 50, 172 S. W. 833, L. R. A. 1915, § 704 (1914). The mere bursting of an electric light bulb in a street car does not place on the company the burden of proof since the accident may have happened through some cause beyond the control of the company. It was assumed that the rule of *res ipsa loquitur* applies to this case but the court points out that this rule simply provides evidence and does not alter the burden of proof. It simply requires the defendant to explain and his explanation may leave the matter in equipoise in which case the defendant would be entitled to a verdict because the plaintiff had failed to prove his case by the weight of the evidence. *Hughes v. Atlantic City, etc., R. Co.*, 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916 A 927 and note (1914). The unexplained presence on the public highway of a runaway horse unattached raises a presumption of negligence on the part of the owner. *Dennery v. Great Atlantic & Pacific Tea Co.*, 82 N. J. L. 517, 81 Atl. 861, 39 L. R. A. (N. S.) 574 (1911). Presumption of negligence from proof of explosion, see note, *Bender ed.*, 122 N. Y. 131. Presumption of negligence from injury, see note, *Bender ed.*, 114 N. Y. 463.

Doctrine of *res ipsa loquitur* not applicable.—A passenger injured cannot invoke the rule of *res ipsa loquitur* against the carrier unless something unusual happens and the mere fact of injury is not enough. *Pointer v. Mountain R. Co.*, 269 Mo. 104, 189 S. W. 805, L. R. A. 1917 B 1091 (1916). The jolting or jerking of a train which causes the conductor to fall is not a case for the application of the doctrine of *res ipsa loquitur*, as this is not enough of itself to show negligence. *Hunt v. Chicago, Burlington & Quincy R. Co.*, Iowa, 165 N. W. 105, L. R. A. 1916 B 369. The doctrine of *res ipsa loquitur* does not apply where cars on a siding escape on to the main line where there is no evidence what caused them to start. *Denver, etc., R. v. Ashton-White-Skillicorn Co.*, 49 Utah 82, 162 Pac. 83, L. R. A. 1917 C 768 (1916). The mere dropping of sparks from an elevated railway does not of itself prove negligence in

Inferences are Rebuttable.—It is part of the very definition of a presumption that it is rebuttable.¹² An irrebuttable or conclusive presumption would be a contradiction in terms.¹³

"No Presumption on a Presumption."—There can be, in the great majority of cases, no presumption upon a presumption.¹⁴ On the contrary, the fact used as the basis of the inference, the *terminus a quo*, so to speak, must be established in a clear manner, devoid of all uncertainty.¹⁵

§ 416. [Inferences of Fact]; Inference of Continuance.¹⁶—It is said that there is a "presumption against change." A given state of affairs being shown to exist, it will be presumed to continue for a reasonable time.¹⁷ Where the subject-matter is of a permanent character but slightly subject to or affected by change of condition, a very considerable time may elapse and yet leave the suggestion that it existed at a later time because it did so at an earlier period, one of rational probative force.¹⁸ On the other hand, establishing the existence

the company, as the mere lawful doing of an act permitted by statute does not create liability for injury caused in so doing. *Carney v. Boston Elevated R. Co.*, 912 Mass. 179, 98 N. E. 605, 42 L. R. A. (N. S.) 90 (1912). The doctrine of *res ipsa loquitur* does not apply to a defect in a highway to show negligence in the city, as the defect may have been caused by a very recent accident of which the city had no notice. *Corbin v. Benton*, 151 Ky. 483, 152 S. W. 241, 43 L. R. A. (N. S.) 591 (1913). The doctrine of *res ipsa loquitur* applied to machinery which does not work right cannot be applied to show that because ice near the rail of a track presented a straight edge this showed that the ice was due to water cast by the engines. *Eisentrager v. Great Northern R. Co.*, 178 Iowa 713, 160 N. W. 311, L. R. A. 1917 B 1245 (1916). The doctrine of *res ipsa loquitur* does not apply to a case where a bottle filled with carbonated water exploded when the ice-chest in which it was is opened on a hot day. This does not show that the accident was caused by the negligence of the bottler, but it may have been caused by the change in temperature when the ice-chest was opened. *Wheeler v. Laurel Bottling Works*, 111 Miss. 442, 71 So. 743, L. R. A. 1916 E 1074 (1916).

12. *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 306, 33 Atl. 1009 (1895); *Donaldson v. Donaldson*, 142 Ill. App. 21 (1908); *Morris v. McClary*, 43 Minn. 346, 46 N. W. 238 (1890); *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 82 Pac. 496 (1905); 2 Chamb., Ev., § 1028, n. 1, and cases cited.

13. § 470, *infra*; 2 Chamb., Ev., §§ 1160 *et seq.*

14. *Georgia Ry. & Electric Co. v. Harris*, 1 Ga. App. 714, 57 S. E. 1076 (1907); *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486 (1896); *Atchison, etc., R. Co. v. McFarland*, 2 Kan. App. 662, 43 Pac. 788 (1896); *Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co.*, 140 Mo. App. 374, 124 S. W. 1094 (1910); *Lamb v. Union Ry. Co. of New York City*, 195 N. Y. 260, 88 N. E. 371 (1909); 2 Chamb., Ev., 1028, n. 1, and cases cited.

15. *Duncan v. Chicago, etc., Ry. Co.*, 82 Kan. 230, 108 Pac. 101 (1910); *U. S. v. Ross*, 92 U. S. 281, 23 L. ed., 707 (1875).

16. 2 Chamberlayne. Evidence, §§ 1030–1032.

17. *Schander v. Gray*, 149 Cal. 227, 86 Pac. 695 (1906); *Sanford v. Millikin*, 144 Mich. 311, 13 Detroit Leg. N. 171, 107 N. W. 884 (1906); *In re Darrow's Estate*, 118 N. Y. Supp. 1082, 64 Misc. Rep. 224 (1909); *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500 (1906); 2 Chamb., Ev., § 1030, notes 1 and 2, and cases cited.

18. The operation of natural law furnishes what may perhaps be deemed the maximum force of the inference. An instance is furnished by the uniform action of the tides. It is, for example, a fair inference of fact that a constant shifting in the various inlets of Rockaway Beach, or Long Island, in the state of New York, shown to be going on at the present time was in progress in 1725. *Sandiford v. Town of Hempstead*, 186 N. Y. 554,

of a purely transitory state or evanescent fact may fail to furnish any reasonable mind the basis of an inference that the situation was in the same condition shortly after that time. The true inquiry in each case is at what point in the past will evidence of the existence of a given fact or state of affairs cease to be probative as to its existence at a later period. Or, to reverse this statement, how long may a state of affairs shown to exist at a given time be presumed to continue? ¹⁹ *The established rule is* that the court will infer that a particular fact or set of facts continues to exist as long as such facts usually, as a matter of experience, ²⁰ have been found so to continue. ²¹

Administrative Assumptions.—While the inference of continuance is, in many cases, an inference of fact, in other cases this so-called “presumption” is merely an administrative assumption of regularity. ²² Thus, it may properly be said that no administrative assumption is made that a fact shown to have been in being at a particular time was in existence for any definite period prior to that time, ²³ or that it will continue to exist for any given period in the future. ²⁴ Where, however, a state of affairs is presented, as profound intoxication, ²⁵ insolvency, ²⁶ and the like, ²⁷ which obviously has required a certain length of time for its creation, the pre-existence of the state or of its efficient causes may properly be assumed to have existed over a reasonable interval in the past.

79 N. E. 1115 (1906) [*affirming* 100 N. Y. Supp. 76, 97 App. Div. 163 (1904)]. Where the condition of a railing is in issue and evidence of its condition immediately before the accident is not available evidence may be received of its condition within such a reasonable time as will in the nature of the case fairly tend to show its condition at the moment preceding the accident. *English v. Thomas*, Okla. (1915), 149 Pac. 906, L. R. A. 1916 F, 1110.

19. *Toledo, etc., R. Co. v. Smith*, 25 Ind. 288 (1865); *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389, 32 Am. Dec. 220 (1838); *Gernau v. Oceanic Steam Nav. Co.*, 141 N. Y. 588, 36 N. E. 739 (1894); 2 Chamb., Ev., § 1030, n. 4, and cases cited.

20. The law will not presume a thing contrary to the custom of men. *Bright v. J. Bacon & Sons*, 131 Ky. 848, 116 S. W. 268, 20 L. R. A. (N. S.) 386 (1909).

21. *Bludworth v. Bray*, 59 Fla. 437, 52 So. 957 (1910); *Wheelan v. Chicago, etc., R. Co.*, 85 Iowa 167, 52 N. W. 119 (1892); *McGraw v. McGraw*, 171 Mass. 146, 50 N. E. 526 (1898); *People v. McLeod*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328 (1841); *Oller v. Bonebrake*, 65 Pa. 338 (1870); *Kosminsky v. Estes*, 27 Tex. Civ. App. 69, 65 S. W. 1108

(1901); 2 Chamb., Ev., § 1030, n. 6, and cases cited.

22. § 422, *infra*; 2 Chamb., Ev., §§ 1049 *et seq.*

23. *Butler v. Henry*, 48 Ark. 551, 3 S. W. 878 (1886); *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557 (1891); *Erskine v. Davis*, 25 Ill. 251 (1861); *Blank v. Livonia*, 79 Mich. 1, 44 N. W. 157 (1889); *Jarvis v. Vanderford*, 116 N. C. 147, 21 S. E. 302 (1895); *Cullen v. Voss*, 15 N. Brunsw. (Can.) 464 (1875); 2 Chamb., Ev., § 1031, n. 4, and cases cited.

24. *Covert v. Gray*, 34 How. Pr. (N. Y.) 450 (1865).

25. *State v. Hubbard*, 60 Iowa 466, 15 N. W. 287 (1883).

26. *Emmerich v. Heffernan*, 58 N. Y. Super. Ct. 217, 9 N. Y. Supp. 801 (1890).

27. *Gaulden v. Lawrence*, 33 Ga. 159 (1862); *Strong v. Layrence*, 58 Iowa 55, 12 N. W. 74 (1882); *Carlisle v. Rich*, 8 N. H. 44 (1835); 2 Chamb., Ev., § 1031, n. 8, and cases cited. Similarly, no inference of continuance in the future can be raised upon proof of a state of things which is essentially retroactive, in its nature or operations. *Ellis v. State*, 138 Wis. 513, 119 N. W. 1110 (1909).

Length of Time.—The inference of continuance, unless reinforced by additional evidence²⁸ grows weaker with the lapse of time. It is strongest in the beginning,²⁹ and decreases in strength at various rates until it ceases entirely. It may even, perhaps, as in case of the continuance of life, be replaced by a presumption or inference to the contrary effect.³⁰ *The value of property*, real³¹ or personal is a function of so many variables that its continued unimpaired existence at any particular time can scarcely be predicated.

§ 417. [Inferences of Fact]; Nature of Subject-Matter.³²—The more impermanent the fact or state of affairs, the shorter will be the time during which it will be assumed to continue.³³ *Per contra*, the more enduring the nature of the situation shown to exist, the longer will it be taken to maintain its present condition.

Bodily States or Conditions.—Life will be “presumed” to continue so long as, under the conditions shown to exist, it would be reasonable to think it should do so. In case of a young person, in good bodily health, exposed to no particular contagion or other danger, the inference of continued bodily existence would be strong. In proportion as any of these circumstances becomes changed or replaced by its opposite it would naturally follow that a decrease or even an elimination of probative force would occur. For the same reasons, the inference of a continuance of a bodily state or condition, as to health,³⁴ will be strong or weak.

Habits.—Bodily habits, such as those of drunkenness³⁵ once shown to exist, will, in the absence of conflicting evidence, be presumed to continue for a reasonable time. In the same way, mental habits or those developed in carrying on a business,³⁶ occupation or customary pursuit³⁷ will be given the degree of continuance commonly manifested by such habits, under the conditions shown to have existed in any given case.

§ 418. [Inferences of Fact]; Legal Results.³⁸—Legal results, such as the lay-

28. Howland v. Davis, 40 Mich. 545 (1879). See also, Coghill v. Boring, 15 Cal. 213 (1860)

29. Nash v. Classon, 55 Ill. App. 356 (1894); Bexar Bldg., etc., Assoc. v. Seebe (Tex. Civ. App.), 40 S. W. 875 (1897).

30. Oliver v. Ellzy, 11 Ala. 632 (1847); Goodwin v. Dean, 50 Conn. 517 (1883); 2 Chamb., Ev., § 1032, n. 3, and cases cited.

31. McDougald v. Southern Pac. R. Co., 9 Cal. App. 236, 98 Pac. 685 (1908). Presumption that condition once proved to exist continues, see note. Bender ed., 126 N. Y. 545.

32. 2 Chamberlayne, Evidence, §§ 1033–1035.

33. High v. Bank of America, 103 Cal. 525, 37 Pac. 508 (1894); McCabe v. Com. (Pa. 1886), 8 Atl. 45; 2 Chamb., Ev., § 1033, n. 1, and cases cited

34. Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577 (1898); Draves v. People, 97 Ill. App. 151 (1901); 2 Chamb., Ev., § 1034.

35. McCraw v. McCraw, 171 Mass. 146, 50 N. E. 526 (1898); Hoagland v. Canfield (N. Y. 1908), 160 Fed. 146.

36. Leonard v. Nixon, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134 (1895).

37. McMahon v. Harrison, 6 N. Y. 443 (1852) (gambling); 2 Chamb., Ev., § 1035.

38. 2 Chamberlayne, Evidence, § 1036.

out of a highway,³⁹ the ownership,⁴⁰ possession⁴¹ or seizin⁴² of real estate⁴³ or personal property,⁴⁴ stand in the same position. Proper allowance should, however, be made in all cases for the ephemeral nature⁴⁵ or the rapid sale⁴⁶ of any chattel or other personal property involved in the inquiry.

§ 419. [Inferences of Fact]; Legal Status and Standing.⁴⁷— Legal status, e.g., the citizenship of a person⁴⁸ or the incorporation of a company⁴⁹ will be inferred to possess the continuance customary in such matters. In like manner, coverture,⁵⁰ being unmarried⁵¹ or other personal legal status,⁵² once shown to exist, will be presumed to continue for a reasonable time.

Foreign Law.— Where a rule of foreign law, written⁵³ or unwritten,⁵⁴ has been shown to the courts of a given forum⁵⁵ and has been judicially recog-

39. *Beckwith v. Whalen*, 65 N. Y. 322 (1875).

40. *Hohenshell v. South Riverside Land, etc., Co.*, 128 Cal. 627, 61 Pac. 371 (1900); *Coleman, etc., Co. v. Rice*, 105 Ga. 163, 31 S. E. 424 (1898); *Abbott v. Union Mut. L. Ins. Co.*, 127 Ind. 70, 26 N. E. 153 (1890); *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 Am. Dec. 49 (1851); *Lind v. Lind*, 53 Minn. 48, 54 N. W. 934 (1893); *Flanders v. Merritt*, 3 Barb. (N. Y.) 201 (1848); *Stickney v. Stickney*, 131 U. S. 227, 9 S. Ct. 677, 33 L. ed. 136 (1889); 2 Chamb., Ev., § 1036, n. 2, and cases cited. An appropriation of water by a public water supply company is presumed to be permanent. *Wagner v. Purity Water Co.*, 241 Pa. 328, 88 Atl. 484, L. R. A. 1916 E 981 (1913).

41. *Alabama State Ld. Co. v. Kyle*, 99 Ala. 474 (1892); *Choisser v. People*, 140 Ill. 21, 29 N. E. 546 (1892); *Janssen v. Stone*, 60 Mo. App. 402 (1894); *Smith v. Hardy*, 36 Wis. 417 (1874); *Lazarus v. Phelps*, 156 U. S. 202, 15 S. Ct. 271, 39 L. ed. 397 (1894); 2 Chamb., Ev., § 1036, n. 3, and cases cited.

42. *Cobleigh v. Young*, 15 N. H. 493 (1844); *Adair v. Lott*, 3 Hill (N. Y.) 182 (1842); *State v. Atkinson*, 24 Vt. 448 (1852); *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648 (1892); *Thomas v. Hatch*, 23 Fed. Cas. No. 13,899, 3 Sumn. (U. S.) 170 (1838); 2 Chamb., Ev., § 1036, n. 4, and cases cited.

43. *Leport v. Todd*, 32 N. J. L. 124 (1866); *Bradt v. Church*, 39 Hun (N. Y.) 262 (1886); *Caffrey v. McFarland*, 1 Phila. (Pa.) 555 (1855); 2 Chamb., Ev., § 1036, n. 5, and cases cited.

44. *Burgener v. Lippold*, 128 Ill. App. 590 (1906); *Buckley v. Buckley*, 16 Nev. 180 (1881); *Flanders v. Merritt*, 3 Barb. (N. Y.) 201 (1848); 2 Chamb., Ev., § 1036, n. 6, and cases cited. *Occupation of tracks* by a street railway company stands in the same position. *Jennings v. Brooklyn Heights R. Co.*, 106 N. Y. Supp. 279, 121 App. Div. 587 (1907).

45. *Adams v. Clark*, 53 N. C. 56 (1860).

46. *Bethel v. Linn*, 63 Mich. 464, 474, 30 N. W. 84 (1886).

47. 2 Chamberlayne. Evidence, §§ 1037-1041.

48. *State v. Jackson*, 79 Vt. 504, 65 Atl. 657 (1907).

49. *Anglo-California Bank v. Field*, 146 Cal. 644, 80 Pac. 1080 (1905).

50. *Wilson v. Allen*, 108 Ga. 279, 33 S. E. 979 (1899); *Goodwin v. Goodwin*, 113 Iowa 319, 85 N. W. 31 (1901); 2 Chamb., Ev., § 1037, n. 3, and cases cited.

51. *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578 (1905).

52. *Montgomery, etc., Plank-Road Co. v. Webb*, 27 Ala. 618 (1855).

53. *Seaboard Air Line R. Co. v. Phillips*, 117 Ga. 98, 43 S. E. 494 (1902); *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622 (1885); *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754 (1856); 2 Chamb., Ev., § 1038, n. 1, and cases cited.

54. *In re Huss*, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620 (1891); *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728 (1899).

55. *Bush v. Garner*, 73 Ala. 162 (1882); *In re Huss*, *supra*.

nized⁵⁶ or assumed by them to exist⁵⁷ in a sister state⁵⁸ or foreign country,⁵⁹ it will be assumed, in the absence of evidence to the contrary, that it has not ceased to be the law.

Foreign Regulations.—Where a foreign nation, state, municipal,⁶⁰ or business corporation,⁶¹ is shown to have established statutes, ordinances or other regulations, their continued operation and effect will be inferred until reason is shown to the contrary.

Official and Other Fiduciary Relations.—The tenure of office under a state or national⁶² government or the holding by an individual of a position as an officer in a public⁶³ or private⁶⁴ corporation, will be assumed to continue to the same extent that is usual in such cases. The relation of a given individual to some other trust⁶⁵ shows occasionally a still greater intrinsic permanence.

Qualification or Disqualification.—A state of qualification or disqualification⁶⁶ for the discharge of any legal privilege, franchise, or function will be assumed to continue until the contrary is shown, unless the facts constituting the legal standing are inherently transitory.

§ 420. [Inferences of Fact]; Life.⁶⁷—Under the general presumption against change,⁶⁸ human life once shown to exist, will, in the absence of evidence to the contrary, be presumed to continue⁶⁹ for a reasonable time. The test is simply that of what is reasonable under all the circumstances;⁷⁰—including the inference of fact, if any, as to actual continuance, in case of a human being of the age in question.⁷¹ The presumption of life has, therefore, been

56. *Stokes v. Macken*, 62 Barb. (N. Y.) 145 (1861).

57. *Graham v. Williams*, 21 La. Ann. 594 (1869).

58. *Raynham v. Canton*, 3 Pick. (Mass.) 293 (1825); *People v. Calder*, 30 Mich. 85 (1874); *State v. Armstrong*, 4 Minn. 335 (1860); 2 Chamb., Ev., § 1038, n. 6, and cases cited.

59. *In re Huss*, *supra*. See also, *Arayo v. Currel*, 1 La. 528, 20 Am. Dec. 286 (1830).

60. *Cleveland, etc., R. Co. v. Bender*, 69 Ill. App. 262 (1896).

61. *Paquin v. St. Louis, etc., R. Co.*, 90 Mo. App. 118 (1901); 2 Chamb., Ev., § 1039.

62. *Doe d. Hopley v. Young*, 8 Q. B. 63 (1845); 2 Chamb., Ev., § 1040, n. 1, and cases cited.

63. *Kaufman v. Stone*, 25 Ark. 336 (1869); *Kinyon v. Duchene*, 21 Mich. 498 (1870); 2 Chamb., Ev., § 1040, n. 2, and cases cited.

64. *Stafford Springs St. Ry. Co. v. Middle*

River Mfg. Co., 80 Conn. 37, 66 Atl. 775 (1907); *Sisk v. American Central F. Ins. Co.*, 95 Mo. App. 695, 69 S. W. 687 (1902); 2 Chamb., Ev., § 1040, n. 3, and cases cited.

65. *In re Fisher's Estate*, 128 Iowa 18, 102 N. W. 797 (1905); *Sawyer v. Knowles*, 33 Me. 208 (1851).

66. *Esker v. McCoy*, 5 Ohio Dec. (Reprint) 73, 6 Am. L. Rec. 694 (1878) (voter); *Bolling v. Anderson*, 4 Baxt. (Tenn.) 550 (1874) (judge); 2 Chamb., Ev., § 1041.

67. 2 Chamberlayne. Evidence, § 1042.

68. § 416, *supra*; 2 Chamb., Ev., § 1030.

69. *Martin v. Chicago, etc., R. Co.*, 92 Ill. App. 133 (1900); *Hyde Park v. Canton*, 130 Mass. 505 (1881); *State v. Plym*, 43 Minn. 385, 45 N. W. 848 (1890); *Augustus v. Graves*, 9 Barb. (N. Y.) 595 (1850); 2 Chamb., Ev., § 1042, n. 2, and cases cited.

70. *Posey v. Hanson*, 10 App. Cas. (D. C.) 496 (1897); *Sprigg v. Moale*, 28 Md 497, 92 Am. Dec. 698 (1868).

71. *Hyde Park v. Canton*, *supra*.

said not only to continue for short periods,⁷² for more extended intervals⁷³ but even up to the age of a hundred years.⁷⁴

§ 421. [Inferences of Fact]; Mental Conditions.⁷⁵—Mental conditions, such as sanity⁷⁶ or insanity,⁷⁷ will be taken to continue according to their intrinsic permanence or liability to alteration from subjective or outside influences. Thus, to state an extreme case, the imbecility of old age will be presumed to continue, in the absence of contrary evidence.⁷⁸ “The rule does not apply to cases of occasional or intermittent insanity;⁷⁹ but it does to all cases of habitual or apparently confirmed insanity, of whatever nature;⁸⁰ even where the existence of lucid intervals may have been shown. This proposition seems well settled.⁸¹ The same rule may be put into the form of an assumption of administration.⁸²

Mental States.—Transient states of consciousness like intent⁸³ or intention⁸⁴ will be accorded vitality in accordance with their inherent strength or

72. *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088 (1900) (5 years); *Rosenblum v. Eisenberg*, 108 N. Y. Supp. 350, 123 App. Div. 896 (1908) (9 months); 2 Chamb., Ev., § 1042, n. 7, and cases cited.

73. *Willis v. Ruddock Cypress Co.*, 108 La. 255, 32 So. 386 (1902) (25 years); *Dunn v. Travis*, 67 N. Y. Supp. 743, 6 App. Div. 317 (1900) (30 years); *In re Sherwood's Estate*, 206 Pa. 465, 56 Atl. 20 (1903) (29 years); 2 Chamb., Ev., § 1042, n. 8, and cases cited. *That a grantor is dead* eighty years after he acknowledged a deed has been assumed as an administrative matter. 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 (1901), *affirming* 54 N. Y. Supp. 419, 35 App. Div. 39 (1898).

74. *Matter of Bd. of Education*, 173 N. Y. 321, 66 N. E. 11 (1903). So great an extension of the presumption is especially frequent under the civil law. *Willett v. Andrews*, 51 La. Ann. 486, 25 So. 391 (1899); 2 Chamb., Ev. § 1042, n. 10, and cases cited.

Absence.—An absentee must be presumed to be alive until his death is proved and he will not be presumed dead until he is one hundred years old. So there is no presumption of the death of an absentee who is if alive ninety-eight years old. *Quaker Realty Co. v. Starkey*, 136 La. 281, 66 So. 386, L. R. A. 1015 D 176 (1914).

75. 2 Chamberlayne. Evidence, §§ 1043–1045.

76. *In re Brigham's Estate*, 144 Iowa 71, 120 N. W. 1054 (1909); *West v. McDonald* (Ky. 1908), 113 S. W. 872.

77. *Lilly v. Waggoner*, 27 Ill. 395 (1862);

Beard v. Southern Ry. Co., 143 N. C. 137, 55 S. E. 505 (1906); 2 Chamb., Ev., § 1043, n. 2, and cases cited.

78. *Rogers v. Rogers* (Del. 1907), 66 Atl. 374; *Mason v. Rodriguez* (Tex. Civ. App. 1909), 115 S. W. 868.

79. *Branstrator v. Crow*, 162 Ind. 362, 69 N. E. 668 (1904).

80. *Hallohan v. Rempe*, 120 N. Y. Supp. 901 (1910); *State v. Wilner*, 40 Wis. 304 (1876); 2 Chamb., Ev., § 1043, n. 5, and cases cited.

81. *Crouse v. Holman*, 19 Ind. 30, 39 (1862).

82. As where it is said that one who claims insanity to have existed at a particular time in one who has temporary fits of insanity. *Wooten v. State* (Tex. Cr. App. 1907), 102 S. W. 416; or to establish the fact that one chronically insane did a particular act in a lucid interval. *In re Kehler* (N. Y. 1908), 159 Fed. 55, 86 C. C. A. 245; 2 Chamb., Ev., § 1043, n. 8, and cases cited. is said to have the burden of proof, meaning burden of evidence on the point. Proof of present insanity grounds no inference as to its past existence. *Schander v. Gray*, 149 Cal. 227, 86 Pac. 695 (1906). As to effect of judgment, see *Stilzel v. Farley*, 148 Ill. App. 635 (1909); 2 Chamb., Ev., § 1043.

83. *State v. Johns*, 140 Iowa 125, 118 N. W. 295 (1908).

84. *Oller v. Bonebrake*, 65 Pa. 338 (1870); 64 Mo. 367 (1877); 2 Chamb., Ev., § 1044, n. 2, and cases cited.

the permanence of the conditions out of which they arise or by which they are accompanied and stimulated.

Mental or Moral Character.—Character, meaning the actual sum of bodily, mental and moral habits, tastes and aptitudes, will be taken to continue in accordance with the permanence and strength of the composite forces of which it is a resultant. The same is true, *mutatis mutandis*, of any single trait in this character,⁸⁵ as want of chastity.⁸⁶

§ 422. [Inferences of Fact]; Personal or Business Relations.⁸⁷—Relations between persons,⁸⁸ whether as partners⁸⁹ in a course of business dealing⁹⁰ or in some other contractual⁹¹ connection, when once shown to exist, will be presumed to continue in accordance with the nature of such arrangements. Marital cohabitation once established by evidence, will, for a reasonable time, be inferred to continue.⁹² The rule is the same, whether the relation is one of legitimate business or is unlawful or is even immoral in its nature.⁹³

Relations to Creditors.—Relations to creditors, such as solvency, insolvency⁹⁴ or other financial conditions⁹⁵ will, it is inferred, continue within reasonable limits, prescribed by experience.⁹⁶

Relations to Localities.—What inference arises as to the continuance of personal relations to places, as presence or residence in⁹⁷ or absence from⁹⁸ a

85. *Sleeper v. Van Middlesworth*, 4 Den. (N. Y. 1847) 431; *State v. Chittenden*, 112 Wis. 569, 88 N. W. 587 (1902); 2 *Chamb., Ev.*, § 1045, n. 1, and cases cited.

86. *People v. Squires*, 49 Mich. 487, 13 N. W. 828 (1882); *Kerr v. U. S.* (Ind. Terr. 1907), 104 S. W. 800.

87. 2 *Chamberlayne. Evidence*, §§ 1046–1050.

88. *Eames v. Eames*, 41 N. H. 77 (1860); *Hilliard v. Wisconsin Life Ins. Co.*, 137 Wis. 208, 117 N. W. 999 (1908).

Agency.—There is a presumption of the continuance of the relation of master and servant and where a business is sold the burden of proof is on those seeking to show notice or knowledge of the servant of the new relationship. *Benson v. Lehigh Valley Coal Co.*, 124 Minn. 222, 144 N. W. 774, 50 L. R. A. (N. S.) 170 (1914).

89. *Pursley v. Ramsey*, 31 Ga. 403 (1860); *Anslyn v. Franke*, 11 Mo. App. 598 (1882); *Cooper v. Dedrick*, 22 Barb. (N. Y. 1856) 510; 2 *Chamb., Ev.*, § 1046, n. 2, and cases cited.

90. *Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473, 34 N. E. 289 (1903); *Brooks v. U. S.*, 146 Fed. 223, 76 C. C. A. 581 (1906).

91. *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539, 31 S. W. 265 (1895); *Hensel v. Maas*, 94 Mich. 563, 54 N. W. 381 (1893);

Love v. Edmonston, 27 N. C. 354 (1845); 2 *Chamb., Ev.*, § 1046, n. 4, and cases cited.

92. *Stoutenborough v. Rammel*, 123 Ill. App. 487 (1905).

93. *Jones v. Jones*, 45 Md. 144 (1876); *Caujolle v. Ferrie*, 23 N. Y. 90 (1861); *Reading F. Ins., etc., Co's Appeal*, 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448 (1886); 2 *Chamb., Ev.*, § 1046, n. 6, and cases cited. Thus, improper sexual relations between persons will be inferred to continue in the absence of evidence tending to establish the fact of change. *Caujolle v. Ferrie, supra*; *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 433 (1908).

94. *Wachsmuth v. Penn. Mut. L. Ins. Co.*, 147 Ill. App. 510 (1909); *In re Brigham's Estate, supra*; *Mullen v. Pryor*, 12 Mo. 307 (1848); 2 *Chamb., Ev.*, § 1047, n. 1, and cases cited.

95. *Wallace v. Hull*, 28 Ga. 68 (1859); *Scammon v. Scammon*, 28 N. H. 419 (1854). A definite indebtedness is under the same rule. *Carder v. Primm*, 52 Mo. App. 102 (1892); *Farr v. Payne*, 40 Vt. 615 (1868); 2 *Chamb., Ev.*, § 1047, n. 2, and cases cited.

96. *Donahue v. Coleman*, 49 Conn. 464 (1882). See also, *Coghill v. Boring*, 15 Cal. 213 (1860).

97. *Daniels v. Hamilton*, 52 Ala. 105 (1875); *Nixon v. Palmer*, 10 Barb. (N. Y.)

given locality, is a question merely as to what experience shows to be probable.

§ 423. **Inferences of Regularity; Human Attributes; Physical.**⁹⁹— Each individual possesses or is possessed by the ordinary physical, mental or spiritual qualities by which men as a class are generally influenced.¹ A given individual will be presumed or inferred, as well as assumed or taken, to have the ordinary physical powers of sense-perception usual to persons of the same age, race and other conditioning circumstances. The law presumes that a person possessing good eyesight must have seen that which was within range of his vision, if he gave attention and looked.² In like manner, the ordinary capability of hearing will be assumed.³

Capacity for Child-Bearing.— The assumption of the existence of a capacity for child-bearing at any period after its physical conditions exist is so fully recognized that the sole issue presented in this connection is as to the date of its termination. *In the United States*, it is assumed that except in extreme age,⁴ or when other strong invalidating circumstances are present, that a woman is capable of giving birth to children at any period of her adult life.⁵ The inference is especially strong where the presumption is reinforced by the previous birth of children.⁶ *In England*, a rather more discriminating course has been adopted by judges, especially those of chancery jurisdiction or land registration.⁷

Power of Procreation.— It will be assumed, in the absence of evidence to any different effect, that any male person above the age of puberty is capable of procreation.⁸ The assumption has been deemed reasonable even up to an advanced age.⁹

175 (1850); *Burleigh v. Hecht*, 22 S. Dak. 301 (1908); 2 Chamb., Ev., § 1048, n. 1, and cases cited.

98. *Com. v. Pollitt*, 25 Ky. L. Rep. 790 (1903), 76 S. W. 412. The party who claims that a residence shown to have existed within a reasonable length of time has since been changed is under the burden of evidence to prove that fact. *Wray v. Wray*, 33 Ala. 187 (1858); *Nixon v. Palmer*, *supra*; *Rixford v. Miller*, 49 Vt. 319, 326 (1877).

99. 2 Chamberlayne, Evidence, §§ 1050, 1051.

1. *Holcombe v. State*, 5 Ga. App. 47, 62 S. E. 647 (1908). For a general discussion of inferences of regularity and the distinction between administrative assumptions of regularity and inferences or presumptions of regularity, see 2 Chamb., Ev., §§ 1049, 1193 *et seq.*

2. *Lowden v. Pennsylvania Co.*, 41 Ind.

App. 614, 82 N. E. 941 (1907); 2 Chamb., Ev., § 1050.

3. *Holcombe v. State*, *supra*.

4. *Bacot's Case*, cited in *In re Appgar*, 37 N. J. Eq. 502 (1883) (62).

5. *Hill v. Spencer*, 196 Ill. 65, 63 N. E. 614 (1902). See also, *In re Appgar*, *supra*. There is often said to be a presumption of law that one dying has left heirs. *Modern Woodmen v. Ghromley*, 41 Okla. 532, 139 Pac. 306, L. R. A. 1915 B 728 (1914).

6. *List v. Rodney*, 83 Pa. 483 (1877) (75; married); *Flora v. Anderson*, 67 Fed. 182 (1895) (49; married); 2 Chamb., Ev., § 1050a.

7. 2 Chamb., Ev., § 1050a, notes 4-13; *Re G* —, 21 Ont. 109 (1891).

8. *Gardner v. State*, 81 Ga. 144, 7 S. E. 144 (1888); 2 Chamb., Ev., § 1051, and cases cited.

9. *Lushington v. Boldero*, 15 Beav. 1, 16 Jur. 140, 21 L. J. Ch. 49 (1851) (age of 95).

§ 424. [Inferences of Regularity]; Mental or Moral.¹⁰—Prominent among inferences of regularity in human attributes, mental or moral, is the so-called “presumption” that a given individual, in the absence of evidence to the contrary, will be taken to be sane,¹¹ i.e., that he is a person of common understanding.¹² The procedural effect of a presumption of law has been conferred at times upon this inference of fact.¹³ In much the same way, it is said to be presumed that a child of 14 is *sui juris*,¹⁴ and that one under 12 is not.¹⁵ A deaf mute is not presumed to be an idiot.¹⁶ It will be presumed that each human being has the ordinary mental powers and qualifications connoted by the term *man*.¹⁷

Moral Attributes.—In the same way, it will be inferred or assumed that each man has the usual moral attributes attaching to the race, the customary habits, and the general way of looking at questions presented for consideration. Thus, it may fairly be said that it will be presumed or assumed that a person did not voluntarily incur the risk of death.¹⁸

Instinct of Self-Preservation.—Among propositions of experience relating to the probable conduct of mankind is that men love life and, therefore, instinctively avoid obvious danger.¹⁹ It follows that where a deceased person

10. 2 Chamberlayne, Evidence, §§ 1052, 1053.

11. Stanfill v. Johnson, 150 Ala. 546, 40 So. 223 (1909); Kelly v. Nusbaum, 244 Ill. 158, 91 N. E. 72 (1910); *In re Phillips*, 158 Mich. 155, 16 Detroit Leg. N. 623, 122 N. W. 554 (1909); Dodd v. Anderson, 115 N. Y. Supp. 688, 131 App. Div. 224 (1909); 2 Chamb. Ev., § 1052, and cases cited. There is a presumption of sanity even of a suicide. Ledy v. National Council, etc., 129 Minn. 137, 151 N. W. 905, L. R. A. 1915 D 1095 (1915). Presumption as to suicide in action on life policy, see note, Bender ed., 47 N. Y. 58

Presumption of sanity.—Every defendant is presumed to be sane but when evidence is introduced sufficient to raise a reasonable doubt of sanity the law imposes on the state the burden of establishing his sanity the same as any other material fact. *Alberty v. State*, 10 Okla. Crim. Rep. 616, 140 Pac. 1025, 52 (N. S.) L. R. A. 248 (1914). In a criminal case the presumption of sanity prevails until it is met by evidence and if any evidence is introduced of insanity at the time of the commission of the offence charged then the burden of proving sanity devolves on the prosecution and the state is bound to prove his sanity like all other elements of the crime beyond a reasonable doubt. *Adair v. State*, 6 Okla. Crim. Rep. 284, 118 Pac. 416, 44 L. R. A. (N. S.) 119 (1911).

12. *Holcombe v. State, supra*; *Fosnes v. Duluth St. Ry. Co.*, 140 Wis. 455, 122 N. W. 1054 (1909). The rule is the same in criminal cases. *U. S. v. Chosholm*, 153 Fed. 808 (1907).

13. *Rogers v. Rogers* (Del. 1907), 66 Atl. 514.

14. *Fortune v. Hall*, 195 N. Y. 578, 89 N. E. 1100 (1909), affirming 106 N. Y. Supp. 787, 122 App. Div. 250 (1907). See also, *Gunter v. Hinson*, 161 Ala. 536, 50 So. 86.

15. *Grealish v. Brooklyn, etc., R. Co.*, 114 N. Y. Supp. 582, 130 App. Div. 238 (1909), judg. affd. 197 N. Y. 540, 91 N. E. 1114 (1910).

16. *Alexier v. Matzke*, 151 Mich. 36, 115 N. W. 251, 14 Detroit Leg. N. 955 (1908).

17. *Succession of Jones*, 120 La. Ann. 986, 45 So. 965 (1908). The usual limitations upon mental powers will also be presumed or assumed. For example, the law will not presume that a fact once known will always remain in the memory. *Fire Ass'n of Phila. v. La Grange & Lockhart Com. Co.* (Tex. Civ. App. 1908), 109 S. W. 1134

18. *Chicago Terminal Transfer R. Co. v. Reddick*, 131 Ill. App. 515 (1907), aff'd 230 Ill. 105, 82 N. E. 598 (1907); *Lamb v. Union Ry. Co. of N. Y. City*, 109 N. Y. Supp. 97, 125 App. Div. 286 (1908); 2 Chamb. Ev., § 1052, n. 12, and cases cited.

19. *Atchison, etc., R. Co. v. Hill*, 57 Kan.

was sane²⁰ at the time of his death the *prima facie* inference arises, so far as these facts of death and sanity are concerned, that the death was not self-inflicted.²¹ In like manner, it has been "presumed," *assumed* probably being meant, in the absence of evidence to the contrary, that one killed by a locomotive engine was, at the time, in the exercise of due care.²²

§ 425. [Inferences of Regularity]; Business Affairs.²³— Certain inferences of fact relating to regularity in business matters seem to be bare assumptions made for the purposes of convenience in directing the course of the trial.²⁴ Their office is simply to sustain the burden of evidence²⁵ until proof on the subject is introduced, as may properly be done.²⁶

Dates and Actual Time.— Whether the ruling that the date affixed to a document as the date of its execution is *prima facie* correct, is an inference of fact or purely an assumption of administration, it will be taken that an

139, 45 Pac. 581 (1896); *Morrison v. New York Cent., etc., R. Co.*, 63 N. Y. 643 (1875); *Texas, etc., R. Co. v. Gentry*, 163 U. S. 353, 366, 16 S. Ct. 1104, 41 L. ed. 186 (1896); 2 *Chamb., Ev.*, § 1053, and cases cited. This inference as to what is probable can, as a matter of necessity, have weight only in the absence of evidence of the actual. *Connerton v. Delaware, etc., Canal Co.*, 169 Pa. 339, 32 Atl. 416 (1895). Little reason, therefore, exists for applying it to a case where an injured party can testify as to the real circumstances attending the happening itself. *Reynolds v. Keokuk*, 72 Iowa 371, 34 N. W. 167 (1887).

20. *Germain v. Brooklyn L. Ins. Co.*, 26 Hun (N. Y.) 604 (1882).

21. *Devine v. National Safe Dep. Co.*, 145 Ill. App. 322 (1908), *judg. aff'd* 88 N. E. 804 (1909); *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410 (1871); *Clemens v. Royal Neighbors of America*, 14 N. D. 116, 103 N. W. 402 (1905); 2 *Chamb., Ev.*, § 1053, n. 5, and cases cited.

22. *Davenport, etc., Ry. Co. v. De Yaeger*, 112 Ill. App. 537 (1904); *Cahill v. Chicago & A. R. Co.*, 205 Mo. 393, 103 S. W. 532 (1907). Presumptions of due care, see note, *Bender ed.*, 112 N. Y. 223. Presumption as to negligence and contributory negligence, see note, *Bender ed.*, 139 N. Y. 274. There is a presumption that a switchman moved by love of life and the ordinary instinct of self-preservation which is characteristic of all living beings was in the exercise of reasonable care to that end. *Korab v. Chicago, Rock Island & Pa-*

cific R. Co., 149 Iowa 711, 128 N. W. 529, 41 L. R. A. (N. S.) 32 (1910). Because of the natural instinct of self-preservation which generally prompts men to exercise care and caution for their safety, there is ordinarily a presumption that due care and caution were observed in particular instances. But this presumption may be rebutted where it is incompatible with the duly proven conduct of the person in particular circumstances. The burden is upon the defendant to show contributory negligence on the part of the plaintiff. *Southern Express Co. v. Williamson*, 66 Fla. 286, 63 So. 433, L. R. A. 1916 C 1208 (1913). In an action against a railroad company running a park for the death by drowning of a boy to whom the defendant let a row-boat claimed to be defective, where there was no witness to the accident and no direct evidence as to how it happened, the court holds that there is a presumption of due care on the part of the plaintiff which is sufficient to permit recovery if negligence is shown on the part of the defendant. *Lincoln v. Detroit & M. R. Co.*, 179 Mich. 189, 146 N. W. 710, 51 L. R. A. (N. S.) 710 (1914).

23. 2 *Chamberlayne*, Evidence, §§ 1054-1056.

24. *Infra*, § 490 *et seq.*; 2 *Chamb., Ev.*, §§ 1054, 1193 *et seq.*

25. §§ 402 *et seq.*; 2 *Chamb., Ev.*, §§ 967 *et seq.*

26. *H. A. Pitts' Sons Mfg. Co. v. Poor*, 7 Ill. App. 24 (1880); *Cutts v. York Mfg. Co.*, 18 Me. 190 (1841); 2 *Chamb., Ev.*, § 1054, and cases cited.

abstract of title,²⁷ power of attorney,²⁸ or other document²⁹ was executed, or a letter written³⁰ on the day of its date. In like manner, documents of different dates will be taken to relate to separate transactions.³¹ The inference, in the nature of things, is rebuttable.³²

Usual Methods Followed.—An inference of fact, justified by experience but liable to be disproved,³³ is to the effect that the customary methods of doing business in general are followed in a particular case which naturally falls within the rule.³⁴ For example, the habit of business men to retain valuable collaterals or other valuable papers until the indebtedness secured by them is paid, has been recognized by the courts. Therefore the possession of an overdue note by its maker gives rise to an inference that its obligation has been discharged.³⁵ The custom of tradesmen is to seek their own interest by giving credit to solvent persons rather than to others.³⁶ Accordingly it will be inferred that credit was given to a responsible principal rather than to an irresponsible agent.³⁷ For a like reason, where the holder of a mortgage takes no steps to secure payment, it will be inferred that the mortgage is paid.³⁸ In the same way, men in business offices are in the habit of signing their own names to their correspondence, of having persons connected with the office answer telephone communications and to state truly with whom the conversation is being held. An inference, therefore, arises that the signature on a business letter, in answer to one sent to him,³⁹ especially on office stationery,⁴⁰

27. *Chicago, etc., R. Co. v. Keegan*, 152 Ill. 413, 39 N. E. 33 (1894).

28. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874).

29. *Hauerwas v. Goodloe*, 101 Ala. 162, 13 So. 567 (1892); *Lauder v. Peoria Agricultural, etc., Soc.*, 71 Ill. App. 475 (1897); 2 *Chamb., Ev.*, § 1055, n. 3, and cases cited.

Negotiable instruments stand in the same position. They will be taken to have been executed on the day of their date. 2 *Chamb., Ev.*, § 1055, n. 3, and cases cited.

30. *Potez v. Glossop*, 2 Exch. 191 (1848); 2 *Chamb., Ev.*, § 1055, n. 4, and cases cited.

31. *Matter of Miller*, 77 N. Y. App. Div. 473, 78 N. Y. Supp. 930, *rev'g* 37 Misc. 449, 75 N. Y. Supp. 929 (1902).

32. *Dowie v. Sutton*, 126 Ill. App. 47, *aff'd* 227 Ill. 183, 81 N. E. 395 (1906).

33. *Savings, etc., Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922 (1895).

34. *Phillips v. Wright*, 5 Sandf. (N. Y.) 342 (1852); *First Nat. Bank v. Colonial Hotel Co.*, 226 Pa. 292, 75 Atl. 412 (1910); *Adams v. Adams*, 22 Vt. 50 (1849); 2 *Chamb., Ev.*, § 1056, n. 2, and cases cited.

35. *Blodgett v. Webster*, 24 N. H. 91

(1851); *Halfin v. Winkleman*, 83 Tex. 165, 18 S. W. 433 (1892); *Kincaid v. Kincaid*, 8 *Humphr. (Tenn.)* 17 (1847); 2 *Chamb., Ev.*, § 1056, n. 3, and cases cited.

36. Banks will be assumed to discount paper only on the indorsement of those who are able to pay their indebtedness. *German Security Bank v. Columbia Finance & Trust Co.*, 27 Ky. Law Rep. 581, 85 S. W. 761 (1905).

37. *Ferris v. Kilmer*, 47 Barb. (N. Y.) 411 (1867).

38. *Locke v. Caldwell*, 91 Ill. 417 (1879); *Kellogg v. Dickinson*, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346 (1888); *Wilson v. Albert*, 89 Mo. 537, 1 S. W. 209 (1886); *McMurray v. McMurray*, 17 N. Y. Supp. 657, 63 Hun 183 (1892), fifteen years sufficient, the mortgagor being solvent; *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328 (1886); *Ray v. Pearce*, 84 N. C. 485 (1881); *Sawyer v. Link*, 193 Pa. 424, 44 Atl. 457 (1899); 2 *Chamb., Ev.*, § 1056, n. 6, and cases cited. As to payment of a bond. *Id.*

39. *Ragan v. Smith*, 103 Ga. 556, 29 S. E. 759 (1897); *Melby v. Osborne*, 33 Minn. 492, 24 N. W. 253 (1885); *Newell v. White*, 29

is that of the writer or has been authorized by him.⁴¹ So it will be inferred that one answering a telephone is connected with the office,⁴² and is actually the person whom he purports to be.⁴³

Minor Instances.— That business has been transacted at one's office rather than at his residence,⁴⁴ that the entries upon books of account are authorized,⁴⁵ that estates of any financial value will receive legal administration,⁴⁶ that business enterprises will not be undertaken until all necessary legal authority is procured,⁴⁷ and the like ⁴⁸ will be presumed, or assumed.

Corporation Business.— Where the seal of a corporation has been affixed by its secretary, it will be inferred that the act was done under authority of the company, such being the usual course of business.⁴⁹

Officer's Returns.— In the same way the correctness of an officer's return will be presumed.⁵⁰

§ 426. [Inferences of Regularity]; Official Business; Mail Service.⁵¹— The regularity of the mail service is a matter established by experience.⁵² It will, therefore, be inferred that in a particular instance of transportation by mail the same regularity of transmission was applied.⁵³ When certain necessary

B. 1 343, 73 Atl. 798 (1908)); 2 Chamb., Ev., § 1056, n. 7, and cases cited. It has been held that no presumption arises that a person whose name is appended to a business letter actually wrote it. *Beard v. Southern Ry. Co.*, 143 N. C. 137, 55 S. E. 505 (1906). The same presumption will be indulged in case of one whose name is affixed to a telegram. *Western Union Tel. Co. v. Troth*, 43 Ind. App. 7, 84 N. E. 727 (1908).

40. *Ragan v. Smith*, *supra*.

41. *American Bonding Co. of Baltimore v. Ensey*, 105 Md. 211, 65 Atl. 921 (1907).

42. *Rock Island, etc., R. Co. v. Potter*, 36 Ill. App. 500 (1888).

43. *Guest v. Hannibal, etc., R. Co.*, 77 Mo. App. 258 (1898).

44. *Varicks v. Crane*, 4 N. J. Eq. 128 (1837).

45. *Henry v. Travelers' Ins. Co.*, 42 Fed. 363 (1890).

46. *Johnson v. Burks*, 103 Mo. App. 221, 77 S. W. 133 (1903).

47. *McWethy v. Aurora Electric Light, etc., Co.*, 202 Ill. 218, 67 N. E. 9, *aff'g* 104 Ill. App. 479 (1903).

48. *Allen v. Wilbur*, 199 Mass. 366, 85 N. E. 429 (1908), an addressed letter delivered at addressee's office was received. It will be assumed that promissory notes are worth their face value. *Anderson v. Grand Forks Nat.*

Bank, 6 N. D. 497, 72 N. W. 916 (1897). When a month is referred to, without further limitation, it will be taken to be a month of the current year. *Tipton v. State*, 119 Ga. 304, 46 S. E. 436 (1903).

49. *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076 (1906). It will be inferred that a business corporation has officers and stockholders, such being the usual custom. *Richards v. Northwestern Coal & Mining Co.*, 221 Mo. 149, 119 S. W. 953 (1909).

50. It is presumed that a public officer does his duty and this presumption applies to a return on the summons by a sheriff showing that he received it. *Galehouse v. Minneapolis, St. Paul, etc., R. Co.*, 22 N. D. 615, 135 N. W. 189, 47 L. R. A. (N. S.) 965 (1912).

51. 2 Chamberlayne, Evidence, §§ 1057-1061.

52. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187 (1896); *Dunlop v. U. S.*, 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 700 (1897).

53. The presumption has been said to be rather that postal officials do their duty. *Watson v. Richardson*, 110 Iowa 673, 80 N. W. 407 (1899); *Briggs v. Hervey*, 130 Mass. 186 (1881); *Henderson v. Carbondale Coal, etc., Co.*, 140 U. S. 25, 37, 11 S. Ct. 691, 35 L. ed. 332 (1890); 2 Chamb., Ev., § 1057, n. 2, and cases cited.

conditions are complied with,⁵⁴ the mailing of a letter or other postal matter, gives rise to an inference that it arrived at its destination in due course of mail.⁵⁵ The presumption or inference is one of fact.⁵⁶ The force of the inference of receipt from mailing is not suspended by any so called "conflicting" presumption of innocence.⁵⁷

Necessary Conditions on Inference of Receipt from Mailing; (a) Proper Address.—That the inference of receipt from mailing should arise it is essential that the mail matter should be properly posted. This, in turn, involves compliance with certain familiar conditions;—(a) the letter or article must beailable matter and properly addressed, (b) the postage must be prepaid, so far as required by the postal regulations and (c) it must be actually deposited in the mail.⁵⁸ Accordingly, no inference of receipt arises from mailing unless the letter or other article is shown⁵⁹ to have been properly addressed to the person for whom it was intended,⁶⁰ at the place of his residence⁶¹ at the

54. *Allen v. Blunt*, 1 Fed. Cas. No. 217, 2 Woodb. & M. (U. S.) 121, 131.

55. *German Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247 (1889); *Bloom v. Wanner*, 25 Ky. L. Rep. 1646, 77 S. W. 930 (1904); *McDowell v. Aetna Ins. Co.*, 164 Mass. 444, 41 N. E. 665 (1895); *Long Bell Lumber Co. v. Nyman*, 145 Mich. 477, 13 Detroit Leg. N. 577, 108 N. W. 1019 (1906); *Sills v. Burge*, 141 Mo. App. 148, 124 S. W. 605 (1910); *Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473, 34 N. E. 289 (1893); *Jensen v. McCorkell*, 154 Pa. 323, 26 Atl. 366, 5 Am. St. Rep. 843 (1893); *Dunlop v. U. S.*, *supra*; 2 Chamb., Ev., § 1057, n. 4, and cases cited.

Registered Mail.—The inference of delivery from proper posting applies though the letter was registered, under the postal regulations which call for an entry of receipt on the books of the receiving office and no such entry is offered or its absence explained. *Bellefonte First Nat. Bank v. McManigle*, 69 Pa. 156, 8 Am. Rep. 236 (1871).

56. *Pitts v. Hartford L., etc., Ins. Co.*, 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96 (1895); *Pittsburg Lawrence Bank v. Raney, etc., Iron Co.*, 77 Md. 321, 26 Atl. 119 (1893); *Plath v. Minnesota Farmers' Mut. F. Ins. Assoc.*, 23 Minn. 479, 23 Am. Rep. 697 (1877); *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246 (1877); *Henderson v. Carbondale Coal, etc., Co.*, *supra*; 2 Chamb., Ev., § 1057, n. 5, and cases cited.

57. *Rosenthal v. Walker*, 111 U. S. 185, 4 S. Ct. 382, 28 L. ed. 395 (1884), receipt of an incriminating letter presumed.

58. A statement that a person "mailed" a letter implies compliance with all these conditions. *Ward v. Morr Transfer & Storage Co.*, 119 Mo. App. 83, 95 S. W. 964 (1906); *Reynolds v. Maryland Casualty Co.*, 30 Pa. Super. Ct. 456 (1906).

59. It need not be affirmatively proved that the letter in an envelope is the one intended for the person whose address is on the envelope. *Phelan v. Northwestern Mut. L. Ins. Co.*, 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441 (1889).

60. *Bankers' Mut. Casualty Co. v. People's Bank of Talbotton*, 127 Ga. 326, 56 S. E. 429 (1907); *Ward v. Hasbrouck*, 60 N. Y. Supp. 391, 44 App. Div. 32 (1899); *Reeves & Co. v. Martin*, 20 Okl. 558, 94 Pac. 1058 (1908); 2 Chamb., Ev., § 1058, n. 3, and cases cited. A defective address will exclude the inference even if the letter enclosed a self-addressed postcard which was not returned. *U. S. Equitable L. Assur. Soc v. Frommhold*, 75 Ill. App. 43 (1897). A correct street and number and a wrong place—e.g., "317 Main St., New York City." instead of 317 Main St., Cincinnati"—raises no presumption of receipts. *Westheimer v. Hoyer*, 22 N. Y. Supp. 518, 47 Misc. Rep. 171 (1901). The presumption that a letter mailed was received only arises on evidence that it was properly addressed. Merely stating that "demand was made by mail" is insufficient as it does not appear how the letter was addressed. *Silberg Co. v. McNeil*, 18 N. M. 44, 133 Pac. 975, 49 L. R. A. (N. S.) 458 (1913), citing text.

61. *Goodwin v. Provident Sav. L. Assur. Assoc.*, 97 Iowa 226, 66 N. W. 156, 59 Am.

post-office where he customarily receives his mail. In case of a large place, this requirement includes in addition, the correct street and number.⁶² A person who customarily receives his mail at both of two post-offices may properly be addressed at either.⁶³

(b) *Postage Must Be Prepaid.*—No presumption or inference of receipt arises from the fact of mailing unless it is affirmatively shown that stamps have been affixed sufficient, under the postal regulations, to carry it to its destination.⁶⁴ The fact of prepayment may be inferred from the custom of an individual⁶⁵ or the practice of a business establishment in this particular.

(c) *Deposit in the Mail.*—It is a necessary condition of any inference of receipt of mail matter from its posting that the fact of deposit in the mail should be affirmatively shown.⁶⁶ The fact may be shown either by direct evidence so called, or by inferences drawn from proof of probative facts, including the regular course of business in a particular mercantile office,⁶⁷ the custom of a given individual in this matter⁶⁸ together with evidence that the special parcel of mail matter in question had been placed within the operation of the system or custom of the office.⁶⁹ Even where the facts are so inconclusive as not to justify a ruling that the inference of mailing is a *probable* one, it may still be held to be a *reasonable* one, and a verdict rendered thereon may be sustained.⁷⁰

Postmarks.—A postmark raises an inference that the article so stamped has been mailed.⁷¹ It affords, however, no inference that the article was

St. Rep. 411, 32 L. R. A. 473 (1896); *Henderson v. Carbondale Coal, etc., Co.*, *supra*; *Russell v. Buckley*, 4 R. I. 525 (1857).

62. *Fleming, etc., Co. v. Evans*, 9 Kan. App. 558, 61 Pac. 503 (1900); *Chicago, etc., Ry. Co. v. Chickasha Nat. Bank* (Okla. 1909), 174 Fed. 923; *Phelan v. Northwestern Mut. L. Ins. Co.*, *supra*; 2 Chamb., Ev., § 1058, n. 5, and cases cited. If the person addressed has changed his address and left the new address with the proper post office officials, it will be assumed that the letter has been properly forwarded. *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43 (1889).

63. *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 Am. St. Rep. 445 (1869).

64. *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938 (1895); *Mishkind-Feinberg Realty Co. v. Sidorsky*, 189 N. Y. 402, 92 N. E. 448 (1907), *aff'g judg.* 98 N. Y. Supp. 496, 111 App. Div. 578 (1906); 2 Chamb., Ev., § 1059, n. 1, and cases cited. A *certificate that a letter was "duly" mailed* will be construed to mean that the postage was prepaid. *Peo-*

ple v. Crane, 125 N. Y. 535, 26 N. E. 736 (1891).

65. *Brooks v. Day*, 11 Iowa 46 (1860).

66. *Bankers' Mut. Casualty Co. v. People's Bank of Talbotton*, *supra*; *Best v. German Ins. Co.*, 68 Mo. App. 598 (1897); 2 Chamb., Ev., § 1060, n. 1, and cases cited.

67. *Lawrence Bank v. Raney, etc., Iron Co.*, *supra*; *William Gardam & Son v. Batterson*, 198 N. Y. 175, 91 N. E. 371, *aff'g judg.* 113 N. Y. Supp. 1150, 129 App. Div. 906 (1908); 2 Chamb., Ev., § 1060, n. 2, and cases cited.

68. *Miller v. Hackley*, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372 (1810); *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61, 48 N. W. 454 (1891).

69. *Dana v. Kemble*, 19 Pick. (Mass.) 112 (1837); *Whitney Wagon Works v. Moore*, 61 Vt. 239, 17 Atl. 1007 (1889); 2 Chamb., Ev., § 1060, n. 4, and cases cited.

70. *Hastings v. Brooklyn L. Ins. Co.*, *supra*.

71. *New Haven County Bank v. Mitchell*, 15 Conn. 206 (1842); *U. S. v. Williams*, 3 Fed. 484 (1880); 2 Chamb., Ev., § 1060, n. 7, and cases cited.

mailed on the day of the date indicated on the postmark,⁷² though it is a circumstance which the jury are entitled to consider, as bearing on the question of date of mailing.⁷³

Date.— Experience indicates no such uniform connection between the date of a letter and the time of its mailing as to raise an inference that a letter was posted on the day of its date.⁷⁴

When Mailing is Complete.— A letter, or other postal matter delivered to a railway postal agent while on duty⁷⁵ or to a mail carrier while engaged in official business⁷⁶ is duly mailed. Deposit in a post-office or in a letter box provided by government for the purpose and as part of the work of collecting letters⁷⁷ has the same effect. In either case the mailing is complete.

"Due Course of Mail."— To raise an inference or presumption of the receipt of mail matter at any particular time, it must be shown not only that it was properly mailed⁷⁸ but also as to what is the usual course of mail between the place of mailing and the place of receipt.⁷⁹ The inference is that the mail matter was delivered in due course of post.⁸⁰ In many cases, the subject is not one which the court and jury will treat as one covered by the common knowledge of the community.⁸¹ The tribunal cannot know, as matters of notoriety, the running time of trains between places,⁸² the number of mail trains within a given time⁸³ or other facts involved in such an inquiry.

Receiving Postmark.— The date of delivery cannot be inferred from the postmark of the receiving office.⁸⁴

72. *New Haven County Bank v. Mitchell*, *supra*.

73. *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 Am. Rep. 445 (1869).

74. *Phelan v. Northwestern Mut. L. Ins. Co.*, *supra*; *Uhleman v. Arnholdt, etc.*, *Brewing Co.*, 53 Fed. 485 (1893).

75. *Watson v. Richardson*, 110 Iowa 673, 80 N. W. 407 (1899).

76. *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737 (1882).

77. *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 282 (1887); *McCoy v. New York*, 46 Hun (N. Y.) 268 (1887).

78. *Phelan v. Northwestern Mut. L. Ins. Co.*, *supra*; *Uhlman v. Arnholdt, etc.*, *Brewing Co.*, *supra*.

79. *Boon v. State Ins. Co.*, 37 Minn. 426, 34 N. W. 902 (1887).

80. *Sherwin v. National Cash Register Co.*, 5 Colo. App. 162, 38 Pac. 392 (1894); *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987 (1899); *Augusta v. Vienna*, 21 Me. 298 (1842); *Bachman v. Brown*, 56 Mo. App. 396 (1894); 2 *Chamb., Ev.*, § 1061, n. 3, and cases cited.

81. *Bishop v. Covenant Mut. L. Ins. Co.*, 5 Mo. App. 302 (1900); 2 *Chamb., Ev.*, § 1061, n. 4, and cases cited.

82. *Early v. Preston*, 1 *Patt. & H.* (Va.) 228 (1855); *Wiggins v. Burkham*, 10 *Wall.* (U. S.) 129, 19 *L. ed.* 884 (1869).

83. *Wiggins v. Burkham*, *supra*.

84. *Early v. Preston*, *supra*.

Practical Suggestions.— In proving the mailing in a large office it may be necessary to put on the clerk who wrote and addressed the letter and in addition the office boy or other clerk who actually put it in the mail. Counsel should not forget to ask whether the envelope had printed on it the name and address of the addressor and a direction to the postmaster to return it if not called for within a certain period and whether it ever was returned. The clerks need not remember whether this particular was actually written and mailed, but it will be sufficient for them to testify from their notes that the letter was given them to write and mail and that they know that all letters so given them were written and mailed. See *supra*, § 425.

§ 427. [Inferences of Regularity]; Rebuttal of Inference of Receipt from Mailing.⁸⁵—Evidence rebutting the inference of receipt from mailing may be of several kinds. The person to whom the mail matter is addressed may testify that he did not, in point of fact, receive it at all⁸⁶ or if he did receive it, that it was delivered to him later than it should have been.⁸⁷ He may also, as a matter of course, corroborate his denial by other evidence, as that, by the custom of the receiving office, the mail was delivered to another person.⁸⁸ The need of corroborating arises from the fact that a bald denial of receipt is not convincing in itself but should be reinforced, if possible, by some adequate explanation.⁸⁹ e.g., some uncertainty in the proof of mailing and regularity in transmission at a particular time.⁹⁰ His simple inability to recollect whether the letter or other matter was or was not received⁹¹ a vague impression that it was not,⁹² do not produce a strong probative effect in rebuttal of the inference. The statement that no such letter appears on his office files⁹³ or among the papers of a deceased person to whom it was addressed,⁹⁴ stand in the same position.

Same; Probative Force of Inference of Receipt from Mailing; Request for Return.—The force of the inference of receipt from mailing is greatly increased by failure of the sender to receive some notice of the non-delivery of the article in question in response to a printed request on the envelope for its return, in such an event, to his address which is given, in this way, to the postal authorities.⁹⁵ In case of a failure to receive back a letter bearing such

85. 2 Chamberlayne, Evidence, §§ 1062–1067.

86. Fleming v. Evans, 9 Kan. App. 858, 61 Pac. 503 (1900); National Masonic Acc. Assoc. v. Burr, 57 Neb. 437, 77 N. W. 1098 (1899); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); 2 Chamb., Ev., § 1062, n. 1, and cases cited.

87. Bachman v. Brown, 56 Mo. App. 306 (1894); National Masonic Acc. Assoc. v. Burr, *supra*.

88. Schutz v. Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705 (1891).

89. G. S. Roth Clothing Co. v. Main S. S. Co., 88 N. Y. Supp. 987, 44 Misc. 237 (1904); Fleming v. Evans, *supra*; 2 Chamb., Ev., § 1062, n. 4, and cases cited.

90. Hobson v. Queen Ins. Co., 2 Ohio S. & C. Pl. Dec. 475, 2 Ohio N. P. 296 (1893).

91. Pioneer Sav., etc., Co. v. Thompson, 115 Ala. 552, 22 So. 511 (1897); Ashley Wire Co. v. Illinois Steel Co., *supra*; Austin v. Holland, *supra*; 2 Chamb., Ev., § 1062, n. 7, and cases cited.

92. *Id.*

93. Gaar v. Stark (Tenn. Ch. App. 1895), 36 S. W. 149.

94. Sabre v. Smith, 62 N. H. 663 (1883). But see Hastings v. Brooklyn L. Ins. Co., *supra*.

Inference of Regularity of Constant Assistance.—The presumption of the receipt from mailing being one of fact, it results that whatever evidence is submitted in rebuttal, the original inference still maintains its intrinsic probative effect. Marston v. Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43 (1889); Sutton v. Corning, 69 N. Y. Supp. 670, 59 App. Div. 589 (1901). It follows that while it is certainly incumbent upon the party having the burden of evidence (§§ 402 *et seq.*; 2 Chamb., Ev., §§ 967 *et seq.*; Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536 (1870)) to prove the fact of actual delivery of the letter to the person addressed, this contention is at all times aided by the inference that a particular letter was probably delivered because letters so transmitted usually are. Marston v. Bigelow, *supra*; 2 Chamb., Ev., § 1063.

95. Sherwin v. National Cash Register Co., 5 Colo. App. 162, 38 Pac. 392 (1894); Baker v. Temple, 160 Mich. 318, 16 Detroit Leg. N.

a request the inference of its receipt by the sendee is said to become "well-nigh conclusive."⁹⁶

Corroboration.—Finding the letter in possession of the addressee,⁹⁷ his agent or principal⁹⁸ naturally corroborates the inference that it was duly transmitted. His refusal to admit or deny receipt⁹⁹ or other relevant conduct on his part¹ may strengthen the presumption against the addressee of the letter almost to a moral certainty.²

Presumption of Law.—In certain branches of the substantive law, for example, that relating to the protest of negotiable paper, or in other connections where constructive notice is required, or deemed sufficient, this inference of fact of receipt from mailing has been given the *prima facie* force of a presumption of law.³ Unless, therefore, there is affirmative evidence of non-delivery,⁴ or circumstances likely to cause unusual delay or other reasonable matter is shown, not to follow this inference is against the evidence and ground is furnished for a new trial.⁵ Whether, in cases where *actual* notice is required as in case of creditors of a firm at the time of dissolution, such notice will be *prima facie* inferred from mailing, other conditions being fulfilled, will be regarded as a presumption of law, is in doubt.⁶

Presumption of Law Denied.—It has been explicitly denied that there is presumption of law. Williams v. Silver, 1092, 125 N. W. 63 (1910); Matter of Wiltse, 25 N. Y. Supp. 733, 5 Misc. 105 (1893); Hedden v. Roberts, 134 Mass. 38, 43 Am. Rep. 276 (1883); 2 Chamb., Ev., § 1064, n. 1, and cases cited.

96. Jensen v. McCorkell, 154 Pa. 323, 26 Atl. 366, 35 Am. St. Rep. 843 (1893).

97. Possession of one enclosure leads to the conclusion that all the enclosures have been received. Melvin v. Purdy, 17 N. J. L. 162 (1839).

98. Blodgett v. Webster, 24 N. H. 91 (1851).

99. Woodman v. Jones, 8 N. H. 344 (1836).

1. Bell v. Hardy, 9 La. Ann. 547 (1854); Lawrence Bank v. Raney, etc., Iron Co., *supra*.

2. Pitts v. Hartford L., etc., Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96 (1895); 2 Chamb., Ev., § 1065, n. 5, and cases cited.

Statutory Recognition.—The inference has been recognized by statute as valid in several jurisdictions. Stockton Combined Harvester, etc., Works v. Houser, 109 Cal. 9, 41 Pac. 809 (1895); Williams v. Silver, 39 Or. 337, 64 Pac. 763 (1901). While the two statutes of California and Oregon are practically identical in terms, in the former state the inference is one of fact. Grade v. Mariposa County, 132 Cal. 75, 64 Pac. 117 (1901). In Oregon, the legislature is held to have laid down a

presumption of law. Williams v. Silver, *supra*.

3. §§ 444 *et seq.*; 2 Chamb., Ev., §§ 1082 *et seq.* Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987 (1899); Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536 (1870); 2 Chamb., Ev., § 1066, n. 1, and cases cited.

4. Pitts v. Hartford L., etc., Ins. Co., *supra*; New York Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633 (1890); McDowell v. Aetna Ins. Co., 164 Mass. 444, 41 N. E. 665 (1895); Ackley v. Welch, 85 Hun 178, 32 N. Y. Supp. 577 (1895); Small v. Prentice, 102 Wis. 256, 78 N. W. 415 (1899); 2 Chamb., Ev., § 1066, n. 2, and cases cited.

5. Russell v. Buckley, 4 R. I. 525 (1857); Oaks v. Weller, 16 Vt. 63 (1844). Should affirmative evidence of non-delivery be offered the addressee is entitled to have it considered. Kingsland Land Co. v. Newman, 36 N. Y. Supp. 960, 1 App. Div. 1 (1896). The postmark of a letter containing a notice of protest of a promissory note "is evidence that the letter was mailed and sent, rather than that it was merely put into the post-office. New Haven County Bank v. Mitchell, 15 Conn. 206 (1842).

6. Young v. Clapp, 147 Ill. 176, 190 (1892). That it is not so to be regarded, see Kenney v. Altvater, 77 Pa. 34 (1874). See also Eck-

any presumption of law to the effect that mailing under proper conditions is *prima facie* evidence of receipt.⁷ In other words, it has been held that the jury may rationally find in many cases that the inference has a *prima facie* value. The law does not, however, it is said, require the judge to rule that the inference has, until actual evidence of receipt is produced, a *prima facie* force on which the jury are justified in acting.⁹

§ 428. [Inferences of Regularity]; Inference Rebuttable.¹⁰— That the presumption is rebuttable¹¹ is implied in the very fact that it is a presumption. As against the positive evidence of the addressee that the mail was never received, the inference that a letter addressed to one on a given street in a populous city, without addition of a street number, must have reached him cannot prevail.¹² Indeed, as against positive evidence of non-receipt, the inference may at times appear devoid of probative weight, i.e., seem to be reduced to the weight of an administrative assumption.¹³

§ 429. [Inferences of Regularity]; Telegrams; Statutes.¹⁴— Experience has shown the existence of such uniformity in conducting the business of telegraphic communications as to give rise to a probable though, of course, rebuttable,¹⁵ inference of the fact that a properly addressed telegraphic message¹⁶ delivered to the company for transmission¹⁷ reached its destination¹⁸ without unneces-

erly v. Alcorn, 62 Miss. 228 (1884); Van Doren v. Liebman, 11 N. Y. Supp. 769 (1890); Austin v. Holland, *supra*; 2 Chamb., Ev., § 1066, n. 5, and cases cited. The probative force of a presumption of law has been at times accorded to this inference of fact in proof of actual receipt. Merchants' Exch. Co. v. Sanders, 74 Ark. 16, 84 S. W. 786 (1905).

7. Continental Ins. Co. of New York v. Hargrove, 131 Ky. 837, 116 S. W. 256 (1909); Campbell v. Gowans, 35 Utah 268, 100 Pac. 397 (1909).

8. De Jarnette v. McDaniel, 93 Ala. 215 (1890); German Nat. Bank v. Burns, 12 Colo. 539 (1889).

9. Hastings v. Brooklyn L. Ins. Co., 138 N. Y. 473 (1893); Huntley v. Whittier, *supra*; Austin v. Holland, *supra*; 2 Chamb., Ev., § 1067, n. 4. See also, Eckerly v. Alcorn, 62 Miss. 228 (1884); National Bank, etc. v. McManigle, 69 Pa. 156, 160 (1871).

10. 2 Chamberlayne, Evidence, § 1068.

11. Hamilton v. Stewart, 108 Ga. 472, 34 S. E. 123 (1899); Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495 (1885); Huntley v. Whittier, *supra*; Eckerly v. Alcorn, *supra*; Hurley v. Olcott, 198 N. Y. 132, 91 N. E. 270 (1910). Offg. judg. 119 N. Y. Supp. 430, 154 App. Div.

631 (1909); Jensen v. McCorkell, *supra*; 2 Chamb., Ev., § 1068, n. 1, and cases cited.

12. Cagliostro v. Indelli, 102 N. Y. Supp. 918, 53 Misc. 44 (1907).

13. Beeman v. Supreme Lodge, Shield of Honor, 215 Pa. 627, 64 Atl. 792 (1906). It is not necessary that non-receipt should be proved by a preponderance of the evidence. Judge v. Masonic Mut. Ben. Assoc., 30 Ohio Cir. Ct. R. 133 (1907).

14. 2 Chamberlayne, Evidence, § 1069.

15. Eppinger v. Scott, 112 Cal. 369, 42 Pac. 301, 53 Am. St. Rep. 220 (1896). Whether the inference in any given case has been rebutted is for the jury. Long Bell Lumber Co. v. Nyman, 145 Mich. 477, 13 Detroit Leg. N. 557, 108 N. W. 1019 (1906).

Proof of delivery of an altered telegram establishes *prima facie* the negligence of the company and puts on it the burden of proving that it was not negligent. Baily v. Western Union Telegraph Co., 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502 (1910).

16. Eppinger v. Scott, *supra*. See also, Flint v. Kennedy, 33 Fed. 820 (1888).

17. Some evidence has been required that the message reached the receiving office. State v. Gritzner, 134 Mo. 512, 36 S. W. 39 (1896).

18. Breed v. Central City First Nat. Bank,

sary delay. The inference becomes greatly strengthened by failure on the part of the addressee to improve an obvious opportunity¹⁹ of denying the receipt of the message.

So it will be presumed that statutes are regularly passed²⁰ and are constitutional.²¹

§ 430. [*Omnia Contra Spoliatores*.]²²—The inferences from experience, grouped under the general maxim *Omnia praesumuntur contra spoliatores*²³ are dealt with by the administrative procedure of the courts upon a double basis. In other words the same transaction is regarded from two distinct points of view. Spoliation may be treated, (1) logically, as a deliberative fact; (2) from the administrative standpoint, as an insult to the court. The presumption from spoliation except in continental Europe,²⁴ is not conclusive.²⁵

Secret Offenses.—Where the perpetrator of a civil wrong has proceeded by stealth or secrecy, a court will require less proof from the complaining party.²⁶

Rebuttable.—Any inference from spoliation is rebuttable.²⁷ The assignment of a false reason, however, for a failure to testify or produce other witnesses or evidence may in itself give rise to an inference of fabrication.²⁸

Value and Damages.—All presumptions are indulged in against the party who having full evidence as to the value of an article, fails or declines to produce it to the court. Where the actor, for example, omits to prove what he knows to be the value of an article the lowest possible within the evidence

6 Colo. 235 (1882); *Long Bell Lumber Co. v. Myman*, *supra*; *Perry v. German-American Bank*, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593 (1897); *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221 (1885); 2 Chamb., Ev., § 1069, n. 4, and cases cited.

19. *Oregon Steamship Co. v. Otis*, *supra*.

20. According to the weight of authority it will be presumed that all the requirements of the constitution have been followed in passing a statute unless the journal affirmatively shows the contrary. So where a bill is passed and the journal does not show that it has had three readings as required on three separate days but is silent on the matter, the court presumes that the requirement has been complied with. *Re Drainage District*, 26 Idaho 311, 143 Pac. 299, L. R. A. 1915 A 1210 (1914).

21. A statute fixing rates is presumed to be constitutional like other statutes. *State v. Adams Express Co.*, 85 Neb. 25, 122 N. W. 691, 42 L. R. A. (N. S.) 396 (1909).

22. 2 Chamberlayne, Evidence, §§ 1070, 1070a.

23. *Bush v. Guion*, 6 La. Ann. 797 (1851);

Livingstone v. Newkirk, 3 Johns. Ch. (N. Y.) 312 (1818); *Harris v. Rosenberg*, 43 Conn. 211 (1875); 2 Chamb., Ev., § 1070, n. 1, and cases cited.

24. 2 Chamberlayne, Evidence, § 1078b.

25. *Thompson v. Thompson*, 9 Ind. 323 (1857). As to the English rule in equity, see 2 Chamb., Ev., § 1070, n. 3, and cases cited.

26. 2 Chamb., Ev., § 1070, n. 4.

27. *Lowe v. Massey*, 62 Ill. 47 (1871); *Miami, etc., Turnpike Co. v. Baily*, 37 Ohio St. 104 (1881); *The Olinde Rodrigues*, 174 U. S. 510, 19 S. Ct. 851, 43 L. ed. 1065 (1898); 2 Chamb., Ev., § 1070, n. 5, and cases cited.

28. Thus, for example, where the accused has relied on his alleged unsound condition of health, and not his constitutional rights as a reason for failing to testify in his own behalf, if the jury found that his condition did not prevent him from testifying, they could infer that he could not truthfully deny the important facts bearing upon the question of his guilt. *State v. Skillman*, 76 N. J. L. 464, 70 Atl. 83 (1908).

will be assumed ("presumed") to have been involved.²⁹ Where, however, the other party suppresses or conceals the decisive evidence as to value, it will be assumed that the article was of the highest price possible under the facts shown.³⁰

Damages.—Probably the most conspicuous application of this rule is to the matter of damages. In general, where the best proof of actual damage is removed by the act of the offending party, he will be mulcted in the highest prices, or other elements of damage, which the evidence, as given, will fairly warrant.³¹ In the same way, one who wrongfully negotiates a note is liable for its full face value;³² and one who, when a draft is presented to him for acceptance destroys it, is equally liable as if he had formally accepted it.³³ The presumption, however, can properly be applied only to such facts as are established in the evidence.³⁴

Confusion.—So, in case of a deliberate confusion of the goods of one who seeks to conceal their identity by mingling them with those of another, all inferences are made, by way of damages or otherwise, in the latter's favor.³⁵ The actual facts and range of spoliation should be clearly established.³⁶

§ 431. [Omnia Contra Spoliatorem]; **Spoliation a Deliberative Fact.**³⁷—It will be noticed that these inferences of fact drawn from the fabrication or suppression of evidence, both of which are comprehended under the term spoliation, are rather of a *deliberative* than of a directly probative nature. In other words, their function is rather to test the weight of the evidence furnished than to furnish it. Its result is not directly to enhance the probative value of the facts offered by the other side.³⁸ It cannot turn assertion³⁹ or conjecture into proof.⁴⁰ In case of documentary evidence suppressed or de-

29. 2 Chamb., Ev., § 1070a, n. 1, and cases cited.

30. Bailey v. Shaw, 24 N. H. 300 (1851); Clarke v. Miller, 4 Wend. (N. Y.) 628 (1830); 2 Chamb., Ev., § 1070a, n. 2, and cases cited.

31. Downing v. Plate, 90 Ill. 268 (1878); Preston v. Leighton, 6 Md. 88 (1854); Barney v. Sweeney, 38 Wis. 381 (1875).

32. Decker v. Matthews, 12 N. Y. 313 (1855).

33. Jenne v. Ward, 2 Stark. 327 (1818).

34. Harris v. Rosenberg, 43 Conn. 227 (1875).

35. Ryder v. Hathaway, 21 Pick. (Mass.) 293 (1838); Hart v. Ten Eyck, 2 Johns. Ch. 108 (1816).

36. McReynolds v. McCord, 6 Watts (Pa.) 288 (1837). Effect of suppression of evidence of indebtedness, see note, Bender's ed., 47 N. Y. 556.

37. 2 Chamberlayne, Evidence, §§ 1070b, 1070d.

38. Duffy v. Jacobsen, 135 Ill. App. 472 (1907); Meyer v. Minsky, 112 N. Y. Supp. 860, 128 App. Div. 589 (1908); Stout v. Sands, 56 W. Va. 663, 49 S. E. 428; 2 Chamb., Ev., § 1070b, n. 3, and cases cited.

39. Cooper v. Upton, 65 W. Va. 401, 64 S. E. 523 (1909).

40. Cartier v. Troy Lumber Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470 (1891); Life, etc., Ins. Co. v. Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31 (1831); Arbuckle v. Temple, 65 Vt. 205, 25 Atl. 1095 (1892); 2 Chamb., Ev., § 1070b, n. 5, and cases cited. It has been held, for example, that the mere failure to question one's own witness as to a certain fact will not relieve the other side of the necessity of proving the fact affirmatively, if material to his case. "To so hold would be substituting conjecture for proof." Arbuckle v. Templeton, *supra*. See, however, Sutton v. Davenport, 27 L. J. C. P. 54 (1857).

stroyed, no inference as to contents can arise where direct and positive evidence other than the document itself is produced of its actual contents.⁴¹

Subjective Relevancy.—The relevancy of spoliation is not objective, of the world of physical nature. It is rather *subjective*⁴² relating to the domain of morals. It operates, in most instances, by way of reducing the probative force of the evidence actually produced by the spoliator;⁴³—and thereby, indirectly, adding both to the relative weight and also to the absolute force of the case produced by his opponent.⁴⁴ “It is certainly a maxim, that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.”⁴⁵ The inference is warranted that facts not produced, but known to the party himself, are of such a nature that they would, if produced to the tribunal, have disentitled him to succeed in his contention.⁴⁶ This is an inference to be taken into account in weighing the value of the evidence produced⁴⁷ and the courts have felt justified in assuming the existence of all facts which the offending party might reasonably be assumed to have known.⁴⁸ If the spoliating party has the affirmative of the issue, the diminution of his case by the unfavorable inference may alone be sufficient to reduce it below the probative force of a *prima facie* case.⁴⁹

Criminal Cases.—In criminal proceedings the same inference arises;—in many cases, accentuated in probative force by the very obvious interest of the accused to produce any evidence which is calculated to help him.⁵⁰ Here also, however, the force of the inference from suppression or fabrication is rather of deliberative than of probative, of subjective rather than of objective, relevancy.⁵¹

Modifying Circumstances.—If all the constituent facts are clearly proved

41. *Bott v. Wood*, 56 Miss. 136 (1878); *Miltenberger v. Croyle*, 27 Pa. 170 (1856).

42. § 36, *supra*; 1 Chamb., Ev., § 56.

43. *Boler v. Sorgenfrei*, 86 N. Y. Supp. 180 (1904).

44. *Del Campo v. Camarillo*, 154 Cal. 647, 98 Pac. 1049 (1908); *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218, 14 Detroit Leg. N. 709 (1907); *Reehil v. Fraas*, 114 N. Y. Supp. 17, 129 App. Div. 563 (1908); 2 Chamb., Ev., § 1070c, n. 3, and cases cited.

45. *Blatch v. Archer*, 1 Cowp. 63 (1774). And see *Wallace v. Harris*, 32 Mich. 380 (1875).

46. *Kirkpatrick v. Allemannia Fire Ins. Co.*, 184 N. Y. 546, 76 N. E. 1098 (1906); *Ferrari v. Interurban St. Ry. Co.*, 103 N. Y. Supp. 134, 118 App. Div. 155 (1907); *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015 (1907).

47. *East St. Louis, etc., Ry. Co. v. Altgen*,

112 Ill. App. 471 (1904), judg. aff'd 210 Ill. 213, 71 N. E. 377.

48. *Gray v. Haig*, 20 Beav. 219, 226 (1854).

49. Where a party produces the best evidence in his power, no unfavorable inference arises because more probative evidence actually exists. *Shields v. Georgia Ry. & Electric Co.*, 1 Ga. App. 172, 57 S. E. 980 (1907).

50. “Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to the contrary conclusion is to be considered—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence.” *Com. v. Webster*, 5 Cush. (Mass.) 316 (1850).

51. Thus, the nonproduction of a witness presumptively able to explain the circumstances constituting a *prima facie* case against a defendant may be considered by the jury in

by the uncontroverted evidence of others and thereupon establish a sufficient case for the fraudulent or spoliating party, his own adverse opinion as implied in lying, fabrication or suppression, is entitled to no particular weight.⁵²

§ 432. [Omnia Contra Spoliatores]; Spoliation as an Insult to the Court.— It is quite possible to regard spoliation not only as a deliberative fact but as constituting a serious contempt of court. The sounder view of judicial administration seems to be to the effect that the situation as developed should not be extended beyond its logical bearings and that a litigant ought not to be deprived of his legal rights by refusing to receive other and relevant evidence, in his favor,⁵³ unless, indeed, the jury would not, as a matter of reason, be justified, after the disclosures, in acting favorably upon it.

§ 433. [Omnia Contra Spoliatores]; Fabrication; Witnesses.⁵⁴— A mere conflict of evidence among a party's witnesses will not authorize an inference of fabrication or attempt to mislead.⁵⁵ Possibly the fabrication of oral testimony lacks an element of deliberateness, in the average instance, which makes the inference a trifle less strong than in case of documentary proof. Still, the presumption possesses great probative force⁵⁶ even where the party goes no further than to use improper influence or pressure to induce a witness to testify in his favor beyond the truth of the case.⁵⁷ "Evidence of the fact of an attempted subornation is admissible as an admission by conduct that the party's cause is an unrighteous one."⁵⁸

Bribery.— Bribery of witnesses furnishes a common instance of the application of this rule. Thus, for example, a charge that a party has sought to bribe one of his adversary's witnesses is a deliberative fact for the consideration of the jury.⁵⁹ Bribing a witness to testify on one's behalf naturally gives rise to the same inference;⁶⁰ "is in the nature of an admission that

weighing the effect of the evidence applicable to the matter in dispute. The failure to produce does not, however, raise any presumption of guilt or innocence. *State v. Callahan*, 76 N. J. L. 426, 69 Atl. 957 (1908).

52. *Rayssiguier v. Fourchy*, 49 La. Ann. 1627, 22 So. 833 (1897); *Welty v. Lake Superior Terminal, etc., Co.*, 100 Wis. 128, 75 N. W. 1022 (1898); 2 Chamb., Ev., § 1070d.

53. *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238 (1870); *Harris v. Rosenberg*, 43 Conn. 227 (1875); *Armory v. Delamirie*, 1 Str. 505 (1722); 2 Chamb., Ev., § 1070e.

54. 2 Chamberlayne, Evidence. §§ 1071-1072a.

55. *Brown v. State*, 142 Ala. 287, 38 So. 268 (1904); 2 Chamb., Ev., § 1071.

56. *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29 (1882); *McHugh v. McHugh*, 186 Pa. 197, 40 Atl. 410, 65 Am. St.

Rep. 849, 41 L. R. A. 845 (1898); 2 Chamb., Ev., § 1072, n. 1, and cases cited.

False Admissions.— When admissions are offered against the party alleged to have made them, and prove to be fabricated, that fact makes the evidence weigh against the party fabricating them. *Christy v. American Temperance Life Ins. Ass'n*, 123 N. Y. Supp. 740 (1910).

57. *People v. Marion*, 29 Mich. 31 (1874); *Taylor v. Crowninshield*, 5 N. Y. Leg. Obs. 209 (1847); 2 Chamb., Ev., § 1072, n. 2, and cases cited.

58. *Com. v. Min Sing*, 202 Mass. 121, 88 N. E. 918 (1909); *Fulkerson v. Murdock*, 53 Mo. App. 151 (1892); 2 Chamb., Ev., § 1072, n. 3, and cases cited.

59. *Ferrari v. Interurban St. R. Co.*, 103 N. Y. Supp. 134, 118 App. Div. 155 (1907).

60. *Carpenter v. Willey*, 65 Vt. 168 (1892).

the cause of the party resorting to the bribery of witnesses or jurors is unjust, and that his claim is dishonest and unrighteous." ⁶¹ It is carefully to be observed, however, that as is stated above ⁶² the inference is a deliberative rather than a directly probative one. ⁶³ "Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor, although collateral to the issues, is competent as an admission by acts and conduct that his case is weak and his evidence dishonest. * * * Such evidence is for the consideration of the jury, * * * under proper instructions to prevent them from giving undue attention to the collateral matter to the detriment of the main issue." ⁶⁴ In other words, such an attempt is not directly probative, i.e., it affords no presumption against the party's evidence on the question testified to by the witness and does not have the effect of gaining a more ready admission to the evidence of the adverse party on that question, but is merely to be considered in weighing the evidence. ⁶⁵

§ 434. [Omnia Contra Spoliatores]; Writings. ⁶⁶—An inference of extreme evidentiary cogency arises when an attempt is made to pervert the course of justice by the use of fabricated written evidence. ⁶⁷ The force of this is proportionate to the strength of the motive which must have prompted the willingness to perform such morally repellant labor ⁶⁸ and incur the legal risk involved. ⁶⁹ In an admiralty case involving liability for a collision, the court held that the production of a fabricated log book warranted the rejection of the testimony which it was brought to support. ⁷⁰

Criminal Cases.—Should a party in a criminal case, forge a document, whether in the nature of a record book of account or other important or constituent writing, a similar adverse inference naturally arises. ⁷¹

§ 435. [Omnia Contra Spoliatores]; Suppression; Witnesses; Failure to Call. ⁷¹—To smother evidence is not much better, morally or legally, than to fabricate

⁶¹ Kidd v. Ward, 91 Iowa 371, 59 N. W. 279 (1894).

⁶² § 431, *supra*; 2 Chamb., Ev., § 1070b.

⁶³ Moriarity v. London, etc., R. Co., L. R. 2 Q. B. 314 (1870); 2 Chamb., Ev., § 1072a, n. 5.

⁶⁴ Nowack v. Met. St. Ry., 166 N. Y. 433, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691 (1901); Ferrari v. Interurban St. Ry. Co., *supra*; 2 Chamb., Ev., § 1072a.

⁶⁵ Brown v. State, *supra*; Ferrari v. Interurban St. Ry. Co., *supra*.

⁶⁶ 2 Chamberlayne, Evidence, §§ 1073, 1074.

⁶⁷ Winchell v. Edwards, 57 Ill. 41 (1870); McMeen v. Com., 114 Pa. 300, 9 Atl. 878 (1886); 2 Chamb., Ev., § 1073, n. 1, and cases cited.

False Seal.—"If it is shown that a sealed

certificate which, if genuine, should have a genuine seal, is stamped with a false one, it raises a very strong presumption that the signature is false." People v. Marion, 29 Mich. 31 (1874).

⁶⁸ U. S. v. Randall, 27 Fed. Cas. No. 16,118, Doady 524 (1869).

⁶⁹ Daniel v. De Graffenreid, 14 Lea (Tenn.) 385 (1884).

⁷⁰ The Tillie, 7 Ben. (U. S.) 382 (1874).

⁷¹ McMeen v. Com., *supra*; U. S. v. Randall, *supra*; 2 Chamb., Ev., § 1074.

^{71a} 2 Chamberlayne, Evidence, §§ 1075-1075e. Presumptions against party who suppresses evidence, see note, Bender ed. 127 N. Y. 46. Presumptions from—and effect of—destruction or suppression of evidence, see note, Bender ed., 33 N. Y. 501.

it.⁷² "Where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, this supplies a presumption of fact that the charge or claim is well founded. This presumption attaches with more force in cases where a party, having more certain and satisfactory evidence in his power, relies upon that which is of a weaker or more inferior nature."⁷³ Neither one accused of crime.⁷⁴ nor a party in a civil case should be affected, beyond his personal connection with the transaction, by the conduct of ill-advised friends or other persons in suppressing the evidence of witnesses. Only when a party himself is shown to have procured⁷⁵ or connived at the absence of material witnesses will he be affected by the inference that the evidence is withheld from the court because if it were produced it would injure his case.⁷⁶ Where a party is in no way called upon to produce a witness, no adverse inference arises from his failure to do so.⁷⁷ In proportion as it is to the interest of the party to submit the evidence of an available witness, the jury are entitled to infer from his neglecting to do so that his evidence, if produced, would not be favorable to the party.⁷⁸ On the contrary, a party whose opponent has failed to establish his own contention to the extent required by law, has no need of further evidence on his own behalf. His failure, therefore, to produce witnesses or documents which are within his power or control gives rise to no deliberative inference against him.⁷⁹

Effect of Knowledge.—In the first place, that the inference should arise

72. *Bryant v. Stillwell*, 24 Pa. 314 (1855).

73. *Savannah, etc., Ry. Co. v. Gray*, 77 Ga. 440, 3 S. E. 158 (1886).

74. *State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104 (1900); *Deneaney v. State*, 58 Tex. Crim. 624, 127 S. W. 201 (1910).

75. *Minihan v. Boston Elevated Ry. Co.*, 205 Mass. 402, 91 N. E. 414 (1910); *Moore v. State*, 45 Tex. Crim. 234, 75 S. W. 497.

76. *Hoffer v. Gladden*, 75 Ga. 532 (1885); *Hausler v. Com. Electric Co.*, 144 Ill. App. 643 (1908), *judg. aff'd* 88 N. E. 561 (1909); *Hodgins v. Bay City*, 156 Mich. 687, 16 Detroit Leg. N. 222, 121 N. W. 274 (1909); *Reiter v. Ziegler*, 121 N. Y. Supp. 324 (1910); *Moore v. Adams*, 26 Okl. 48, 108 Pac. 392 (1910); *Green v. Brooks*, 215 Pa. 492, 64 Atl. 672 (1906); 2 Chamb. Ev., § 1075, n. 5, and cases cited.

A Deliberative Inference.—Such an inference, however, is deliberative rather than directly probative as to a *res geste* fact. *Kimball v. O'Dell & Eddy Co.*, 122 N. Y. Supp. 755 (1910). Where a party has failed to use a deposition available to him the same inference arises. *Thompson v. Chappell*, 91 Mo.

App. 297 (1902). The admissibility of the testimony is, however, largely a question of administration. *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 474, 82 Pac. 547 (1905).

77. *Southern Ry. Co. v. Hobbs*, 151 Ala. 335, 43 So. 844 (1907); *Tauger v. New York City Ry. Co.*, 104 N. Y. Supp. 681 (1907).

78. *Ferrari v. Interurban St. Ry. Co.*, 103 N. Y. Supp. 134, 118 App. Div. 155 (1907). This is true of a witness who could only corroborate evidence already produced. *Richter v. Solomon*, 104 N. Y. Supp. 405 (1907); *Green v. Brooks*, 215 Pa. 492, 64 Atl. 672 (1906).

In a criminal case it has been held that the reasons given by defendant's counsel for the failure of the accused to call his wife and daughter as witnesses on his behalf cannot be controverted by the prosecution. *Rex v. Hill*, 36 Nova Scotia R. 253 (1903), *citing* *Com. v. Scott*, 123 Mass. 241 (1877).

79. *Southern Express Co. v. B. R. Electric Co.*, 126 Ga. 472, 55 S. E. 254 (1906); *Cooper v. Upton*, 65 W. Va. 401, 64 S. E. 523 (1909); 2 Chamb. Ev., § 1075, n. 8, and cases cited.

it must be shown that the party to be affected by the inference knows that he has better and more convincing evidence which he fails to produce⁸⁰ and is aware that such fact is material to the issue between the parties.⁸¹ It is equally necessary that the party alleged to have suppressed the evidence of a witness knows or could ascertain where the latter is. Even if a witness would be valuable if secured, it must appear that the party to be affected by the inference could have procured the attendance of the witness by the use of reasonable diligence.⁸² In an exceptional degree, an omission by a party to produce important testimony relating to a fact of which he has knowledge and which is peculiarly within his own reach and control, as a general rule, raises the presumption, open, of course, to explanation,⁸³ that the testimony, if produced, would be unfavorable to him⁸⁴ or that a particular fact which he could show if it existed and which, if he could prove it, would be very much to his advantage, is not established because it does not exist.⁸⁵

Equal Availability.— It is said that no inference arises against a party from failure to call a material witness when the latter is equally available to his opponent.⁸⁶ It is not sufficient, however, in the way of good faith to the court, for a litigant to produce his own natural witnesses,⁸⁷ his relatives,⁸⁸ employees⁸⁹ and persons similarly situated, in court and permit and even invite the other side to undertake the dangerous task of calling them himself.

80. *Davis v. State*, 4 Ga. App. 441, 61 S. E. 843 (1908).

81. *Rochester German Ins. Co. v. Monumental Sav. Ass'n*, 107 Va. 701, 60 S. E. 93 (1908).

82. *Naughton Co. v. American Horse Exch.*, 97 N. Y. Supp. 387, 49 Misc. 227 (1906). It naturally follows that where the party against whom the inference is invoked has no knowledge or means of acquiring it, as to the residence of the witness or the whereabouts of the document in question, no infirmative adverse inference arises from his failure to produce. *Mutual Industrial Indemnity Co. v. Perkins* (Ark. 1906) 98 S. W. 709; *Texas & N. O. R. Co. v. Harrington* (Tex. Civ. App. 1906), 98 S. W. 653.

83. § 431. *supra*; 2 Chamb., Ev., § 1070c.

84. *Bone v. Hayes*, 154 Cal. 759, 99 Pac. 172 (1908); *Missouri Pac. Ry. Co. v. Kennett*, 79 Kan. 232, 99 Pac. 269 (1909); *Howe v. Howe*, 199 Mass. 598, 85 N. E. 945 (1908); *Mullen v. J. J. Quinlan & Co.*, 195 N. Y. 109, 87 N. E. 1078 (1909), affg. judg. 108 N. Y. Supp. 1141, 124 App. Div. 916 (1908); 2 Chamb., Ev., § 1075a, n. 7 and cases cited. *Corporations.*— The same rule applies to corporations. *Missouri Pac. Ry. Co. v. Kennett*,

supra; *Johnston v. St. Louis & S. F. R. Co.*, 150 Mo. App. 304, 130 S. W. 413 (1910).

85. *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843 (1906); *Despard v. Percy*, 65 W. Va. 140, 63 S. E. 871 (1909). Where a friendly witness knows exculpatory facts if any one does, a failure to call him suggests an inference that such facts do not exist. *Anderson v. Cumberland Telephone & Telegraph Co.*, 86 Miss. 341, 38 So. 786 (1905).

86. *Scovill v. Baldwin*, 27 Conn. 316 (1858); *Princeville v. Hitchcock*, 101 Ill. App. 588 (1901); *Farmers' Bank v. Worthington*, 145 Mo. 91, 46 S. W. 745 (1898); *In re Darrow's Estate*, 118 N. Y. Supp. 1082, 64 Misc. 224 (1909); *Daggett v. Champlain Mfg. Co.*, 72 Vt. 332, 47 Atl. 1081 (1900); 2 Chamb., Ev., § 1075b, n. 1, and cases cited.

87. *Western, etc., R. Co. v. Morrison*, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173, 40 L. R. A. 84 (1897); *Kenyon v. Kenyon*, 88 Hun 211, 34 N. Y. Supp. 720 (1895).

88. *Carpenter v. Pennsylvania R. Co.*, 43 N. Y. Supp. 203, 13 App. Div. 328 (1907); *People v. Hovey*, 92 N. Y. 554 (1883).

89. *Western, etc., R. Co. v. Morrison*, *supra*; *Michigan Cent. R. Co. v. Butler*, 23 Ohio Cir. Ct. 459 (1902).

Still less can any adverse inference arise where a party subsequently produces a present witness whose testimony he is said to have attempted to suppress.⁹⁰ It is for the jury, within the bounds of reason, to say what inferences, if any, are to be drawn, under all the circumstances, from the failure of the parties respectively to call the particular person as a witness in any given case.⁹¹

Explanation Permitted.—The inference against spoliation, like every real presumption or assumption of procedure, is rebuttable. Either party is at liberty, so far as the inference affects him, to explain why an available and material witness, apparently helpful to a *bona fide* contention, was not called.⁹² A party is always at liberty to show that the absence of missing witnesses is not caused by his fault and that he has made every reasonable effort to procure their attendance.⁹³ No adverse inference can properly be drawn where the facts covered by the testimony of the witness in question have already been fully given by other witnesses and the person not called could, therefore, have furnished only corroborative⁹⁴ or cumulative⁹⁵ evidence to an unnecessary degree.⁹⁶ Where a given class of evidence is made privileged by statute, a sufficient explanation is deemed to have been offered and no adverse inference is said to arise from any non-production of the privileged witness.⁹⁷ So no adverse inference can be drawn where a party is prevented by the operation of some other rule of law⁹⁸ from calling the particular⁹⁹ witness whose knowledge would be most conclusive on the matter.

90. *Fleck v. Cohn*, 115 N. Y. Supp. 652, 131 App. Div. 248 (1909).

91. *Gallagher v. Hastings*, 21 App. Cas. D. C. 88 (1903); *Harriman v. Reading, etc. St. R. Co.*, 173 Mass. 28, 53 N. E. 156 (1899); *Reehil v. Fraas*, 114 N. Y. Supp. 17, 129 App. Div. 563 (1908); 2 *Chamb., Ev.*, § 1075b, n. 6, and cases cited.

92. *People v. Clark*, 106 Cal. 32, 39 Pac. 58 (1895); *Tuthill v. Belt Ry. Co. of Chicago*, 145 Ill. App. 50 (1908); *State v. Brannum*, 95 Mo. 19, 8 S. W. 218 (1888); 2 *Chamb., Ev.*, § 1075c, n. 1, and cases cited.

93. *State v. Hogan*, 67 Conn. 581, 35 Atl. 508 (1896); *Reehil v. Fraas*, *supra*; *State v. Ogden*, 39 Or. 195, 65 Pac. 449 (1901); 2 *Chamb., Ev.*, § 1075c, n. 2 and cases cited. It has even been held that on a second trial of a cause, it is proper to admit testimony accounting for the failure of a witness to testify at first trial. *McDonald v. City Electric Ry. Co.*, 144 Mich. 379, 13 Detroit Leg. N. 252, 108 N. W. 85 (1906). On the contrary, it has been held that a party was not at liberty to introduce evidence accounting for the absence of a particular witness. *Gillum v. New York, etc., Co.* (Tex. Civ. App. 1903), 76 S. W. 232.

94. *United Rys. & Electric Co. of Baltimore City v. Cloman*, 107 Md. 681, 69 Atl. 379 (1908); *Sugarman v. Brengel*, 74 N. Y. Supp. 167, 68 App. Div. 377 (1902).

95. *Haynes v. McRae*, 101 Ala. 318, 13 So. 270 (1893); *Mooney v. Holcomb*, 15 Or. 639, 16 Pac. 716 (1888); 2 *Chamb., Ev.*, § 1075c, n. 4, and cases cited.

96. *Ellis v. Sanford*, 106 Iowa 743, 75 N. W. 660 (1898); *Higman v. Stewart*, 38 Mich. 513 (1878); *Meagley v. Hoyt*, 125 N. Y. 771, 26 N. E. 719 (1891); 2 *Chamb., Ev.*, § 1075c, n. 5, and cases cited.

97. *Arnold v. City of Maryville*, 110 Mo. App. 254, 85 S. W. 107 (1905). See also, *Baldwin v. Brooklyn Heights R. Co.*, 91 N. Y. Supp. 59, 99 App. Div. 496 (1904). But while no inference, strictly speaking, may arise in such cases it will be difficult to prevent the jury so far as the party could have called a witness, from drawing such deliberative deductions from his course as they deem warranted. *Kirkpatrick v. Allemannia Fire Ins. Co.*, 92 N. Y. Supp. 466, 102 App. Div. 327 (1905).

98. *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470 (1891).

99. *Adams v. Main*, 3 Ind. App. 232, 29

Equity Causes.—The inference against spoliation from failure to call a material witness operates in equity as at law.¹ *Admiralty Suits* may exemplify the operation of the same deliberative inference.²

Criminal Cases.—In criminal cases the same principles of reasoning apply. Failure by the defendant to call a material witness who has important knowledge gives rise to an adverse inference of fact³ which is strong in proportion to the extent to which it would be reasonable to expect that he would produce the witness, if favorable to him, rather than leave it for the prosecution to do so.⁴ The force of the inference is much affected where the witness in question is one naturally connected with the prosecution⁵ e.g., is the president of a prosecuting corporation.⁶ The same inference operates against the prosecution, under similar circumstances.⁷ *Suppression of Evidence* in general is, in criminal, as in civil cases, usually cogent circumstantial evidence of guilt.⁸

§ 436. [Omnia Contra Spoliatores]; Failure to Testify.⁹—Where a party declines to submit to an order¹⁰ or request¹¹ for a physical examination,¹² to appear in court on the trial of his cause,¹³ or to testify as a witness,¹⁴ on his

N. E. 792, 50 Am. St. Rep. 266 (1891); *Carter v. Beals*, 44 N. H. 408 (1862). A party may forestall the inference from suppression by explaining, as part of his own case, why an important piece of evidence, e.g., the testimony of an eye witness, was not produced. *Macon Ry. & Light Co. v. Mason*, 123 Ga. 773, 51 S. E. 569 (1905).

1. *Eckel v. Eckel*, 49 N. J. Eq., 587 (1892); *Hall v. Vanderpool*, 156 Pa. 152 (1893); 2 *Chamb., Ev.*, § 1075d, n. 1, and cases cited.

2. *The Ville de Havre*, 7 Ben. (U. S.) 328 (1874).

3. *State v. Cousins*, 58 Iowa 250, 12 N. W. 281 (1882); *People v. Hendrickson*, 53 Mich. 525, 19 N. W. 169 (1884); *People v. Hovey*, 92 N. Y. 554 (1883); *Com. v. McMahon*, 145 Pa. 413, 22 Atl. 971 (1891); 2 *Chamb., Ev.*, § 1075e, n. 1 and cases cited.

4. *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711 (1850); *Ormsby v. People*, 53 N. Y. 472 (1873).

5. See, however, *Clifton v. State*, 46 Tex. Crim. 18, 79 S. W. 824 (1904).

6. *People v. McGovern*, 94 N. Y. Supp. 662, 105 App. Div. 296 (1905), it is error, under such circumstances, to instruct the jury that they may draw any presumption in favor of the prosecution from defendant's failure to call the president as a witness.

7. *State v. Buckman*, 74 Vt. 309, 52 Atl. 427 (1901); *State v. Smith*, 71 Vt. 331, 4 Atl. 219 (1899).

8. For example, that a defendant, on his

arrest, made away with the note alleged to have been forged [*State v. Chamberlain*, 89 Mo. 129 (1886)], or offered to destroy certain articles furnishing incriminating evidence of barratry (*Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 307 (1884)) do not differ, in any essential particular, from other facts circumstantially tending to establish guilt.

9. 2 *Chamberlayne, Evidence*, §§ 1076-1076b.

10. *Austin, etc., R. Co. v. Cluck*, 97 Tex. 172, 77 S. W. 403 (1903), rev'd (Civ. App. 1903), 73 S. W. 569.

11. *Gulf, etc., Ry. Co. v. Booth* (Tex. Civ. App. 1906), 97 S. W. 128. See *Pennsylvania R. Co. v. Durkee*, 147 Fed. 99, 78 C. C. A. 107 (1906).

12. See EVIDENCE BY PERCEPTION, *infra*, § 1131 *et seq.* *Austin, etc., R. Co. v. Cluck, supra*. The same rule applies to the examination of a minor child. *Houston Electric Co. v. Lawson* (Tex. Civ. App. 1904), 85 S. W. 450.

13. *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77, 54 N. W. 638 (1893); *Johnston v. McKenna*, 76 N. J. Eq. 217, 74 Atl. 284 (1909); *Brown v. Shock*, 77 Pa. 471 (1875).

14. *Central Stock, etc., Exch. v. Chicago Bd. of Trade*, 196 Ill. 396, 63 N. E. 740 (1902); *Kelley v. City of Boston*, 201 Mass. 86, 87 N. E. 494 (1909); *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77, 54 N. W. 638 (1893); *Connecticut Mnt. L. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 622 (1894).

own behalf in a suit as to which he himself is possessed of material knowledge,¹⁵ an adverse inference of suppression naturally arises.¹⁶

Effect of Inference.—As has been said,¹⁷ the infirmative inferences against the defendant from his failure to testify do not create independent facts in favor of the contention of the opposing party¹⁸ but when that side definitely asserts the existence of a fact which the suppressing party could readily disprove, if it were false, such evidence as can be produced in favor of the contention made will be judged in connection with the circumstance of the suppression.¹⁹

Criminal Cases.—While it is frequently provided by statute that no inference shall be drawn against one accused of crime because he does not take the stand as a witness in his own behalf,²⁰ and although courts have charged juries to the same effect,²¹ the precept is one with which it is practically impossible for the jury to comply. If the situation under which a defendant fails to take the stand is such that a logical conclusion arises of conscious inability to gain by so doing, an infirmative inference must be drawn against him by any tribunal using reason as its means for ascertaining truth.²²

§ 437. [Omnia Contra Spoliatores]; Removal or Concealment.—A party may suppress the evidence of witnesses in other ways. He may, for example, arrange that the witness shall not be within the reach of a subpoena or other compulsory process, when his attendance is desired, by concealing him or by forcing or inducing²³ him to leave the neighborhood, county, state or country.

Rep. 656 (1893); *Anker v. Smith*, 87 N. Y. Supp. 479 (1904); 2 Chamb., Ev., § 1076, n. 5, and cases cited.

15. *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164 (1902); *Jackson v. Blanton*, 2 Baxt. (Tenn.) 63 (1872); *Copperthite v. Loudoun Nat. Bank*, 111 Va. 70, 68 S. E. 392 (1910); 2 Chamb., Ev., § 1076, n. 6, and cases cited.

16. *Western Union Tel. Co. v. McClelland*, 38 Ind. App. 578, 78 N. E. 672 (1906); *Perkins v. Hitchcock*, 49 Me. 468 (1860); *Nuttings v. Kings County El. R. Co.*, 47 N. Y. Supp. 327, 21 App. Div. 72 (1897); *Kirby v. Tallmadge*, 160 U. S. 379, 16 S. Ct. 349, 40 L. ed. 463 (1896); 2 Chamb., Ev., § 1076, n. 7, and cases cited. *Testify for Adversary.*—Practically the same adverse inference arises where a party refuses to testify as a witness for his adversary either orally, in response to interrogations (*Locust v. Randle* (Tex. Civ. App. 1907), 102 S. W. 946) or by deposition (*Belknap Hardware Co. v. Sleeth*, 77 Kan. 164, 93 Pac. 580 (1908), at the request of the latter. *Locust v. Randle* (Tex. Civ. App. 1907) 102 S. W. 946.

17. § 431, *supra*; 2 Chamb., Ev., § 1070b.

18. *Diel v. Missouri Pac. R. Co.*, 37 Mo. App. 454 (1889).

19. *Union Pac. R. Co. v. Hepner*, 3 Colo. App. 313, 33 Pac. 72 (1893); *Heath v. Waters*, 40 Mich. 457 (1879); *Buncley v. Jones*, 79 Miss. 1, 29 So. 1000 (1901); 2 Chamb., Ev., § 1076a, n. 3 and cases cited. A failure to testify is, therefore, in the nature of an admission by conduct (§§ 559 *et seq.*; 2 Chamb., Ev., §§ 1392 *et seq.*) as well as a deliberative fact of subjective relevancy. (§§ 34, 36, *supra*; 1 Chamb., Ev., §§ 52, 56.)

20. *Com. v. Hanley*, 140 Mass. 457, 5 N. E. 468 (1886).

21. *U. S. v. Pendergast*, 32 Fed. 198 (1887). See also, *People v. Billa*, 114 N. Y. Supp. 587, 129 App. Div. 798 (1909); 2 Chamb., Ev., § 1076b, n. 2, and cases cited.

22. *People v. Smith*, 144 Ill. App. 129 (1908), judg. aff'd 87 N. E. 885 (1909). See also, *People v. Smith*, 100 N. Y. Supp. 259, 114 App. Div. 513 (1906).

23. *Cruikshank v. Gorden*, 118 N. Y. 178, 23 N. E. (1890); 2 Chamb., Ev., § 1077 and cases cited.

The infirmative inference, from spoliation under such circumstances, is almost a necessary and intuitive one.²⁴

Other Modes of Suppression.—Other methods of suppressing the testimony of a witness are open to a litigant. For, example, he may dissuade a witness from appearing,²⁵ or he may call him as a witness but refrain from eliciting from him any evidence on a particular point.²⁶

§ 438. [Omnia Contra Spoliatores]; Probative Force of Inference.—It may be said that, in any particular instance, the probative force of the inference from spoliation will be found to be proportionate to the degree of moral obliquity involved in the course pursued,²⁷ according as the testimony of the witness is essential to the case²⁸ or whether the evidence suppressed would have been available to the suppressing litigant as part of his original case²⁹ or in rebuttal of that made out by his adversary.³⁰

Statutory Regulation.—It is sometimes provided by statute or in some other way, that no inference shall be drawn from the parties claiming a privilege accorded by the rules of the trial, e.g., declining to allow one's attorney³¹ or physician³² to take the stand as a witness. Such a statute may, and frequently does enact that no adverse suggestion shall arise from the fact that husband and wife claims a right not to testify against the other.³³ So far as the mind is concerned, such a rule is nugatory. Its operations cannot be thus controlled.³⁴ The only result which can be effected is that the trier should not be allowed to follow his reason;—rendering a verdict which, *pro tanto*, he may know to be false.

Strength of Inducement to Speak.—The probative effect of the inference

24. For when a party seeks to prevent a full investigation into the truth of a matter by removing a witness beyond the reach of process [Carpenter v. Willey, 65 Vt. 168, 26 Atl. 488 (1892)], he inevitably exposes himself to the adverse presumption that he is aware that the evidence of the witness will be hostile to him; and that he also feels that he has no evidence which will legitimately control his testimony.

25. Houser v. Austin, 2 Ida. 204, 10 Pac. 37 (1886); Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29 (1882); 2 Chamb., Ev., § 1077, n. 3, and cases cited.

26. Bornhofen v. Greenebaum, 68 Ill. App. 645 (1896); Arbuckle v. Templeton, 65 Vt. 205, 25 Atl. 1095 (1893).

27. 2 Chamb., Ev., §§ 1077a, 1077b.

28. East Tennessee, etc., R. Co. v. Douglass, 94 Ga. 547, 19 S. E. 885 (1877); Vergin v. Saginaw, 125 Mich. 499, 84 N. W. (1901); Minch v. New York, etc., R. Co., 80 N. Y. Supp. 712, 80 App. Div. 324 (1903); 2

Chamb., Ev., § 1077a, n. 2, and cases cited.

29. Bent v. Lewis, 88 Mo. 462 (1885); Merrill v. Grinnell, 30 N. Y. 594 (1864); Wimer v. Smith, 22 Or. 469, 30 Pac. 416 (1891); 2 Chamb., Ev., § 1077a, n. 3, and cases cited.

30. Schwier v. New York Cent., etc., R. Co., 90 N. Y. 558 (1882).

31. Gardner v. Benedict, 75 Hun 204, 27 N. Y. Supp. 3 (1894); 2 Chamb., Ev., § 1077b, n. 1, and cases cited. See Privilege of Witnesses.

32. Brackney v. Fogle, 156 Ind. 535, 60 N. E. 303 (1901); Lane v. Spokane Falls, etc. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153 (1899). See Privilege of Witnesses.

33. National German-American Bank v. Lawrence, 77 Minn. 282, 70 N. W. 1016, 90 N. W. 363 (1899); Johnson v. State, 63 Miss. 313 (1885). See Husband and Wife.

34. McCooe v. Dighton, etc., St. R. Co., 173 Mass. 117, 53 N. E. 133 (1899).

from silence is, plainly, gauged by the inducement to speak — could speech avail. Thus, where the charge to be rebutted is one of fraud,³⁵ or illegality³⁶ or where, for some other reason, an adverse case has been made out which calls urgently for a reply, the infirmative inference from suppression gains in probative force.

§ 439. [Omnia Contra Spoliatores]; Writings; Destruction.— A similar infirmative inference arises from the suppression of material documents within the defendant's control which must necessarily help him if his present story or contention be true.³⁷ The distrust of the spoliating party in the true merits of his contention become glaringly obvious, in case of intentional and calculated destruction by him of such writings³⁸ for the purpose of preventing their use as evidence. The logical reaction against the party who has been guilty of such a course becomes still further intensified where the document destroyed is the absolutely determining factor in the case.³⁹

Administrative Punishment and Indulgence.— It is clear that none but those conniving at the act of spoliation will be affected by any inference from it.⁴⁰ The significant circumstance to which administration is forced to direct its attention is the relation existing between the document destroyed and the interest of the destroyer. It is very reasonably inferred that material, highly probative or even constituent writings could have been destroyed by a party litigant in a controversy to which the writing bore this relation only because the spoliator knew that their contents if produced to the court would injure his chances of success.⁴¹ In any case of destruction the inference invalidates the evidence of the spoliator⁴² or, if the form of expression be preferred, it increases the probative weight of his opponent's case by the facts which the spoliator may reasonably be assumed to have known and used as constituting the motive for his

35. Where the party himself declines to testify the presumption is exceptionally strong. *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773 (1901); *Brown v. Shock*, 77 Pa. 471 (1875); 2 Chamb., Ev., § 1077c, n. 1.

36. *Cheney v. Gleason*, 125 Mass. 166 (1878); *Knight v. Capito*, 23 W. Va. 639 (1884).

37. *State v. Rosier*, 55 Iowa 517, 8 N. W. 345 (1881); *Morrow v. Missouri Pac. Ry. Co.*, 140 Mo. App. 200 (1910); 2 Chamb., Ev., § 1078, n. 1, and cases cited.

38. *Johnson v. White*, 46 Cal. 328 (1873); *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376 (1897); *Sullivan v. Sullivan*, 188 Mass. 380, 74 N. E. 698 (1905); *Ames v. Manhattan L. Ins. Co.*, 52 N. Y. Supp. 59, 31 App. Div. 180 (1898); *The Olinde Rodrigues*, 174 U. S. 510, 19 Sup. Ct. 851, 43 L. Ed. 1065

(1898); 2 Chamb., Ev., § 1078, n. 2, and cases cited. The inference cumulates in seriousness where the accused destroys books and papers after arrest or seeks to conceal them. *Roberston v. State*, 40 Fla. 509, 24 So. 474 (1898); *State v. Baldwin*, 70 Iowa 180, 30 N. W. 476 (1886).

39. *Lucas v. Brooks*, 23 La. Ann. 117 (1871); *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 507 (1884); 2 Chamb., Ev., § 1078, n. 3, and cases cited.

40. *Clark v. Ellsworth*, 104 Iowa 442, 73 N. W. 1023 (1898); *Blake v. Blake*, 56 Wis. 392, 14 N. W. 173 (1882).

41. *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238 (1870); 2 Chamb., Ev., § 1078a, n. 2, and cases cited.

42. *Downing v. Plate*, 90 Ill. 268 (1878); *Pomeroy v. Benton*, 77 Mo. 64 (1882).

evidence of contents will be received.⁶³ Under the inference of spoliation, in *odium spoliatoris*, as is said, where the proponent has been tortiously deprived, by act of the opponent, of an original document to the possession of which he is entitled, he may as a matter of course, and without notice, offer secondary evidence of its contents.⁶⁴ *A fortiori* the voluntary destruction of such a document by the opponent confers the right to use secondary evidence of its contents.⁶⁵

§ 441. [Omnia Contra Spoliatorem]; Refusal to Produce on Demand.—Where a party's attention has been pointedly called to the matter by a notice to produce,⁶⁶ his failure to comply with the notice is more significant than a bare neglect which may have been due to oversight or accident. While such a refusal does not, in itself, constitute evidence of any probative or constituent fact involved in the inquiry,⁶⁷ it is an important deliberative one⁶⁸ which increases, for the reasons stated,⁶⁹ the probative effect of the parol evidence given by the party asking production of the document which is, by this refusal, made the best evidence within his power to offer.

Summons, Order of Court, etc.—When a summons⁷⁰ or other direct order of court⁷¹ is made requiring the production of a particular document a refusal to comply with it gives rise to correspondingly greater certainty that the writing which is being held is adverse to the contention of its possessor. Where a litigant has testified to the contents of documents in his possession and the court has declined to order production of the writings, it is said that no inference of suppression arises.⁷²

Social Consequences of Suppression.—Where production is sought by the other side and a party is notified to produce books of account or the like, it has been held that the only effect of a failure to produce these documents on notice is that secondary evidence may now be given by the proponent of their contents.⁷³ So considered, a trial at law resembles, as it were, the playing of a

63. *Livingston v. Rogers*, 2 Johns. Cas. (N. Y.) 488 (1802).

64. *Grimes v. Kimball*, 3 Allen (Mass.) 518 (1862); *Hedge v. McQuaid*, 11 Cush. (Mass.) 352 (1853).

65. *Blake v. Fash*, 44 Ill. 304 (1867); *Broadwell v. Stiles*, 8 N. J. L. 58 (1824); *Parker v. Kane*, 4 Wis. 1 (1855); 2 Chamb., Ev., § 1079b, n. 5, and cases cited.

66. *Life, etc., Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. (N. Y.) 31 (1831). See also, 2 Chamb., Ev., § 1080, n. 1, and cases cited.

67. *Union Pac. R. Co. v. Hepner*, 3 Colo. App. 313, 33 Pac. 72 (1892); *Cartier v. Troy Lumber Co.*, *supra*; *Lockwood v. Rose*, 125 Ind. 588, 25 N. E. 710 (1890); *Wilde v. New Jersey Northern R. Co.*, 53 N. Y. 156 (1873); *Missouri, etc., R. Co. v. Elliott*, 102 Fed. 96,

42 C. C. A. 188 (1900); 2 Chamb., Ev., § 1080, n. 2, and cases cited.

68. § 34; 1 Chamb., Ev., § 52.

69. §§ 430, 431; 2 Chamb., Ev., §§ 1070, 1070b.

70. *Darby v. Roberts*, 3 Tex. Civ. App. 427 (1893).

71. *Mills v. Fellows*, 30 La. Ann. 824 (1878); *Devlan v. Wells*, 65 N. J. L. 213, 47 Atl. 467 (1900).

72. *Roberts v. Francis*, 123 Wis. 78, 100 N. W. 1076 (1904).

73. *Cartier v. Troy Lumber Co.*, *supra*. This is an entirely logical development of the theory that litigation is a matter primarily or even exclusively of the parties. § 132; 1 Chamb., Ev., § 303.

game in which no inference should be drawn against a player merely because he claims the benefit of a rule established in it. No one, it is thought, can be required to aid his opponent.⁷⁴ In a very just sense, however, an inference of suppression, deliberative it is true⁷⁵ but a fair presumption from spoliation, necessarily arises against the withholding party in such cases.⁷⁶ To be sure, the presiding judge frequently rules otherwise. But the court is impotent to control the reasoning faculty of a coordinate branch of the tribunal. His power is limited to nullifying the results by ordering a new trial.

§ 442. [*Omnia Contra Spoliatores*]; **Mutilation, Alteration, etc.**—The same logical deduction from spoliation with suitable modifications, arises in case of the mutilation,⁷⁷ alteration, concealment or removal⁷⁸ of documents known to be valuable for evidentiary purposes, or any material portion of such a document.⁷⁹

§ 443. [*Omnia Contra Spoliatores*]; **Real Evidence.**—Much the same deliberative inference from spoliation arises where a critical piece of real⁸⁰ evidence is withheld from the tribunal by a party whose interest to produce it, were the inferences arising from it favorable to himself, is obvious.⁸¹ Thus, where the evidence was conflicting as to whether a rope the parting of which caused the death of a seaman was defective, the doubt should be solved against the vessel because of her failure to produce the rope which was in her possession.⁸² In much the same way, where the issue relates to the condition of a

74. *Rector v. Rector*, 8 Ill. 120 (1846); *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1 (1856). See also, *Life & Fire Ins. Co. v. Mechanics' F. Ins. Co.*, *supra*; 2 Chamb., Ev., § 1080a, n. 4, and cases cited.

75. §§ 430, 431; 2 Chamb., Ev., §§ 1070, 1070b.

76. Even objecting to evidence may stand in the same position. *Sutton v. Davenport*, 27 L. J. C. P. 54 (1857). For an illustrative instance in an English case, see 2 Chamb., Ev., § 1080a, notes 8 and 9 and cases cited.

77. *Sheils v. West*, 17 Cal. 324 (1861); *Murray v. Lepper*, *supra*; *Dimond v. Henderson*, 47 Wis. 172, 2 N. W. 73 (1879); 2 Chamb., Ev., § 1081, n. 1, and cases cited.

78. *Bricker v. Lightner*, 40 Pa. 109 (1861).

79. *The Sam Sloan*, 65 Fed. 125 (1894).

Alterations of Deeds.—There is no presumption that an alteration on a deed was made after delivery but it must be made to appear that an alteration was made after delivery before any presumption of fraud can arise. *Tharp v. Jamison*, 154 Iowa 77, 134 N. W. 583, 39 L. R. A. (N. S.) 100 (1912). Where a deed appears on its face to be

altered or erased the burden is upon one who would attack it to show that the alteration was made after execution. The court remarks that the authorities are in hopeless conflict on the question but that most of the deeds in the state are written by laymen and that the great majority of the alterations are made by them in ignorance and innocently and it would be a great hardship and would upset titles to adopt any other rule. *Wicker v. Jones*, 159 N. C. 102, 74 S. E. 801, 40 L. R. A. (N. S.) 69 (1912).

80. §§ 21 *et seq.*; 1 Chamb., Ev., §§ 27 *et seq.*

81. *Federal Lumber Co. v. Reece* (Ky. 1909), 116 S. W. 783; 2 Chamb., Ev., § 1081a. So where a party in whose possession a decisive map is to be found declines to produce it, an inference arises that it supports the contention of his adversary. *Isabella Gold Min. Co. v. Glenn*, 37 Colo. 165, 86 Pac. 349 (1906); *Bryant v. Stillwell*, 24 Pa. 314 (1855).

82. *The Luckenbach*, 144 Fed. 980 (1906). In like manner, where, in an action against a railroad for injuries to a passenger in con-

building⁸³ or other piece of real or personal property, the act of one of the parties in refusing to permit the other to examine the same under reasonable conditions gives rise to an inference that such an inspection would disclose facts detrimental to his cause.

Mutilation.— In case of the mutilation of an important piece of real evidence, a party is to be affected by a deliberative inference, if at all, only to the extent that he appears to have been connected with it.⁸⁴

sequence of the breaking of a defective coupling, the company removed it and failed to produce the same in court, though notified so to do by plaintiff, failing to give any explanation for the non-production, a presumption arose that the appearance of the broken apparatus would not have benefited the rail-

road, but would have injured it. *Galveston, etc., Ry. Co. v. Young* (Tex. Civ. App. 1907), 100 S. W. 993.

83. *Byrant v. Stillwell, supra.*

84. *Bank of Irwin v. American Express Co.*, 127 Iowa 1, 102 N. W. 107 (1905).

CHAPTER XIV.

PRESUMPTION OF LAW.

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§ 444. **Assumptions of Procedure.**¹—The presumption of law assumes the *prima facie* truth of particular inferences of fact relating to the substantive law, and maintains this assumption until the *prima facie* quality of the case so established is met by evidence creating an equilibrium. if the case be a civil one, or a reasonable doubt should it be criminal. This is the presumption of law properly so-called.²

1. 2 Chamberlayne. Evidence. § 1082.

ple v. Wong Sang Lung, 3 Cal. App. 221, 84

2. Other definitions of presumption.—California.—Cal. Code Civ. Proc., § 1959; Peo-

Pac. 843 (1906).

§ 445. **Presumptions of Law.**³—Somewhat to amplify the definition given above,⁴ it may be said that the presumption of law is a legal rule⁵ established in that branch of the substantive law to which the presumption relates, and provisionally assuming, until evidence has been introduced on the subject,⁶ that a given inference of fact from certain circumstances,⁷ previously shown to exist has a *prima facie* value. As rule of law it is not within the option or discretion of the trial judge to employ it or not, as would be the case were the matter one involving a mere assumption of administration.⁸ He cannot refuse to rule as to its existence, for a party is as much entitled to the benefit of a presumption of law as he would be to have any other appropriate legal rule applied to the facts of his case.⁹ “Presumptions serve a most useful

Colorado.—Doane v. Glenn, 1 Colo. 495, 504 (1872).

Florida.—Newton v. State, 21 Fla. 53, 98 (1884).

Georgia.—Bryan v. Walton, 20 Ga. 480, 508 (1856).

Indiana.—City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499, rev'g (App. 1905) 76 N. E. 1117.

Louisiana.—Cronan v. City of New Orleans, 16 La. Ann. 374 (1861); Civ. Code La. 1900, art. 2284.

Maine.—State v. Tibbetts, 35 Me. 81 (1852).

Missouri.—Lane v. Missouri Pac. Ry. Co., 132 Mo. 4, 21, 33 S. W. 645-650 (1895).

New Jersey.—Bower v. Bower, 78 N. J. L. 387, 74 Atl. 522 (1909), rev'g. judg. (Ch. 1908) 69 Atl. 1077.

New York.—Jackson v. Warford (N. Y. 1831), 7 Wend. 62, 66.

North Carolina.—Lee v. Pearce, 68 N. C. 76, 85 (1873).

Oklahoma.—Johnson v. Territory, 5 Okl. 695, 50 Pac. 90 (1897).

Pennsylvania.—*In re* Brown's Estate, 8 Philadelphia 197 (1871).

South Carolina.—Pell v. Ball's Ex'rs (S. C. 1840), Cheves, Eq. 99, 123.

West Virginia.—State v. Heaton, 23 W. Va. 773, 782 (1883).

Wisconsin.—Welch v. Sackett, 12 Wis. 243, 257 (1860).

United States.—U. S. v. Sykes, 58 Fed. 1000, 1004 (1893).

See also, other cases in different jurisdictions cited in 2 Chamb. Ev., n. 3: As to the distinction between inference and presumption and colloquial uses of the term *presumption*. *Id.*

Where the assumption is made under a rule of law it may properly be regarded as one of *procedure* and is properly styled a “presumption of law.” Where, on the other hand, there is no rule of law, procedural or substantive, in the matter, the assumption is one of *administration* (§§ 372 et seq.; 1 Chamb., Ev., §§ 174 et seq.) or, at most, in point of fixity, one of *practice*. (§ 71; 1 Chamb., Ev., § 173.) See also, as to Presumptions of Law and Assumptions of Administration and Logic v. Law, 2 Chamb., Ev., §§ 1083, 1084, and notes.

3. 2 Chamberlayne, Evidence, § 1083-1089.

4. § 444; 2 Chamb., Ev., § 1082.

5. “A presumption (of law) (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect, but unless so controverted, the jury are bound to find according to the presumption.” *In re* Bauer's Estate, 79 Cal. 304, 307, 21 Pac. 759 (1889).

6. Or, as has been said, until it is disproved. *First Nat. Bank v. Adams*, 82 Neb. 805, 118 N. W. 1055 (1908).

7. *People v. Wong Sang Lung*, *supra*.

8. §§ 486 et seq.; 2 Chamb. Ev., §§ 1184 et seq. The constituent facts grounding the inference must themselves be proved to the satisfaction of the jury, unless admitted. *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277 (1909).

9. “Presumptions, or, as they are sometimes called, ‘intendments of the law,’ are inferences or positions established for the most part by the common and occasionally by the statute law, and are obligatory alike on judges and jury” *Doane v. Glenn*, 1 Colo. 495, 504 (1872). For example, from a lawful marriage and the birth of offspring

and indispensable part in the correct decision of many questions, but they are out of place, *when the facts are known, or are admitted.*"¹⁰

A Limited Number.—Unlike inferences of fact,¹¹ or administrative assumptions of procedure,¹² presumptions of substantive law are limited in number, and are properly considered in connection with the several branches of law to which they relate and will not, therefore, beyond a reasonable number of illustrative instances, be deemed to fall within the scope of the present treatise. The creation of future presumptions of law lies mainly with the legislature. The work of the courts, in this respect, will more properly deal with the announcement of assumptions of administration, which do not deal with specific branches of the substantive law.¹³

Civil Cases.—Very many of the civil branches of substantive law have rules of presumption announcing that a *prima facie* probative force will, until evidence to the contrary is introduced, be provisionally attached to a given state of facts.¹⁴ That is, a certain inference will be drawn from it, unless and until countervailing evidence is introduced.

§ 446. [Presumptions of Law]; Presumption of Legitimacy — Marriage.¹⁵—

The presumption of legitimacy, under which a child born during the cohabitation of a married couple will be taken, *prima facie*, to be legitimate, *provided* the husband could have had access, is properly spoken of as a presumption of

during cohabitation the presumption of law is that the children are legitimate. When conflicting evidence is introduced upon the point covered by the presumption of law, the presumption itself, the rule of law, is *functus officio*. It has done its work. *People v. Wong Sang Lung, supra*; *Schaub v. Kansas City Southern Ry. Co.*, 133 Mo. App. 444, 113 S. W. 1163 (1908). The entire inquiry is now one of logic, as to inferences of fact. *Turner v. Williams*, 202 Mass. 500, 89 N. E. 110 (1909); *Lynch v. Metropolitan St. Ry. Co.*, 112 Mo. 420, 433, 20 S. W. 642 (1892).

Burden of Proof and Burden of Evidence.

—The effect of the establishment by a party, in his own favor, of a presumption of law, or, more properly of the facts regarding one, is not to shift the burden of proof. *Citizens' Ins. Co. v. Helbig*, 138 Ill. App. 115 (1907), *judg. aff'd Helbig v. Citizens' Ins. Co.*, 234 Ill. 251, 84 N. E. 897 (1908). The burden of evidence, however, being discharged by the person so establishing a presumption of law may properly be said to have shifted. *Id.*

10. *Erhart v. Dietrich*, 118 Mo. 418, 427, 24 S. W. 188 (1893). "The office of presumptions is not to overthrow admitted facts

but rather to supply the absence of facts; there can be no presumption against ascertained and established facts." *Conway v. Supreme Council Catholic Knights of America*, 137 Cal. 384, 389, 70 Pac. 223 (1902). Any inference of fact previously assumed as *prima facie* correct by the presumption of law continues to exert its full logical effect. As to the Evolution of Substantive Law: Rulings as to *Prima Facie* Case, see 2 *Chamb., Ev.*, §§ 1086, 1087.

11. §§ 414 *et seq.*; 2 *Chamb., Ev.*, §§ 1026 *et seq.*

12. §§ 486 *et seq.*; 2 *Chamb., Ev.*, §§ 1184 *et seq.*

13. Presumptions of law are usually grounded upon public policy, social convenience, or safety, and are either such as the statutes expressly declare, or such inferences as the courts generally in their legal experience have recognized and sanctioned in the administration of justice. *Modern Woodmen of America v. Craiger*, 175 Ind. 30, 92 N. E. 113, *rev'g judg.* (App. 1909) 90 N. E. 84. See also, 2 *Chamb., Ev.*, § 1088.

14. *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907); 2 *Chamb., Ev.*, § 1089.

15. 2 *Chamberlayne, Evidence*, § 1089a.

law. It is a recognized part of the substantive law of the family that a child born during the coverture of a married couple "within the espousals," as the early phrase went, "*deinz les espousuills*," will be presumed to be the legitimate child of persons so cohabiting.¹⁶

"*Inter quatuor maria*."—If the husband, *pater quem nuptiae demonstrant*, was within the four seas, *inler quatuor maria*, of England during the time when the child might have been begotten, the latter was legitimate.¹⁷ This continued to be the rule as announced by the common law, which in this particular, was in sharp contrast with that of Holy Church,¹⁸ from the time of Bracton through the seventeenth century. Even the clearest proof of the wife's adultery did not suffice to bastardize the spurious offspring. If he were not impotent, or under a decree of divorce from his wife,¹⁹ the husband, if within the four seas of England, was conclusively presumed²⁰ (the expression may be noted) to be the father of his wife's children. After the seventeenth century, the rule of the *inter quatuor maria* may be regarded as abandoned.²¹

Proof under the Modern Use of Reason.—Modern methods, those of reason, venture boldly to enter upon the inquiry as to whether the husband was under the circumstances disclosed in the evidence, actually the father of a child begotten in coverture. In attempting this task, the law avails itself of all probative facts with a single exception, a reservation of doubtful expediency, to be mentioned hereafter.²² If it may be reasonably found by the tribunal of fact that the husband could, in the nature of things, have been the father of the child, the presumption of substantive law assuming legitimacy will be allowed to stand.²³ In few connections, is the intimate relation between the substantive law and the so-called presumption of law more clearly shown than in the present.²⁴

16. 2 Chamb., Ev., § 1089a.

17. 36 Hen. VI, pl. 14, p. 22 (1457).

18. The Canon or Ecclesiastical Law, which was usually called by early English lawyers 'the law of the Holy Church,' though founded upon the Civil Law, was at variance both with the Civil and Common Law with respect to Adulterine Bastardy, for it looked only to the actual paternity. Nicolas on Adulterine Bastardy, p. 2; Bracton, Lib. 1, c. 9, f. 6b; Lit. II c. 29, pp. 63, 70.

19. 18 Hen. VI, Hil. T. pl. 3, pp. 32, 34 (1440); Rolle's Abr. 358, Tit. Bastards, letter B.

20. §§ 470 *et seq.*; 2 Chamb., Ev., §§ 1160 *et seq.*

21. 2 Chamb., Ev., § 1089a, n. 8, and cases cited.

22. § 449; 2 Chamb., Ev., § 1089e.

23. Mills' Estate, 137 Cal. 298, 70 Pac. 91 (1902); Robinson v. Ruprecht, 191 Ill.

424, 61 N. E. 631 (1901); Bowman v. Little, 101 Md. 273, 61 Atl. 1084 (1905); Rabeke v. Baer, 115 Mich. 328, 73 N. W. 242 (1897); Matthews' Estate, 153 N. Y. 443, 47 N. E. 901 (1897); Locust v. Caruthers, 23 Okl. 373, 100 Pac. 520 (1899); Bunel v. O'Day, 125 Fed. 303 (1903); 2 Chamb., Ev., § 1089b, n. 3, and cases cited.

24. Birth of issue shortly after marriage is an exception to the rule and stands upon its own facts. R. v. Luffe, 8 East. 193 (1807). This law seems well settled. Grant v. Stimpson, 79 Conn. 617, 66 Atl. 166 (1907); Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644 (1857); Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527. The courts will not indulge the presumption that a marriage was entered into merely to avoid the possible consequences of a pending bastardy proceeding, but will assume that, had the alleged father doubted his paternity, he would

Marriage.— There is also a presumption of a legal marriage from proof of a marriage ceremony in due form²⁵ or even from cohabitation as man and wife.²⁶

§ 447. [Presumptions of Legitimacy]; Proof of Access.— If personal access on the part of the husband is shown at a time when the child might have been begotten, it will be assumed that sexual intercourse took place, unless such an occurrence is clearly negatived by the attendant circumstances.²⁷ “Access like any other important fact, must be satisfactorily established, but access is not to be presumed because the parties were within such distance that access was possible.”²⁸

§ 448. [Presumption of Legitimacy]; Rebuttal of Presumption.²⁹— That the have resisted the prosecution and refused to marry. *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806 (1904).

25. Evidence of a marriage ceremony in due form puts on the other side the burden of proving that the marriage was illegal. *Goset v. Goset*, 112 Ark. 47, 164 S. W. 759, L. R. A. 1916 C 707 (1914).

Effect of Second Marriage.— The burden is on one who seeks to show the illegality of a marriage to prove such illegality which presumption is not overcome by mere proof of a second marriage and the parties attacking such second marriage have the burden of proof to show that neither party to the first marriage had obtained a divorce. *Jones v. Jones*, Okla (1917), 164 Pac 463, L. R. A. 1917 E 921. The tendency of the courts is to hold a second marriage valid, and if it has not been questioned for many years its validity will not be overcome by mere proof of a prior marriage. In such case the presumption in favor of innocence and morality will prevail over the presumption of the continuance of the former marriage and it will be presumed that the first marriage was not binding at the time of the second. Proof of subsequent marriage alone makes out a *prima facie* case of its validity. To overcome this *prima facie* case, proof of a former marriage is required and also evidence from which it may be concluded that it has not been dissolved by death or divorce. *Shaeffer v. Richardson*, 125 Md. 88, 93 Atl. 391, L. R. A. 1015 E 186 (1915). Where a man leaves the state saying that he will get a divorce and returns after two years saying that he has one and later marries again and lives with the second wife fourteen years the presumption is that the sec-

ond marriage is legal as the presumption of the continuance of the first marriage is outweighed by the presumption of innocence as the second marriage was entered into in good faith and all parties have acted upon an assumption of its validity. *Shepard v. Carter*, 86 Kan. 125, 119 Pac. 533, 38 L. R. A. (N. S.) 568 (1911). To show that a second marriage is bigamous the burden is upon the state to show that the first wife is still alive and this burden is not met by evidence that the first wife was alive four and a half years before. The presumption of continuance of life must give way to that of innocence. *Dunlap v. State*, 126 Tenn. 415, 150 S. W. 86, 41 L. R. A. (N. S.) 1061 (1912). The mere fact that a man having a living wife in Tennessee had married another woman in Alabama does not raise an absolute presumption that he had obtained in Alabama, or at some place other than Tennessee, a divorce on some ground recognized in the forum. *Neely v. Tennessee, etc., R. Co.*, 145 Ga. 363, 89 S. E. 325, L. R. A. 1916 F 819 (1916).

26. The presumption of marriage from cohabitation and reputation is rebutted by evidence that the man married another woman without protest from the reputed wife and where there is an absence of other evidence of marriage which could easily have been produced if in existence. *Farley v. Frost-Johnson Lumber Co.*, 133 La. 497, 63 So. 122, L. R. A. 1915 A 200 (1913).

27. 2 Chamberlayne, Evidence, § 1089c, n. 1, and cases cited.

28. 2 Chamberlayne, Evidence, § 1089c, n. 2, and cases cited.

29. 2 Chamberlayne, Evidence, § 1089d.

inference of fact that children born during the coverture of a married woman were begotten by her husband may be rebutted is unquestionable.³⁰ Among facts showing that children born during coverture could not have been the children of the husband are a second marriage by the mother supposing a former husband to be dead,³¹ or a continuous absence by the husband,³² especially at sea or in foreign parts, during the period when he might, in course of nature, have been the father of the child. A difference in race between the parents and the child as where the married pair are white and the child is a mulatto³³ has been held to rebut the presumption of legitimacy. The question in each case is, of course, as to actual access on the part of the husband. That fact, being proved, or disproved,³⁴ the judicial inquiry, as a rule, ceases.³⁵

§ 449. [Presumption of Legitimacy]; Limitation upon Scope of Evidence.³⁶—Neither of the married couple is permitted to testify to the fact of actual non-access to the wife on the part of her husband. The modern rule dates from the time of Lord Mansfield who announced, in 1777:³⁷ “It is a rule founded in decency, morality, and policy, that they (husband and wife) shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious.” This rule was later adopted in affiliation proceedings³⁸ and obtained much vogue and popularity.³⁹ Indeed, it may be regarded as settled law.⁴⁰ As to the fact of non-access alone, how-

30. *Bunel v. O'Day*, 125 Fed. 303 (1903); *McNeely v. McNeely*, 47 La. Ann. 1321, 17 So. 928 (1895), in Louisiana after an interval of 300 days after separation of the married couple the presumption of legitimacy becomes rebuttable for after-born children of the wife.

31. *St. Andrews v. St. Brides*, 1 Stra. 51 (1760).

32. *Mebane v. Capehart*, 127 N. C. 44, 37 S. E. 84 (1900); *In re Divver's Estate*, 22 Pa. Super. Ct. 436 (1903).

Where the husband and wife are living apart there is no presumption of law that any child born to the wife is legitimate as was formerly the rule. Probable evidence that the husband had no chance of access to the wife is now admissible, following the English rule in the English House of Lords in *Morris v. Davies*, 5 Clark & F. 163. *State v. Shaw*, 89 Vt. 121, 94 Atl. 434, L. R. A. 1915 F 1087 (1915)

Impotency, moreover, on the part of the husband still rebuts the presumption of legitimacy. Impossibility of procreation must, however, be established, in order to justify the affirmative action of the court. Even a high degree of improbability is not sufficient

for the purpose of bastardizing the offspring. 2 Chamb., Ev., § 1089d.

33. *Bullock v. Knox*, 96 Ala. 195, 11 So. 339 (1892).

34. *Wallace v. Wallace*, 73 N. J. Eq. 403, 67 Atl. 612 (1907).

35. The presumption of legitimacy cannot be rebutted by showing that the wife was guilty of adultery during the period of gestation. *Town of Canaan v. Avery*, 72 N. H. 591, 59 Atl. 509 (1904).

36. 2 Chamberlayne, Evidence, § 1089e.

37. *Goodright v. Moss*, Cowp. 591 (1777).

38. *R. v. Kea*, 11 East 132 (1809).

39. *Legge v. Edmonds*, 25 L. J. Ch. 125, 135 (1856); *R. v. Sourton*, 5 A. & E. 180, K. B. (1836).

40. *Mills' Estate*, *supra*; *Abington v. Duxbury*, 105 Mass. 287 (1870); *Rabeke v. Baer*, *supra*; *Chamberlain v. People*, 23 N. Y. 85, 88 (1861); *Boykin v. Boykin*, 70 N. C. 262 (1874); *Bell v. Terr.*, 8 Okl. 75, 56 Pac. 853 (1899); *Tioga v. South Creek*, 75 Pa. 433 (1874); *Shuman v. Shuman*, 83 Wis. 250, 53 N. W. 455 (1892); *Mulligan v. Thompson*, 23 Ont. (Can.) 54 (1892); 2 Chamb., Ev., § 1089e, n. 5, and cases cited.

ever, is silence imposed by the law upon the married pair.⁴¹ Thus an illegal marriage ceremony⁴² or the non-existence of any marriage ceremony whatever,⁴³ may be stated by either one of the married couple although the necessary effect of the testimony, if believed, would be to bastardize the offspring. Either parent is quite as competent to testify that a particular child born during the coverture is, in fact, illegitimate⁴⁴ as to testify that he or she is legitimate.⁴⁵

§ 450. [Presumption of Legitimacy]; Inferences of Fact.⁴⁶—Inferences of fact are to be distinguished from this presumption of law. As an inference of fact, for example, legitimacy may be presumed from recognition of the child by its supposed parents.⁴⁷ Husband or wife, may, as witnesses, depose to the existence of facts from which the inference of illegitimacy may properly be drawn, or which tend to exclude the conclusion that the child is legitimate.⁴⁸ With this, however, the presumption of law is not concerned. So also, there is said to be no presumption that certain alleged heirs are the legitimate descendants of the ancestor.⁴⁹

§ 451. Presumptions of Law; Presumption of Death; Continuance of Life.⁵⁰—Prominent among presumptions of law, properly so-called, under the rules regulating the rights of persons, is the so-called presumption of death from seven years absence from home with no tidings received by those who naturally would have heard had the person in question been alive. It is not disputed that it is a fair inference of fact, i.e., a presumption of fact,⁵¹ that a person may, with greater or less probative force according to varying circumstances, be taken as being alive shortly after he is proved to have been so. Nor would it be doubted that with the same variations, the inference of fact though with constantly diminishing force, would operate in favor of life for a considerable time.⁵² The presumption of the inference of life applies equally to the young⁵³

41. *Chatham v. Mills*, 137 Cal. 298 (1902); *Bert v. Greenwalt*, 44 Mich. 245, 6 N. W. 634 (1880); *Chamberlain v. People*, *supra*; *Hoga v. South Creek*, *supra*.

42. *Darcy's Infants*, 11 Ir. C. L. R. 298 (1860).

43. *Niles v. Sprague*, 13 Iowa 198, 207 (1862); *Allen v. Hall*, 2 Nott & McC. (S. C.) 114 (1819).

44. *Murray v. Milner*, L. R. 12 Ch. D. 845 (1879). See, however, *In re Mills' Estate*, 137 Cal. 298.

45. *Cooley v. Cooley*, 58 S. C. 168, 36 S. E. 563 (1900), rehearing denied, 58 S. C. 582, 37 S. E. 226.

46. 2 Chamberlayne, Evidence, § 1089f.

47. *Zachmann v. Zachmann*, 201 Ill. 380, 66 N. E. 256 (1903); *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644 (1857); *Locust*

v. Caruthers, *supra*; 2 Chamb., Ev., § 1089f, n. 1, and cases cited.

48. *Poulett Peerage*, L. R. (1903) App. Cas. 395 (abandonment of wife upon her confession of pregnancy by another)

49. *Osborne v. McDonald*, 159 Fed. 791 (1908).

50. 2 Chamberlayne Evidence, §§ 1090, 1091.

51. § 415; 2 Chamb., Ev., § 1027.

52. §§ 417, 420; 2 Chamb., Ev., §§ 1034, 1042; *Bartley v. Boston & N. St. Ry. Co.*, 198 Mass. 163, 83 N. E. 1093 (1908); *Hall v. Hall*, 122 N. Y. Supp. 401 (1910); 2 Chamb., Ev., § 1090, n. 4, and cases cited.

53. *Lewis v. People*, 87 Ill. App. 588 (1899); *Manley v. Pattison*, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 481 (1895).

and the old,⁵⁴ the sick⁵⁵ and the well, the absent and those near at hand.

Inference of Continuance of Life Rebuttable.—So far as it is an inference of fact, the presumption of the continuance of life is controlled, modified or overbalanced by facts from which a contrary inference may logically arise.⁵⁶ The probative force of the presumption of continuance of life is, therefore, in a state of constant change.⁵⁷

§ 452. [Presumption of Death]; An Inference of Varying Probative Force.⁵⁸—Every loss in probative force of the presumption or inference of continuance adds to that of the inference of death and *vice versa*. It necessarily follows that a point of time is certain to arrive at which the evidentiary power of the presumption of death will overcome that of the continuance of life.⁵⁹ Later on, a second point of time is, as a matter of logic, certain to be reached at which the presumption or inference of death has become *prima facie* valid. As a matter of experience alone, however, no precise point of time could well be agreed upon by the courts as that at which a presumption of law should begin to operate.⁶⁰ The *prima facie* point in the proof might well arise in different cases, at very divergent points of time.⁶¹ The courts, therefore, instead of announcing a rule of presumption, i.e., a presumption of law, adopted the time limit, seven years,⁶² of a statute passed for another purpose⁶³ and applied it, generally, to all cases of unexplained absence, where one is presumed to be dead.

§ 453. [Presumption of Death]; Adoption of Rule in America.⁶⁴—The presumption of law that one absent for seven years without tidings by his family and friends will be assumed to be dead is universally adopted in the United States,⁶⁵ and Canada.⁶⁶ Even where the legislature has not intervened a

54. *Watson v. Tindal*, 24 Ga. 404, 71 Am Dec. 742 (1858).

55. *Hall's Deposition*, 11 Fed. Cas. No. 5,924, 1 Wall. Jr. (U. S.) 85 (1843).

56. *Hyde Park v. Canton*, 130 Mass. 505 (1881); *Davie v. Briggs*, 97 U. S. 628, 24 L. ed 1086 (1878); 2 Chamb., Ev., § 1091, n. 1, and cases cited.

57. *Hyde Park v. Canton*, *supra*; 2 Chamb., Ev., § 1091, n. 2, and cases cited.

58. 2 Chamberlayne Evidence, §§ 1092, 1093.

59. *Smith v. Knowlton*, 11 N. H. 191 (1840).

60. *Czech v. Bean*, 72 N. Y. Supp. 402, 35 Misc. 729 (1901).

61. *Merritt v. Thompson*, 1 Hilt. (N. Y.) 550 (1858); 2 Chamb., Ev., § 1092, n. 3, and cases cited.

62. *Doe d. Lloyd v. Deakin*, 4 B. & A. 433 (1821); *Doe d. George v. Jesson*, 6 East 84 (1905), per *Ld. Ellenborough*, C. J.

63. This was done by the English courts (*in re Benjamin*, 1 Ch. 723, 71 L. J. Ch. 319, 86 L. T. Rep. (N. S.) 387 (1902); *Wilson v. Hodges*, 2 East 312, 6 Rev. Rep. 427 (1802)) taking as a basis the Statute of 1 James I, c. XI, relating to prosecutions for adultery and practically extended by 19 Car. 2, c. 6 to cases of absent life tenants. *Doe d. Banning v. Griffin*, 15 East 293 (1812). See an interesting statement of the Origin of the Rule as to Seven Years' Absence, 2 Chamb., Ev., § 1093 and notes.

64. 2 Chamberlayne, Evidence, §§ 1094–1096.

65. *Hansen v. Owens*, 132 Ga. 648, 64 S. E. 800 (1909); *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028 (1895); *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797 (1884); *Stockbridge, Petitioner*, 145 Mass. 517, 14 N. E. 928 (1887); *Gilroy v. Brady*, 195 Mo. 205, 93 S. W. 279 (1906); *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75 (1908), *revg.* 105

ruling by the judge to this effect seems a reasonable exercise of judicial administration in giving certainty to substantive law.⁶⁷ In any case, the burden of evidence to show absence and other facts grounding the presumption of death rests upon him who alleges it.⁶⁸

§ 454. [Presumption of Death]; Statutory Modifications.⁶⁹—The legislature has introduced certain variations upon this general rule of presumption.⁷⁰ Occasionally a less time than seven years is declared to be sufficient to ground the presumption of law.⁷¹ Other statutes have been limited in operation to residents of the forum. In this case, application to other persons is excluded.⁷²

Absence from Jurisdiction.—It has been frequently required, in certain statutes, that the absence of the person in question must be shown to have been in another state or country.⁷³ But to require affirmative proof that the person in question is beyond the sea, or out of the state or hiding in it, is to demand the impossible. Evidence showing that the person is *doing* anything establishes that he is alive, and it is precisely this fact which the absence of all tidings tends to negative.⁷⁴ Proof of other facts grounding an

N. Y. Supp. 1106, 120 App. Div. 879 (1907); *In re Freeman's Estate*, 227 Pa. 154, 75 Atl. 1063 (1910); *Davie v. Briggs*, *supra*; 2 Chamb., Ev., § 1094, n. 1, and cases cited in 24 other states.

66. *Giles v. Morrow*, 1 Ont. Rep. 527 (1882).

67. §§ 305 *et seq.*; 1 Chamb., Ev., §§ 556 *et seq.*

68. *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9 (1892). That there is no probative force in the presumption itself, see 2 Chamb., Ev., § 1095; *State v. Henke*, 58 Iowa 457 (1882). *No Reverse Presumption.*—The expiration of seven years without tidings gives rise to no presumption of law that the person at home is dead. "If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law authorizes, to those that remain, the presumption of fact that he is dead; but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died. *Hyde Park v. Canton*, *supra*; 2 Chamb., Ev., § 1096. The same rule applies in case of absence longer than seven years. *Garwood v. Hastings*, 38 Cal. 216 (1899 (17 years)).

69. 2 Chamberlayne, Evidence, §§ 1097, 1098.

70. *Matter of Board of Education*, 173 N. Y. 321, 66 N. E. 11 (1903), dismissing appeal 77 N. Y. Supp. 1121 (1902).

71. Mo. Rev. St., 1899, § 3144; *Winter v.*

Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662 (1902).

72. *Ironton Fire Brick Co. v. Tucker*, 26 Ky. L. Rep. 532, 82 S. W. 241 (1904). Even where the statutory provision is broad enough to cover a voluntary and open change of domicile and residence outside of the state, the intent of the legislature may be so far followed as to limit the application of the presumption to cases where the absentee has abandoned his home which still remains in the jurisdiction of the forum. *Latham v. Tombs* (Tex. Civ. App. 1903), 73 S. W. 1060. In such a case it is necessary to establish conclusively that the decedent left the state. *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428, 124 S. W. 69 (1910); 2 Chamb., Ev., § 1097, n. 5, and cases cited.

73. *Louisville Bank v. Public School Trustees*, 83 Ky. 219 (1885); *Winter v. Sup. Lodge K. of P.*, 96 Mo. App. 1, 69 S. W. 662 (1902); Mo. Rev. St. (1899) § 3144; *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358 (1899); Tex. Rev. St. art. 3372 (1841); 2 Chamb., Ev., § 1098, n. 1, and cases cited.

74. "All the proof that can be required or expected is, that the party has been absent from the state, or from his family or home, and has not been heard from within the period prescribed by the statute. The effect of the statute was simply to define the limits and direct the application of an ancient rule of the common law, which had been adopted and applied by existing English statutes

inference of death is not excluded by the existence of such statutes,⁷⁵ unless there be affirmative proof that the person has left the state or country.

§ 455. [Presumption of Death]; Proof of Death by Inferences of Fact.⁷⁶—

While mere length of time during which the presumption of continuance of life is required to operate, gradually deprives it of probative weight, mere lapse of time, within the limits of possible longevity, will not establish a *prima facie* case in favor of death.⁷⁷ The inertia of the court will not be overcome, except by facts from which an inference of death may logically be drawn.⁷⁸ Occurrence of shipwrecks,⁷⁹ the outbreak of serious epidemics⁸⁰ and the like⁸¹ may so reinforce the inference arising from lapse of time as with it, to constitute a case in favor of death upon which a jury might reasonably act. The force of all such inferences is greatly enhanced where unavailing efforts to acquire knowledge as to the whereabouts or existence of the party have been made.⁸² The truth, however, of this proposition is not affected by the circumstance that in connection with other facts, length of unexplained absence, unheard from, will lead to an inference of death even before the expiration of seven years.⁸³

Proof Must Be Competent.—Any fact upon which an inference of death is to be based must be proved, as a matter of course, by legal testimony. For example, *hearsay* will not be received. Death cannot be proved by showing that a witness has “heard” that the person in question was drowned.⁸⁴ That

to certain specified cases. [Thorne v. Rolff, 1 Dyer 185a; S. C. Bendloe 86 (1894)]. The statute may, perhaps, have been further designed to convert a mere presumption of fact into a presumption of law; for it seems to have been doubted whether at common law the presumption of death arising from seven years' absence was obligatory on juries. But in this respect, the rule at common law is now held to be obligatory.” Osborn v. Allen, 26 N. J. L. 388 (1857).

75. Louisville Bank v. Public School Trustees, *supra*.

76. 2 Chamberlayne, Evidence, § 1099.

77. § 420; 2 Chamb., Ev., § 1042, n. 9.

78. Magness v. Modern Woodmen of America, 146 Iowa 1, 123 N. W. 169 (1909); Jacobs v. Fowler, 119 N. Y. Supp. 647 (1900).

79. Merritt v. Thompson, 1 Hilt. (N. Y.) 550 (1858); Holmes v. Johnson, 42 Pa. 159 (1862); Gibbes v. Vincent, 11 Rich. (S. C.) 323 (1858); 2 Chamb., Ev., § 1099, n. 3, and cases cited.

80. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924 (1905).

81. Eagle v. Emmet, 4 Bradf. Sur. (N. Y.) 117 (1856); Smith v. Knowlton, 11 N. H.

191 (1840); Davie v. Briggs, 97 U. S. 628 (1878).

Sickness, Bad Bodily Condition, etc.—

Leach v. Hall, 95 Iowa 611, 64 N. W. 790 (1885); Chapman v. Kimball, 83 Me. 389, 22 Atl. 254 (1891); Cambreleng v. Purton, 12 N. Y. Supp. 741 (1890); *aff'd* 125 N. Y. 610, 26 N. E. 907 (1891); 2 Chamb., Ev., § 1099, n. 5, and cases cited.

82. Modern Woodmen of America v. Graber, 128 Ill. App. 585, (1906); Renard v. Bennett, 76 Kan. 848, 93 Pac. 201 (1908); Bailey v. Bailey, 36 Mich. 181 (1877); Dunn v. Travis, 67 N. Y. Supp. 743, 56 App. Div. 317 (1900); 2 Chamb., Ev., § 1099, n. 6 and cases cited.

83. Johnston v. Garvey, 124 N. Y. Supp. 278 (1910); Puckett v. State, 1 Sneed (Tenn.) 355 (1853); Washington Safe, etc., Co. v. Lietzow, 59 Wash. 281, 109 Pac. 1021 (1910); 2 Chamb., Ev., § 1099, n. 6, and cases cited.

84. Iberia Cypress Co. v. Thorgeson, 116 La. 218, 40 So. 682 (1906); Harris v. State Bank, 97 N. Y. Supp. 1044, 49 Misc. 458 (1906). So also, acts of conduct by persons within or without the family of which the person whose death is in question was a mem-

the absentee was treated in legal proceedings as a nonresident⁸⁵ is inadmissible. That the testator on whose disposition of property the inquiry arises apparently supposed that the alleged deceased person was living within seven years, is for like reasons, in itself, a matter of no consequence.⁸⁶

Admissions.—The law of admissions may operate to estop a party from claiming that a given person is dead.⁸⁷

Documents.—The same rule applies to documents. A certificate of death, to be valid, must be properly authenticated.⁸⁸

Relevancy.—It is essential to admissibility, also, that the fact offered in evidence should be relevant.⁸⁹

§ 456. [Presumption of Death]; Failure to Hear.⁹⁰—So instinctive and customary is it that one away from home, even if he have acquired a new domicile elsewhere, should desire to communicate with family and friends, that when it is made to appear in evidence that such persons have, without assignable cause, failed to hear from or of an absent member of the family for a considerable time⁹¹ an inference of fact arises that he is dead. The bare fact of absence for seven years⁹² is not, as has been seen,⁹³ sufficient, as an inference of fact, standing alone, to make a *prima facie* case overcoming the assumption or presumption of the continuance of life.

Absence of Tidings is Important Only When it Exists at Absentee's Home.—The presumption of law that a person not heard from for seven years is dead, arises only when the absence of the person in question is from his home.⁹⁴ No similar inference of fact arises where the person has changed his domicile, or otherwise transferred home ties⁹⁵ or where he has removed to a different state or to a foreign country.⁹⁶ Only ignorance by the home relatives is sig-

ber, concerning his absence which amount to the statement of an inference or conclusion on their part that he is or is not dead, are to be rejected as, in effect, hearsay. §§ 857, *et seq.*; 4 Chamb., Ev., § 2698 *et seq.* Rumor will not be received. *Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084 (1910); 2 Chamb., Ev., § 1099a.

85. *Ferrell v. Grigsby* (Tenn. Ch. App. 1899), 51 S. W. 114.

86. *Whiteside's Appeal*, 23 Pa. 114 (1854).

87. A party who admits that a person is alive by a judicial admission will not be permitted to deny that fact however strong the inference of death. *Doane v. McKenny*, 2 Nova Scotia 328 (1854).

88. *Lucas v. Current River Land & Cattle Co.*, 186 Mo. 448, 85 S. W. 359 (1905).

89. 2 Chamb., Ev., 1099a.

90. 2 Chamberlayne, Evidence, §§ 1100–1105.

91. *Garwood v. Hastings*, 38 Cal. 216

(1869); *Baugh v. Boles*, 66 Ind. 376 (1879); *Bowditch v. Jordan*, 131 Mass. 321 (1881); *Sheldon v. Ferris*, 45 Barb. (N. Y.) 124 (1865); *Holmes v. Johnson*, 42 Pa. 159 (1862); 2 Chamb., Ev., § 1100, n. 1, and cases cited.

92. *Brown v. Jewett*, 18 N. H. 230 (1846).

93. § 452; 2 Chamb., Ev., § 1092.

94. *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524 (1864).

95. *Hansen v. Owens*, 132 Ga. 648, 64 S. E. 800 (1909); *Wentworth v. Wentworth*, 71 Me. 72 (1880).

96. *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455 (1846); *Francis v. Francis*, 180 Pa. 644, 37 Atl. 120, 57 Am. St. Rep. 668 (1897); 2 Chamb., Ev., 1101, n. 3, and cases cited.

Presumption alone.—To raise the presumption of death from seven years' absence the inquiry made must be at the last known residence of the party and where one becomes estranged from his family and goes to another

nificant in this connection.⁹⁷ *A fortiori* where an entire family remove from the old home the failure of the relatives remaining there even after a long time⁹⁸ to hear from the head of the family does not raise a presumption that they are all dead. *Intimate friends* may properly, however, constitute a class whose failure to hear from or about an absentee may be highly significant.⁹⁹

Actual Receipt of Tidings.—The fact of tidings of an absence or other evidence that he is still alive at a certain time, may be proved by any one.¹ Such knowledge destroys the inference of death regardless of the relation to the home of the persons possessed of it.²

Infirmative Considerations.—Many considerations, both objective and subjective, tend to impair the probative force of the inference of fact that a person is dead because he has not been heard from by his family and friends at the place of his former residence for an extended time. "Considering the great length and breadth of this country, and the migratory character of the people, the presumption has less force here than in the country where the law on this subject originated."³

Probability of Information.—The inference that a party is dead because he has not been heard from naturally gains in probative force in proportion to the probability that if he had been alive he would himself have communicated with his friends or been mentioned in some message by others.⁴

state inquiry at the residence of his family is insufficient. *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915 B 749 (1913).

97. *Wentworth v. Wentworth*, *supra*; *Manley v. Pattison*, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 543 (1895); *Thomas v. Thomas*, 16 Neb. 553, 20 N. W. 846 (1884); *In re Miller*, 9 N. Y. Supp. 639 (1888); 2 Chamb. Ev., § 1101, n. 4 and cases cited. In the same way where relatives living elsewhere than at home fail to hear from the person in question [*Hitz v. Algreen*, 170 Ill. 60, 48 N. E. 1068 (1897)], the circumstance is not regarded as significant. Even where a husband or wife move away from the former home of the absentee, their failure to hear from him is not necessarily probative. *Thomas v. Thomas*, *supra*; *Gorham v. Settegast* (Tex. Civ. App. 1906), 98 S. W. 665.

98. *Campbell v. Reed*, 24 Pa. 498 (1855) (30 years); *Manley v. Pattison*, *supra*. The failure of strangers, whether at or near the home or not, is devoid of probative effect *State v. Teulon*, 41 Tex. 249 (1874).

99. *Wentworth v. Wentworth*, *supra*. Should it happen that the absentee leaves no family with whom he is on friendly terms, and no intimate associates with whom he has

been in the habit of corresponding, silence as to news from him at his former home can scarcely be regarded as of probative importance. *In re Bd. of Education*, 173 N. Y. 321, 66 N. E. 11 (1903); *Renard v. Bennett*, 76 Kan. 848, 93 Pac. 261 (1908). The fact that the postal authorities or the makers of directories at the place of an absentee's former residence do not know him is but slight evidence that he is dead. *Hall's Deposition*, 1 Wall. Jr. (U. S.) 85, 104 (1843).

1. *Matthews v. Simmons*, 49 Ark. 468, 5 S. W. 797 (1886).

2. "There is no rule of law which confines such intelligence to any particular class of persons. It is not a question of pedigree." *Flynn v. Coffee*, 12 Allen (Mass.) 133 (1866). Where a person has been heard from at a particular time, the evidence will not be rejected as hearsay. *Dowd v. Watson*, 105 N. C. 476 (1890).

3. *Smith v. Smith*, 49 Ala. 156 (1873); 2 Chamb. Ev., § 1103.

4. *Robinson v. Robinson*, 51 Ill. App. 317 (1893); *Sterrett v. Samuel*, 108 La. 346, 32 So. 428 (1902); *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121 (1877); *Straub v. Grand Lodge, etc.*, 37 N. Y. Supp. 750, 2 App. Div. 138 (1896), *aff'd* 158 N. Y. 729, 53 N. E. 1132

Shorter Periods.—The *prima facie* inference of death from absence, unless accompanied by information among family and friends, may arise at an earlier time than seven years when appropriate facts are shown.⁵ Where the lapsed interval is less than seven years more affirmative evidence of death is needed.⁶

§ 457. [Presumption of Death]; Subjective Facts.⁷—The habits, temperament, objects in life, plans, ideals, and, indeed, anything out of which a motive or shade of motive may arise in case of a person's failure to communicate with home and friends may be received by the court so far as it tends to ascertain the reason for the conduct in question.⁸ Thus, where a person is of a cheerful disposition, attached to his family and friends,⁹ a shorter period of absence will ground a *prima facie* inference of death, than would be the case in respect to one afflicted with domestic troubles, or naturally vicious in character¹⁰ or of a gloomy and morose disposition.

Peculiar Inducements to Communicate.—In general, any circumstance which should have hastened the person affected in communicating with family and friends may be shown to have been known to the absentee.¹¹

§ 458. [Presumption of Death]; Unavailing Search.¹²—The probability that

(1899); *Travelers' Ins. Co. v. Rosch*, 23 Ohio Cir. Ct. 491 (1902); 2 Chamb., Ev., § 1104, n. 1, and cases cited. In proportion as the field over which inquiries are to be made and from which alone information can be received becomes limited, does the inference of death from failure to hear grow stronger in probative force. *Id.*

5. *Tisdale v. Conn. Mut. Life Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136 (1868); *Carpenter v. Supreme Council L. of H., etc.*, 79 Mo. App. 597 (1899); *Cox v. Ellsworth*, 18 Neb. 664, 26 N. W. 460, 53 Am. Rep. 827 (1886); *Stouvenel v. Stephens*, 2 Daly (N. Y.) 319 (1868); 2 Chamb., Ev., § 1105, n. 1, and cases cited.

6. *Garden v. Garden*, 2 Houst. (Del.) 574 (1871). The death of a person may be presumed in less than seven years from circumstances showing the strong probability of his death as where a man with no known reason for disappearing is lost and tracks leading to the river and other circumstances create a strong presumption that he has been drowned. *Coe v. National Council*, 96 Neb. 130, 145 N. W. 112, L. R. A. 1915 B 744 (1914).

7. 2 Chamberlayne, Evidence, § 1106.

8. *Reedy v. Millizen*, 155 Ill. 636, 40 N. E. 1028 (1895); *Tisdale v. Conn. Mut. L. Ins. Co., supra*; *Behlmer v. Grand Lodge A. O. U. W., etc.*, 109 Minn. 305, 123 N. W. 1071

(1909); 2 Chamb., Ev., § 1106, n. 1, and cases cited.

9. *In re Ross' Estate*, 140 Cal. 282, 73 Pac. 976 (1903); *Spahr v. Mut. L. Ins. Co.*, 98 Minn. 471, 108 N. W. 4 (1906); *Cox v. Ellsworth, supra*; *Dunn v. Travis, supra*; *Chapman v. Kullman*, 191 Mo. 237, 89 N. W. 924 (1905); 2 Chamb., Ev., § 1106, n. 3 and cases cited.

10. *In re Miller*, 9 N. Y. Supp. 639 (1890), aff'd 147 N. Y. 713 (1895). So also, in case of a man devoted to business, of good habits who has a permanent residence, than would be the case were the person in question one of shiftless and roving habits. *Springmeyer v. Sovereign Camp, Woodmen of the World* (Mo App. 1910), 129 S. W. 273.

11. *In re Miller, supra*. For example, the effect of mere failure to hear is greatly strengthened where a person who knows that he has rights in bank deposits or other property, fails for a long period to advance any claim to them. *Louisville Bank v. Public School Trustees*, 83 Ky. 219 (1885). This inference is still further strengthened where the absentee had previously demanded his rights with regularity and the money is necessary to his support were he alive. *Matter of Ackerman*, 2 Redf. Sur. (N. Y.) 521 (1877).

12. 2 Chamberlayne, Evidence, §§ 1107-1109.

information would have been received from a person had he been alive is greatly increased where diligent search has been made for him.¹³ This reinforcement of the probative force of the inference of death is strong in proportion to the thoroughness and intelligence with which search has been made and the length of time over which it has been maintained.¹⁴ On the contrary, where no efforts have been made to obtain information, extended absences without knowledge even on the part of the family,¹⁵ do not raise the *prima facie* inference of fact or the presumption of law. While affirmative evidence of suitable search will, as a rule, be insisted upon by the court, the requirement will be dispensed with where it is obviously the most pressing moral duty of the absentee to communicate with the person who has failed to hear.¹⁶

What Constitutes.—The presiding judge may well be justified in requiring the affirmative evidence of search, in addition to the inferences arising from failure to hear, in appropriate quarters.¹⁷ “All those persons who in the

13. *Hansen v. Owens*, 132 Ga. 648, 64 S. E. 800 (1909); *Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084 (1910); *Wentworth v. Wentworth*, *supra*; *In re Barnes' Estate*, 91 N. Y. Supp. 706, 100 App. Div. 479 (1905); 2 Chamb., Ev., § 1107, n. 1, and cases cited.

14. *McCartee v. Camel*, 1 Barb Ch. (N. Y.) 455 (1846); *State University v. Harrison*, 90 N. C. 385 (1884); *Nehring v. McMurray* (Tex. Civ. App. 1898), 45 S. W. 1032; 2 Chamb., Ev., § 1107, n. 2, and cases cited. A further enhancement of evidentiary value arises where the unavailing search has been diligently prosecuted over a limited area, e.g. a ship at sea. *Traevlers' Ins. Co. v. Rosch*, *supra*. Where advertisements have been inserted for a considerable time in papers likely to come to the attention of the person in question if alive or a searching inquiry has been made at the place where he was last known to have been living, a presumption or inference of death naturally arises, where such efforts are unattended with success. *In re Robertson*, P. D., p. 8 65 E. C. L. 16 (1896). The probative force of failure to hear from advertisements may be affected by the illiterate condition of the person intended to be reached. *In re Miller*, *supra*.

15. *In re Bd of Education*, 173 N. Y. 321, 66 N. E. 11 (1903), dismissing appeal, 77 N. Y. Supp. 1121, 74 App. Div. 632 (1902); *Ulrich's Estate*, 14 Phila. (Pa.) 243 (1880).

16. Thus, where a wife has remained at the home of herself and her husband for seven years, her failure to hear for that time will raise a presumption of death, even in the ab-

sence of any evidence of search on her part. *In re Harrington's Estate*, 140 Cal. 244, 73 Pac. 1000 (1903), rehearing denied, 140 Cal. 204, 74 Pac. 136; *Behlmer v. Grand Lodge, A. O. U. W.*, 109 Minn. 505, 123 N. W. 1071; *Miller v. Sovereign Camp, Woodmen, etc.*, 140 Wis. 505, 122 N. W. 1126 (1909). The same rule has been applied to other cases. See 2 Chamb., Ev., § 1107, n. 7, and cases cited.

17. *Renard v. Bennett*, 76 Kan. 848, 93 Pac. 261 (1908); *Modern Woodmen of America v. Gedom*, 72 Kan. 391, 82 Pac. 1100 (1905); 2 Chamb., Ev., § 1108, n. 1, and cases cited.

Presumptive absence.—The presumption of death from seven years' absence depends on inquiry made of the persons and at the places where news of him if living would most probably be had. *Modern Woodmen v. Ghromley*, 41 Okla. 532, 139 Pac. 306, L. R. A. 1915 B 728 (1914). Death will be presumed by the unexplained absence of a person for seven years without having been heard from, although diligent inquiry had been made for him, and a rule of a fraternal insurance company that unexplained absence should never be evidence of death is void as unreasonable. *Hannon v. Grand Lodge*, 99 Kan. 734, 163 Pac. 169, L. R. A. 1917 C 1029 (1917).

Where one leaves his orphan brother in an orphans' home and goes to another state where he stays for a number of years and returns and spends three days trying to find his brother, this is not sufficient evidence of death, although it also appears that an epidemic visited the asylum the year before the search, where it did not appear that the brothers

ordinary course of events would likely receive tidings if the party were alive, whether members of his family or not, should be interrogated, and the result of the inquiry should be given in evidence, or the testimony of the parties themselves should be produced at the trial;" ¹⁸ "and until reasonable effort has been expended to exhaust all patent sources of information, and all others which the circumstances of the case may suggest, it cannot be truthfully asserted that diligent inquiry has been made." ¹⁹

Administrative details.—Under the rules of judicial administration, the burden of proof is usually upon the party alleging death at a particular time to establish that fact, ²⁰ by the most probative and conclusive evidence. ²¹

§ 459. [Presumption of Death]; Computation of the Seven Year Period.—The period of seven years at the end of which a presumption of death arises is taken to begin at the time when the last tidings of or from the person in question were received. ²²

§ 460. [Presumption of Death]; Time of Actual Death; No Presumption of Life During Seven Years. ²³—The time at which the presumption in question establishes the *prima facie* inference of death is at the end of seven years from the time when information was last received.

Life During Entire Period.—The courts have left to the actor the duty or burden of producing evidence establishing death at any particular time during the seven years. On this point, of the time of actual death, the substantive law of persons acting through judicial procedure is absolutely silent. ²⁴ No presumption of law exists to the effect that the person in question will be taken to have been alive during the entire period of seven years, ²⁵ although

were in the habit of corresponding or that the lost brother was in the asylum when the search was made. *Modern Woodmen v. Ghromley*, 41 Okla. 532, 139 Pac. 306, L. R. A. 1915 B 728 (1914).

18. *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068 (1897). See also, 13 Cyc. 301.

19. *Modern Woodmen of America v. Gerdorn*, 72 Kan. 391, 82 Pac. 1100 (1905).

20. *Modern Woodmen of Am. v. Gerdorn*, *supra*; 2 Chamb., Ev., § 1109.

21. For example, where the evidence as to a certain person's death is furnished by letters, the judge may insist that the writings themselves should be produced. *Martinez v. Vives*, 32 La. Ann. 305 (1880). Proof of death cannot be made by production of a newspaper, if more conclusive evidence be reasonably procurable. *Fosgate v. Herkimer Mfg., etc., Co.*, 9 Barb. (N. Y.) 287 (1850).

22. *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9 (1892); *Morrow v. McMahon*, 71 N. Y.

Supp. 961, 35 Misc. 348 (1901); 2 Chamb., Ev., § 1110.

23. 2 Chamberlayne, Evidence, §§ 1111-1114.

24. *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443 (1897).

25. *State v. Henke*, 59 Iowa 457, 12 N. W. 477 (1882); *Smith v. Combs*, *supra*; *Supreme Commandery, etc., v. Everding*, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419 (1900); 2 Chamb., Ev., § 1111, n. 2, and cases cited. In case of absence of seven years there is no presumption that death occurred at any particular time, but at the end of seven years' absence the law presumes him to be dead. *Apitz v. Knights and Ladies of Honor*, 274 Ill. 196, 113 N. E. 63, L. R. A. 1917 A. 183 (1916). A presumption of death may arise from seven years' unexplained absence. So where a young unmarried man was in the habit of writing regularly to his parents and is last heard from as going to the mines in

some suggestion has been made that such is the effect of the assumption of the continuance of life when imported into the consideration of the matter.²⁶

Death at Beginning of Period.—It has been judicially asserted that the absentee will be assumed to have died at the beginning of the period of seven years.²⁷

Death at End of a Considerable Period.—A middle ground has, however, been suggested;—to the effect that death will be presumed to have taken place after the lapse of some considerable time from the disappearance.²⁸

Death at the End of Seven Years.—In reality, the only assumption which the law makes is that the absentee is dead at the end of the statutory period.²⁹

No Assumption of Time of Death During the Seven Years.—There is no presumption of law that death took place at any particular time within the period of seven years.³⁰

Burden of Evidence.—The party to whose case the fact of death at a particular time within the statutory period is essential has the burden of evidence to establish it.³¹

Peru his death may be presumed after seven years. But there is no presumption of his death at any particular time in that period. *McLaughlin v. Sovereign Camp, etc.*, 97 Neb. 71, 149 N. W. 112, L. R. A. 1915 B 756 (1914).

26. *Eagle v. Emmet*, 4 Bardf. Sur. (N. Y.) 117 (1856); *Shown v. McMackin*, 9 Lea (Tenn.) 601 (1882); *Whiteley v. Equitable Life, etc., Co.*, 72 Wis. 170 (1888); 2 Chamb., Ev., § 1111, n. 3, and cases cited. "While, therefore, it is true that there is no presumption that death occurred at any particular time within the seven years, it is also true that, in the absence of contravening facts or controlling presumptions, it will be presumed that life continued during the entire period." *Reedy v. Millizen*, 15 Ill. 636, 40 N. E. 1028 (1895), quoted in 13 Cyc., p. 304. There is no presumption of the continuance of life after the lapse of the statutory period. *Gibson v. Hall*, 74 L. J. Ch. 548, 2 Ch. 181, 92 L. T. 826 (1905). For Effect of the Presumption of the Continuance of Life, see discussion in 2 Chamb., Ev., § 1112.

27. *Godfrey v. Schmidt*, Cheves Eq. (S. C.) 57 (1840); 2 Chamb., Ev., § 1113, n. 1, and cases cited.

28. *Nepean v. Doe*, 7 L. J. Exch. 335, 2 M. & W. 894, Thayer, Ev., 109 (1837). Thus, where a vessel on which the absentee took passage was not again heard from, it has been held that death will be taken to have

occurred at the end of the time covered by the longest known voyage between the port of sailing and that of destination. *Gerry v. Post*, 13 How. Pr. (N. Y.) (1855); *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571 (1846). The time of actual death, however, whether before or after the expiration of the statutory period, is purely a question of evidence, for the determination of the jury. *Butler v. Supreme Court I. O. F.*, 53 Wash. 118, 101 Pac. 481 (1909).

29. *Reedy v. Millizen*, *supra*; *Bailey v. Bailey*, 36 Mich. 181 (1877); *Smith v. Knowlton*, 11 N. H. 191 (1840); *Burkhardt v. Burkhardt*, 63 N. J. Eq. 479, 52 Atl. 296 (1902); *In re Davenport*, 75 N. Y. Supp. 934, 37 Misc. 455 (1902); *Rhodes' Estate*, 10 Pa. Co. Ct. 386 (1890); 2 Chamb., Ev., § 1113, n. 5, and cases cited. As to Logic and Procedure, see 2 Chamb., Ev., § 1113, and notes 6-8.

30. *Schaub v. Griffin*, *supra*; *Spahr v. Mut. L. Ins. Co.*, 98 Minn. 471, 108 N. W. 4 (1906); *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455 (1846); *Whiteley v. Equitable L. Assur. Co.*, *supra*; 2 Chamb., Ev., § 1114, n. 2, and cases cited.

31. *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248 (1867); *Johnson v. Merithew*, 80 Me. 111 (1888); *Schaub v. Griffin*, *supra*; *Bradley v. Modern Woodmen of Am.*, 146 Mo. App. 428, 124 S. W. 69 (1910); 2 Chamb., Ev., § 1114, n. 3, and cases cited.

§ 461. [Presumption of Death]; Presumption Rebuttal.³²—The presumption of death from seven years' absence without tidings received by those who are likely to hear, is, like all true presumptions of law, clearly rebuttable.³³ The burden of evidence to produce rebutting inferences is on the party against whom the presumption operates³⁴ and, until such rebutting evidence is produced, the presumption establishes a *prima facie* case, i.e., sustains the burden of evidence.³⁵

Affirmative Evidence of Life.—In rebuttal it may be affirmatively shown even by persons not members of the family,³⁶ that the absentee was alive within a period of seven years. The testimony of a single witness³⁷ accompanied by corroborative evidence of some independent fact, as the receipt of a letter from the alleged deceased within seven years,³⁸ will prevent the operation of the presumption. The presumption of death is equally overcome by evidence of witnesses that the absentee returned to his home³⁹ or is in some other way shown to be alive⁴⁰ within seven years.

Hiding.—It may be shown by the opponent, in rebuttal, that the absentee had a motive for his silence, as that he was a fugitive from justice,⁴¹ had absconded from his creditors,⁴² had run away from an orphan asylum,⁴³ prison, jail or other place of involuntary detention, or has some other reason for concealing his identity.⁴⁴

Motive Not to Return or Communicate.—Even where the absentee is not under a strong motive to conceal his whereabouts, he may be lacking in desire

32. 2 Chamberlayne, Evidence, §§ 1115-1118.

33. *In re Stockbridge*, 145 Mass. 517, 14 N. E. 928 (1887); *Biegler v. Supreme Council, etc.*, 57 Mo. App. 419 (1894); *In re Liter*, 19 Mont. 474, 48 Pac. 753 (1897); 2 Chamb., Ev., § 1115, n. 1, and cases cited.

34. *Magness v. Modern Woodmen of Amer.*, 146 Iowa 1, 123 N. W. 169 (1909); *Hoyt v. Newbond*, 45 N. J. L. 219, 46 Am. Rep. 757 (1883).

35. *Magness v. Modern Woodmen of Amer.*, *supra*; *Willcox v. Trenton Potteries Co.*, 64 N. J. Eq. 173, 53 Atl. 474 (1902). The same idea has been put into the rather misleading form of saying that until rebutting evidence is introduced, the presumption of law is conclusive. *Willcox v. Trenton Potteries Co.*, *supra*. Strictly speaking, the presumption of death from absence is in no proper sense conclusive. *Magness v. Modern Woodmen of Amer.*, *supra*.

36. *Flynn v. Coffee*, 12 Allen (Mass.) 133 (1866).

37. *Springmeyer v. Sovereign Camp, Woodmen of the World* (Mo. App. 1910), 129 S. W. 273; *Kennedy v. Modern Woodmen of Amer.*, 243 Ill. 560, 90 N. E. 1084 (1910);

2 Chamb., Ev., § 1116, n. 2, and cases cited.

38. *Smith v. Smith*, 49 Ala. 156 (1873).

39. *Thomas v. Thomas*, 19 Neb. 81, 27 N. W. 84 (1887).

40. *Spiltoir v. Spiltoir*, 72 N. J. Eq. 50, 64 Atl. 96 (1906). Most conclusive of all, of course, is the reappearance of the person in question. *Mayhugh v. Rosenthal*, 1 Cinc. Super. Ct. (Ohio) 492 (1871).

Question for Jury.—Where rebutting evidence makes it reasonable for the jury to find either way, the question will be submitted to them. *Mutual Ben. L. Ins. Co. v. Martin*, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465 (1900). CONTRA, *Minneapolis M. Co. v. R. Co.*, 51 Minn. 304, 53 N. W. 639 (1892).

41. *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300 (1857); *O'Kelly v. Felker*, 71 Ga. 775 (1883); *Winter v. Sup. Lodge K. of P.*, 96 Mo. App. 1, 69 S. W. 662 (1902); 2 Chamb., Ev., § 1117, n. 1, and cases cited.

42. *Sensenderfer v. Pac. Mut. L. Ins. Co.*, 19 Fed. 68 (1882).

43. *In re Miller*, 9 N. Y. Supp. 639 (1890). *aff'd* 147 N. Y. 713, 42 N. E. 726 (1895).

44. *Donovan v. Twist*, 93 N. Y. Supp. 990, 105 App. Div. 171 (1905).

to reveal them. He may be 'flighty and visionary' in his 'mental' methods.⁴⁵ The case may be one where the motive to return could not effectively operate upon the volition of the person in question, as in case of children of tender years⁴⁶ and others not *sui juris*, where there is, properly speaking, no independent volition to affect. The same inference arises where the person is under the restraint of others, is in prison or the like.⁴⁷

§ 462. **Presumptions of Law; Criminal Cases.**⁴⁸—The jurisprudence of both England and America has seen fit to establish in connection with the substantive law of crimes various presumptions of law attaching a *prima facie* quality to the inferences of fact arising out of certain definite circumstances. Many of these presumptions of law are statutory at the present day.⁴⁹ No constitutional right of a defendant to confrontation,⁵⁰ a speedy and public trial by an impartial jury, to compulsory process, or to a presumption of innocence in his favor, is infringed by the passage of such a statute erecting possession of certain articles into a *prima facie* case of guilt of a given offense.⁵¹

Presumption of Coercion.—A familiar rule in the relations of husband and wife in connection with crimes done by the wife in the presence of the husband may be put into the form of saying that there is a presumption of coercion of a wife by her husband to commit a crime, from his presence at the time of the commission, but the presumption is not conclusive, and may be rebutted.⁵²

§ 463. **[Criminal Cases]; Capacity for Crime.**⁵³—In the absence of evidence of his age, an accused person is said to be presumed (assumed) capable of committing a crime.⁵⁴ Still, proof of age may, under the substantive law, customarily disguised under the terms of presumption, i.e., of evidence, attach to the fact of age certain definite effects as to capacity to commit particular crime.⁵⁵

Under Seven.—Below a certain fixed age, established by the common law at

45. *Sensenderfer v. Pac. Mut. L. Ins. Co.*, *supra*.

46. *Manley v. Pattison*, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 543 (1895); 2 Chamb., Ev., § 1118.

47. *Schwarzhoff v. Necker*, 1 Tex. Unrep. Cas 325 (1880).

48. 2 Chamberlayne, Evidence, § 1119.

49. *Robertson v. People*, 20 Colo. 279 (1894); *Cole v. Porteous*, 19 Ont. App. (Can.) 111 (1892); *Gulson: Philosophy of Proof*, 434, § 498. Wherever, for example, the possession of fish or game out of season is made *prima facie* evidence of a taking in close season contrary to law, or a counterfeiter or burglar is *prima facie* guilty of counterfeiting or burglary if unable to satisfactorily explain his possession of tools well adapted to

such illegal purpose and useless for any other, instances of a very large number of similar presumptions of law in criminal cases are furnished. 2 Chamb., Ev., § 1119.

50. §§ 224 *et seq.*; 1 Chamb., Ev., § 458 *et seq.*

51. *State v. Sheehan*, 28 R. I. 160, 66 Atl. 66 (1907).

52. *Com. v. Adams*, 186 Mass. 101, 71 N. E. 78 (1904).

53. 2 Chamberlayne, Evidence, §§ 1120–1120g.

54. *Broadnax v. State*, 100 Ga. 62, 25 S. E. 844 (1896).

55. *State v. Howard*, 88 N. C. 650 (1883); *Jones v. State*, 31 Tex. Cr. 252, 20 S. W. 578 (1892); 2 Chamb., Ev., § 1120.

7, but which has been variously extended by statute to 9,⁵⁶ 10⁵⁷ or even 12,⁵⁸ a child is said to be "conclusively presumed" incapable of committing crime.⁵⁹

Seven to Fourteen.—Between the ages of 7 and 14⁶⁰ there is, it is said, a presumption of law that an infant is incapable of committing a criminal offense.⁶¹ The ground for this rule is that he is not of sufficient judgment and understanding to be aware of the nature of his act.⁶² This assumption may be rebutted by evidence showing that this ability to realize the nature and quality of a criminal act, in reality, existed at the time of the offence.⁶³ Where this knowledge is shown to have been present he may be punished for what he has done.⁶⁴ The burden of evidence is upon the prosecution to prove the actual capacity for crime.⁶⁵

Rape.—At common law, a male infant under the age of 14 was conclusively presumed⁶⁶ to be incapable of committing the crime of rape. This rule

56. *Gardiner v. State*, 33 Tex. 692 (1870).

57. *Canton Cotton Mills v. Edwards*, 120 Ga. 447, 47 S. E. 937 (1904); *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132 (1880).

58. *Dove v. State*, 37 Ark. 261 (1881).

59. *Ford v. State*, 100 Ga. 63, 25 S. E. 84 (1896); *State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592 (1818); *People v. Townsend*, 3 Hill (N. Y.) 479 (1842); *State v. Davis*, 104 Tenn. 501, 58 S. W. 122 (1900); 2 Chamb., Ev., § 1120a, n. 4, and cases cited. Translated into the language of substantive law, where the conclusive presumption properly belongs (§§ 470 *et seq.*; 2 Chamb., Ev., §§ 116 *et seq.*), this means that a child under this age is not criminally liable for the consequences of his acts.

60. In various states where the legislature has seen fit to increase the first period of legal immunity, the second is correspondingly shortened. Thus, in Arkansas, the second period extends from 12 to 14. *Dove v. State*, *supra*. In Georgia and Illinois, from 10 to 14. *Ford v. State*, *supra*; *Angelo v. People*, *supra*. In New York, the legislature has diminished the age limit within which an infant is *prima facie* incapable of crime, fixing the years of the second period as from 7 to 12. *People v. Squazza*, 81 N. Y. Supp. 254, 40 Misc. 71 (1903). Texas combines these two methods of treatment by establishing the period of presumable immunity as between the years 9 and 13. *Allen v. State* (Tex. Cr. App. 1906), 37 S. W. 757.

61. *Harrison v. State*, 72 Ark. 117, 78 S. W. 763 (1903); *State v. Milholland*, 89 Iowa 5, 56 N. W. 403 (1893); *Com. v. Mead*, 10

Allen (Mass.) 398 (1882); *State v. Adams*, 76 Mo. 355 (1882); *People v. Domenico*, 92 N. Y. Supp. 390, 45 Misc. 309 (1904); *State v. Toney*, 15 S. C. 409 (1880); and cases cited in last preceding note. See also, 2 Chamb., Ev., § 1120b, n. 2, and cases cited.

62. § 463; 2 Chamb., Ev., § 1120f.

63. *McCormack v. State*, 102 Ala. 156, 15 So. 438 (1894); *People v. Squazza*, *supra*; *State v. Hicks*, 125 N. C. 636, 34 S. E. 247 (1899); *State v. Davis*, *supra*; *Allen v. U. S.*, 150 U. S. 551, 14 S. Ct. 196, 37 L. ed. 1179 (1903); and cases cited in last two preceding notes. See also, 2 Chamb., Ev., § 1120b, n. 4, and cases cited.

64. *State v. Fowler*, 2 Ky. Law Rep. 150 (1880); *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404 (1828); *People v. Teller*, 1 Wheel. Cr. (N. Y.) 231 (1823); *Com. v. McKeagy*, 1 Ashm. (Pa.) 248 (1831); 2 Chamb., Ev., § 1120b, n. 5, and cases cited.

65. *Harrison v. State*, *supra*; *Ford v. State*, *supra*; *State v. Adams*, *supra*; 2 Chamb., Ev., § 1120b, n. 7, and cases cited.

Inference of Fact.—There is a general inference of fact that a child under 14 fails to possess the requisite knowledge, mental and physical powers required for the commission of a criminal act. This inference or presumption is very strong while he is near the age of 7 but becomes weaker as he progresses toward the age of 14. *McCormack v. State*, *supra*; *State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592 (1818); 2 Chamb., Ev., § 1120c, n. 2, and cases cited.

66. It is not an inference at all, but a rule

relates to his assumed physical capacity to commit the crime.⁶⁷ The substantive law, therefore, freed the infant from the consequences of a crime of this nature, as principal in the first degree.⁶⁸ The offense of being an accessory, if absent from the scene of the crime⁶⁹ or principal in the second degree, if present,⁷⁰ might still be committed by the infant though under fourteen. The early rule continues to be followed in certain American jurisdictions.⁷¹ In others, however, the assumed physical incapacity of the accused has been placed upon the same legal footing as the presumed mental incapacity⁷² of persons of the same age to commit this and other crimes.

Fourteen to Twenty-one.— In the absence of special circumstances or rules of substantive or procedural law, the fact of *minority*, i.e., that one accused of crime is under the age of 18, where that is the date of majority, or under 21, the more usual limit, does not exempt an accused person from criminal liability for the consequences of his acts.⁷³ In the absence of evidence, capacity for crime will be assumed and this assumption, it is said, will not be affected by the simple statement of the accused that he did not know that it was wrong to do as he had done.⁷⁴ This assumption may be rebutted by appropriate evidence tending to show actual incapacity.⁷⁵

Proof of Mental State or Condition.— The defendant must be affirmatively shown to have had sufficient maturity and discretion of mental power to appreciate the nature and consequences of his act.⁷⁶ The evidence need not be

of substantive law. *State v. Sam*, 60 N. C. 293 (1864).

67. *Gordon v. State*, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189 (1893); *Payne v. Com.*, 33 Ky. L. Rep. 229, 110 S. W. 311 (1908); *People v. Randolph*, 2 Park Cr. (N. Y.) 174 (1855); *State v. Fisk*, 15 N. D. 589, 108 N. W. 485 (1906); 2 Chamb., Ev., § 1120d, n. 2, and cases cited. "No conviction for rape can be had against one who was under the age of 14 years, at the time of the alleged act, unless his physical ability to accomplish penetration is proved as an independent fact, beyond a reasonable doubt." N. Y. Penal Code. § 279.

68. *Reg. v. Williams* (1893), 1 Q. B. 320, 62 L. J. M. C. 69, 5 Reports 186, 41 Wkly. Rep. 332; and other cases cited in 2 Chamb., Ev., § 1120d, n. 3.

69. *State v. McIntire*, 66 Iowa 339, 23 N. W. 735 (1885).

70. *Law v. Com.*, 75 Va. 885, 40 Am. Rep. 750 (1881).

71. *Chism v. State*, 42 Fla. 232, 28 So. 399 (1900); *Com. v. Green*, 2 Pick. (Mass.) 380 (1824); *State v. Knighten*, 39 Or. 63, 64 Pa. 866, 87 Am. St. Rep. 647 (1900); 2 Chamb., Ev., § 1120d, n. 6, and cases cited.

72. 2 Chamb., Ev., § 1120f.

73. *Hill v. State*, 63 Ga. 578, 36 Am. Rep. 120 (1879); *Angelo v. People*, 96 Ill. 209, 30 Am. Rep. 132 (1880); *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741 (1893); *People v. Kendall*, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240 (1841); 2 Chamb., Ev., § 1120e, n. 1, and cases cited. Thus, where one obtains property securing payment of the price of it by a mortgage upon certain chattels, representing that he is of full age, and is the owner of the mortgaged property, while the mortgage may be voidable by reason of non age, the minor will be held criminally liable for swindling by false pretences. *Lively v. State* (Tex. Cr. App. 1903), 74 S. W. 321. So, also, a boy over 14 will be presumed capable of committing rape. *State v. Handy*, 4 Harr. (Del.) 566 (1845); *Payne v. Com.*, *supra*; *Com. v. Hummel*, 21 Pa. Co Ct. 445 (1899).

74. *State v. Kluseman*, *supra*; § 475; 2 Chamb., Ev., § 1166. The burden of evidence is upon him to show incapacity. *State v. Di Guglielmo* (Del. 1903), 55 Atl. 350.

75. *State v. Learnard*, 41 Vt. 585 (1869).

76. *Dove v. State*, 37 Ark. 261 (1881); *Ford v. State*, 100 Ga. 63 (1896); *People v.*

direct, although the conclusion of a skilled witness, expert, so-called,⁷⁷ will be received on this point.⁷⁸ Probative facts of a circumstantial nature may be received,⁷⁹ whether extrinsic to the offense or connected with the doing of the criminal act itself.⁸⁰ When evidence is introduced upon the issue of mental capacity, the question becomes one of fact for the jury⁸¹ Capacity to entertain a criminal intent must be clearly and strongly proved;⁸² the jury must be satisfied upon the point beyond a reasonable doubt.⁸³

Procedural Assumptions.— For reasons elsewhere suggested⁸⁴ proof of the psychological fact necessary to constitute mental capacity for crime, the state of *doli capax*, is necessarily attended with difficulty. Therefore, in the absence of all proof of age, the inference or presumption of sanity so-called,⁸⁵ leads the court to take it for granted, i.e., to assume, that one accused of crime is capable of possessing the mental state requisite for its commission.⁸⁶ Where the accused is shown to be within the limit of the first age period, above mentioned,⁸⁷ the rule of substantive law is frequently put into the form of saying that one under the age of 7 is *conclusively presumed* to be incapable of forming the mental state essential to the commission of the crime;⁸⁸ and where the accused is shown to be over 7 and under 14, that there is a presumption of law that one under that age does not possess the requisite knowledge,⁸⁹ intent or other mental state essential to the commission of a crime.

§ 464. [Criminal Cases]; Presumption of Larceny from Recent, Unexplained Possession of Stolen Goods.⁹⁰— The inference of fact, the teaching of experience, to the effect that one found in the exclusive possession of recently stolen goods who cannot satisfactorily account for them is the person who stole them, is undoubtedly a strong one. It may fairly be said that the mind recognizes a probative relation between the mere possession of recently stolen property and

Domenico, 92 N. Y. Supp. 390, 45 Misc. 309 (1904); 2 Chamb., Ev., § 1120f, n. 1, and cases cited.

77. §§ 713 *et seq.*; 3 Chamb., Ev., §§ 1949 *et seq.*

78. State v. Nickleson, 45 La. Ann. 1172, 14 So. 134 (1893).

79. State v. Toney, 15 S. C. 409 (1880).

80. Stage's Case, 5 City Hall Rec. (N. Y.) 177 (1820); Wusnig v. State, 33 Tex. 651 (1870). See also, State v. Pugh, 52 N. C. 61 (1859). The personal opinion of the judge gained from inspection of the accused is not sufficient. People v. Domenico, *supra*.

81. McCormack v. State, *supra*; Dove v. State, *supra*; State v. Learnard, *supra*.

82. Angelo v. People, *supra*.

83. Martin v. State, 90 Ala. 602, 8 So. 858. 24 Am. St. Rep. 844 (1890); Law v. Com., 75 Va. 885, 40 Am. Rep. 750 (1881); Chamb., Ev., § 1120f, n. 9, and cases cited.

84. § 847; 4 Chamb., Ev., § 2639.

85. § 424; 2 Chamb., Ev., § 1052.

86. State v. Miller, 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703 (1895).

87. § 463; 2 Chamb., Ev., § 1120a.

88. Even a plea of guilty does not remove the presumption of criminal incapacity. People v. Domenico, *supra*.

89. Capacity being shown, knowledge of the illegality of an act may be assumed. Com. v. Mead, 10 Allen (Mass.) 398 (1865). A sense of moral guiltiness alone is not sufficient; guilty knowledge of the nature of the crime must be proved, if disputed. Willet v. Com., 13 Bush (Ky.) 230 (1877); State v. Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196 (1895); Allen v. State (Tex. Cr. App. 1896), 37 S. W. 757.

90. 2 Chamberlayne, Evidence, §§ 1121-1129.

guilty taking or receiving.⁹¹ For reasons analogous to those which constitute the basis of the inference against a despoiler⁹² this inference of fact becomes greatly enhanced in probative value when the possessor, being given a suitable opportunity of doing so, fails to explain, in any reasonable way, how he came by the property.⁹³

Inference Not Conclusive.—No authority exists for holding that, in and of itself, the inference is conclusive in the premises;⁹⁴ notwithstanding that the fact that there is a presumption of law to that effect has been put into the rather misleading form of saying that in the absence of all explanation or any evidence of good character, the inference of guilt is conclusive.⁹⁵

A Presumption of Law.—It is announced by the court, in charging juries on indictments, or similar proceedings, for larceny, that the unexplained exclusive possession of stolen goods shortly after the commission of the offense shall be deemed *prima facie* evidence that the possessor committed the larceny.⁹⁶ Where no suitable opportunity for offering an explanation is presented, the presumption of law does not arise.⁹⁷ The rule applies whether the larceny was simple or aggravated in its nature, was from the person,⁹⁸ committed in a building,⁹⁹ or a part of a burglary or other serious offense.¹

91. *People v. Luchetti*, 119 Cal. 501, 51 Pac. 707 (1897); *Stafford v. State*, 121 Ga. 169, 48 S. E. 903 (1904); *Johnson v. State*, 148 Ind. 522, 47 N. E. 926 (1897); *State v. Hoffman*, 53 Kan. 700, 37 Pac. 138 (1894); *State v. Toohey*, 203 Mo. 674, 102 S. W. 530 (1907); *Knickerbocker v. People*, 43 N. Y. 177 (1870); 2 Chamb., Ev., § 1121, n. 1, and cases cited.

92. §§ 430 *et seq.*; 2 Chamb., Ev., §§ 1070 *et seq.*

93. *State v. Sanford*, 8 Ida. 187, 67 Pac. 492 (1901); *Robb v. State*, 35 Neb. 285, 53 N. W. 134 (1892); *Douthitt v. Territory*, 7 Okl. 55, 54 Pac. 312 (1898); *Cook v. State*, 16 Lea (Tenn.) 461, 1 S. W. 254 (1886); 2 Chamb., Ev., § 1121, n. 3, and cases cited. See discussion as to Procedural Conflict. 2 Chamb., Ev., § 1121. Presumption of guilt from possession of stolen property, see note, *Bender ed.*, 43 N. Y. 184. Presumption of guilt from possession of stolen property, see note, *Bender ed.*, 151 N. Y. 412.

94. *Bellamy v. State*, 35 Fla. 242, 17 So. 560 (1895); *Gablick v. People*, 40 Mich. 292 (1879); *State v. Hoshaw*, 89 Minn. 307, 94 N. W. 873 (1903); *People v. Sheahan*, 1 Wheel Cr. (N. Y.) 188 (1823); *State v. Snell*, 46 Wis. 524, 1 N. W. 225 (1879); 2 Chamb., Ev., § 1122, n. 1, and cases cited.

The mere possession of the stolen goods does not of itself raise a presumption of lar-

ceny and will not alone support a conviction. *Mullins v. State*, Ala. (1918), 77 So. 963; *State v. Ford*, N. C. (1918), 95 S. E. 154.

95. *State v. Vinton*, 220 Mo. 90, 119 S. W. 370 (1909). See, however, *Moore v. State* (Tex. Cr. App. 1896), 33 S. W. 980.

96. *State v. Raymond*, 46 Conn. 345 (1878); *Keating v. People*, 160 Ill. 480, 43 N. E. 724 (1896); *Johnson v. State*, *supra*; *State v. Wilson*, 95 Iowa 341, 64 N. W. 266 (1895); *Com. v. Deegan*, 138 Mass. 182 (1884); *People v. Wood*, 99 Mich. 620, 58 N. W. 638 (1894); *People v. Weldon*, 111 N. Y. 569, 19 N. E. 279 (1888); 2 Chamb., Ev., § 1123, n. 1, and cases cited.

97. *Alexander v. State*, 60 Miss. 953 (1883); *Ball's Case*, 4 City Hall Rec. (N. Y. 113 (1819); 2 Chamb., Ev., § 1123, n. 2, and cases cited.

98. *Roberts v. State*, 33 Tex. Cr. 83, 24 S. W. 895 (1894).

99. *State v. King*, 122 Iowa 1, 96 N. W. 712 (1903).

1. *Magee v. People*, 139 Ill. 138, 28 N. E. (1891); *State v. Conway*, 56 Kan. 682, 44 Pac. 627 (1896); *Knickerbocker v. People*, 43 N. Y. 177 (1870). *Good Character.*—The presumption of law operates only until evidence is introduced on the subject. Even a *deliberative* fact, like proof of good character, may have this effect. *State v. Hes-*

Limited to Use of Circumstantial Evidence.—The use of such a presumption is obviously limited to cases where the evidence is circumstantial. Should direct evidence be furnished either as to the actual *res gestae* of the larceny or regarding the circumstances under which the possession came to be in the accused, the inference in question is irrelevant.²

Statutory Modifications.—As a rule, legislative enactments are merely declaratory of the common law. Occasionally, however, certain modifications upon the established rule have been introduced, for example, the burden of evidence to disprove the identity claimed by the owner of the stolen property may be cast upon the person in whose alleged possession it is found.³

Administrative Details.—The mere fact, however, of such unexplained possession does not, in the absence of evidence of a *corpus delicti* by way of larceny, simple or aggravated, present any evidentiary value in connection with the present presumption.⁴ Nor does probative force distinctly attach to the inference of guilt, even in case the *corpus delicti* be established, until the goods stolen and those found in possession are clearly and closely identified.⁵

Presumption of Law Denied.—Certain courts have denied the procedural force of a presumption of law to the inference of guilt which arises from recent, exclusive, and unexplained possession of stolen goods.⁶ Whatever may be the proper weight in evidence of the inference of guilt from such possession, where it is found unqualified by other evidence, it will seldom occur that it

sians, 50 Iowa 135 (1878); *State v. Sassan*, 75 Mo. App. 197 (1898); *People v. Preston*, 1 Wheel. Cr. (N. Y.) 141 (1823). When the case is otherwise doubtful, and the good character of the accused is shown, possession of stolen property is not sufficient proof to convict. *People v. Turrell*, 1 Wheel. Cr (N. Y.) 34 (1822).

2. *State v. Spencer*, 4 Oen. (Del.) 92, 53 Atl. 337 (1902); *Heed v. State*, 25 Wis. 421 (1870). It is rejected as secondary evidence. (§ 228; 1 Chamb., Ev., § 466.) 2 Chamb., Ev., § 1123a.

3. Thus, in states where the theft of cattle is a serious and customary offense and the property involved difficult of identification. *Flores v. State*, 13 Tex. App. 665 (1883); *State v. Eubank*, 33 Wash. 293, 74 Pac. 378 (1903). No retroactive effect is given to the statute. *Espy v. State*, 32 Tex. 375 (1893). The presumption may be corroborated by direct proof. *State v. McIntyre*, 53 Wash. 178, 101 Pac. 710 (1909). The statute merely regulates the burden of evidence (§ 409; 2 Chamb., Ev., § 995); the jury determine at what point a reasonable doubt has been cre-

ated. *White v. State*, 21 Tex. App. 339, 17 S. W. 727 (1886); 2 Chamb., Ev., § 1123b, n. 4, and cases cited.

4. *Sanders v. State*, 167 Ala. 85, 52 So. 417 (1910); *State v. Sassan*, 75 Mo. App. 197 (1898); *Smith v. State*, 17 Neb. 358, 22 N. W. 780 (1885); *People v. Caniff*, 2 Park. Cr. (N. Y.) 586 (1855); 2 Chamb., Ev., § 1123c, n. 1, and cases cited.

5. 2 Chamb., Ev., § 1131; *State v. Lackland*, 136 Mo. 26, 37 S. W. 812 (1896); *U. S. v. Candler*, 65 Fed. 308 (1894). Discovery of part of the stolen goods grounds an inference that the possessor removed all the missing property. *People v. Fagan*, 66 Cal. 534, 6 Pac. 394 (1885); *State v. Wilson*, *supra*; *State v. Henry*, 24 Kan. 457 (1880).

The possession of stolen goods though not identified as those the subject of the larceny claimed may, however, be competent. *Comm. v. Coyne*, Mass. (1918), 117 N. E. 337.

6. *Clark v. State*, 59 Fla. 15, 52 So. 518 (1910); *Ingalls v. State*, 48 Wis. 647, 656 (1879). It has been even said to be impossible. *State v. Hodge*, 50 N. H. 510, 517 (1869); § 445, *supra*; 2 Chamb., Ev., § 1085.

clearly entitled to reiterate, amplify³² and establish by evidence, at the trial, the explanation asserted on the discovery of the stolen goods. Its reasonableness is, as a rule, a question of fact for the jury.³³

Reasonable Doubt Alone Required.—The accused has no burden of *proof*, no duty of establishing the truth of his explanation on his peril. It is sufficient for him to raise a reasonable doubt as to some material element of his liability.³⁴ It cannot truly be said that the defendant is required “satisfactorily” to explain his possession of the property in question.³⁵

Spoliation.—In so doing, the inference of fact arising from attempting a false explanation³⁶ may seriously impair the prospects of success.³⁷ When the falsity of his explanation has been attacked by the prosecution, the accused may seek to corroborate its truth³⁸ but not, it is said, where no such attack has been made.³⁹

*Spontaneity.*⁴⁰—For reasons, more fully stated in another place, the declaration of one in possession of stolen goods in explanation of his holding, made immediately upon the propriety thereof being questioned, by arrest or otherwise, may be received as statements of part of the *res gestae*, i.e., as affirmative evidence of the facts asserted.⁴¹ So long as the spontaneity persists, the statement may be received in its assertive capacity, even after the declarant has parted with his possession.⁴² A mere narrative, however, will be rejected.⁴³

298 (1906); *Peeples v. States*, 5 Ga. App. 706, 63 S. E. 719 (1909); *Jones v. State*, 49 Ind. 549 (1875); 2 Chamb., Ev., § 1130a, n. 1, and cases cited.

32. *Brittain v. State* (Tex. Cr. App. 1907), 105 S. W. 817.

33. *State v. King*, 122 Iowa 1, 96 N. W. 712 (1903); *State v. Mandich*, 24 Nev. 336, 54 Pac. 516 (1898); 2 Chamb., Ev., § 1130a, n. 3, and cases cited.

34. *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905 (1899); *People v. Walters*, 76 Mich. 195, 42 N. W. 1105 (1885); *State v. Iax*, 71 N. J. L. 386, 59 Atl. 18 (1904); 2 Chamb., Ev., § 1130b, n. 1, and cases cited.

35. *Van Straaten v. People*, *supra*; *Hoge v. People*, 117 Ill. 35, 6 N. E. 796 (1886). “Where a party is found in possession of goods recently stolen directly gives a reasonable and credible account of how he came into such possession, or such an account as will raise a reasonable doubt in the minds of the jury, then it becomes the duty of the state to prove that such account is untrue, otherwise he should be acquitted.” *McDonald v. State* 56 Fla. 74, 47 So. 485 (1908).

36. §§ 432 *et seq.*; 2 Chamb., Ev., §§ 1071 *et seq.*; *Cleveland v. State* (Tex. Cr. App. 1909), 123 S. W. 142.

37. *Wiley v. State*, 92 Ark. 586, 124 S. W. 249 (1909); *Allen v. State* (Tex. Cr. App. 1893), 24 S. W. 30; 2 Chamb., Ev., § 1130c, n. 2, and cases cited.

38. *Nelson v. People*, 22 Colo. 330, 44 Pac. 594 (1896); *Andrews v. State*, 25 Tex. App. 339, 8 S. W. 328 (1888).

39. *May v. State* (Tex. Cr. App. 1899), 51 S. W. 242.

40. §§ 949 *et seq.*, *infra*; 4 Chamb., Ev., §§ 2982 *et seq.*

41. *Bryant v. State*, *supra*; *People v. Cline*, *supra*; *Bennett v. People*, 96 Ill. 602 (1880); *State v. Gillespie*, 62 Kan. 469, 63 Pac. 742 (1900); 2 Chamb., Ev., § 1130d, n. 2, and cases cited.

42. *Taylor v. State*, 15 Tex. App. 356 (1882).

43. § 963, *infra*; 4 Chamb., Ev., § 3021; *Dixon v. State*, 2 Tex. App. 530 (1877).

Admissions.—If the explanation of the accused be adverse to his interests, the declaration may be utilized by the prosecution as constituting an admission, or as being independently relevant. *Douglass v. State*, *supra*; *State v. Rodman*, 62 Iowa 456, 17 N. W. 663 (1883); § 534, *infra*; 2 Chamb., Ev., § 1313; §§ 837 *et seq.*; 4 Chamb., Ev., §§ 2574 *et seq.*

Rebuttal.—The government, upon proof of the explanation offered by the accused may feel that it is so improbable as not to impair the *prima facie* quality of its own affirmative case, i.e., that it raises no reasonable doubt as to guilty conduct or knowledge. If so, no rebuttal on the point is necessary.⁴⁴ Should the prosecution conclude, however, that the explanation of the accused is so far plausible that the jury may feel a reasonable doubt as to the prisoner's guilt, it may introduce evidence in rebuttal, e.g., by showing the falsity of the explanation.⁴⁵

§ 466. [Criminal Cases]; Place and Cause of Finding.⁴⁶—The place of finding the stolen goods is not material in connection with the presumption of guilt from recent possession. It need not be in the same state or county as that in which the larceny was committed.⁴⁷ The cause of finding may, however, have important logical bearing upon the strength of the inference itself.⁴⁸

Identification of Goods.—To identify the discovered goods with those which have been stolen is a clear necessity for founding any presumption of law or, indeed, inference of fact. Pieces of money or bank-notes customarily in circulation, having no ear mark,⁴⁹ are identified with difficulty. On the other hand, money of unusual amount, ancient or otherwise rare⁵¹ coinage, or distinguished by special marks,⁵² may be traced with comparative ease. The inference of identity is especially easy to draw when reinforced by other logical deductions.⁵³ A similarity in general description may suffice, under certain circumstances, for purposes of identification.⁵⁴

§ 467. [Criminal Cases]; Proof of Possession.⁵⁵—Where the goods are found on the person of the accused the issue seems settled but where they are found in a place over which it is claimed the defendant had control it must appear that the control was exclusive and that no one else could have had access to them.⁵⁶ The possession should also be personal in the sense that he was exercising acts of dominion⁵⁷ and also the possession should appear to be recent.⁵⁸ What is a recent possession may depend on the nature of the article.⁵⁹

44. *Hudson v. State*, 121 Ga. 147, 48 S. E. 903 (1904); *State v. Kimble*, *supra*; *Jones v. State*, 30 Miss. 653, 64 Am. Dec. 175 (1856); 2 Chamb. Ev., 1130e, n. 1, and cases cited. For illustrative instances of explanation held insufficient. *Id.*

45. *State v. Carr*, 4 Pen. (Del.) 523, 57 Atl 370 (1904); *Leslie v. State*, 35 Fla. 171, 17 So. 555 (1895); 2 Chamb., Ev., § 1130e, n. 2, and cases cited.

46. 2 Chamberlayne, Evidence, § 1132.

47. *Graves v. State*, 12 Wis 501 (1860).

48. *Hudson v. State*, 9 Yerg (Tenn.) 408 (1836).

50. *Thompson v. State* (Fla. 1909), 50 So. 507.

51. *People v. Getty*, 49 Cal. 581 (1875).

52. *State v. Pigg*, 80 Kan. 481, 103 Pac. 121 (1909).

53. *Collier v. State* (Fla. 1908), 45 So. 752.

54. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45 (1904).

55. 2 Chamberlayne, Evidence, §§ 1133–1136b.

56. *State v. Griffin*, 71 Iowa 372, 32 N. W. 447 (1887).

57. *Watts v. People*, 204 Ill. 233, 68 N. E. 563 (1903).

58. *Bryant v. State*, 4 Ga. App. 851, 62 S. E. 540 (1908).

59. *State v. McRae*, 120 N. C. 608, 27 S. E. 78, 58 Am. St. Rep. 808 (1897).

§ 468. [Criminal Cases]; Presumption of Malice in Homicide.⁶⁰—A most unusual presumption of law is that which as part of the substantive law of homicide has been understood to assert that where a deliberate killing of a human being with a deadly weapon is shown, and no other evidence is produced it will be presumed, as a matter of law, that the killing was done with malice.⁶¹ It has been held by certain courts that where nothing appears beyond the fact of killing, this will be *presumed, as a matter of law, to have been malicious.*⁶²

A Discredited Rule.—It will readily be noticed that the drift of modern judicial opinion is distinctly away from maintaining the presumption of malice. In many jurisdictions the conclusive quality of the presumption, originally attached to it, has been dropped. The presumption is treated as an ordinary rebuttable presumption of law, valid unless and until evidence is introduced, by one side or the other, showing justification or excuse.⁶³ When such evidence is introduced, the presumption of law, as such, is, like any other assumption of procedure as distinguished from an inference of fact, *functus officio*. Even in jurisdictions which still continue to announce the so-called, conclusive “presumption of malice” its potency for injustice has been greatly lessened under later decisions which have introduced such qualifications and modifications on its original statement as suffice to reduce it within very narrow limits.

When evidence is introduced bearing on the question of malice the presumption of law disappears⁶⁴ and it may be said in general that the presumption of malice is used only where direct proof of the actual *res gestae* is lacking.⁶⁵ The rule that malice is presumed in homicide cases is anomalous and is apparently an outgrowth of the early canon of construction of special verdicts that where the jury found that the defendant had killed the deceased this would be presumed to mean a felonious killing.

The true rule is that malice may be established by inferences of fact as from premeditation,⁶⁶ cruelty in killing,⁶⁷ the use of a deadly weapon,⁶⁸ and the absence of justification.⁶⁹

These inferences of malice may be rebutted by evidence explaining them⁷⁰

60. 2 Chamberlayne, Evidence, §§ 1137-1158.

61. Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711 (1850).

62. Hawthorne v. State, 58 Miss. 778 (1881).

63. Stokes v. People, 53 N. Y. 164, 182, 183 (1873). See also, People v. Downs, 127 N. Y. 67 (1890). Coolman v. State (Ind 1904), 72 N. E. 568.

64. Jordan v. State, 70 Ala. 9 (1885); State v. Earnest, 56 Kan. 31, 42 Pac. 359 (1895); People v. Curtis, 32 Mich. 616, 18

N. W. 385 (1883); State v. Rochester, 72 S. C. 194, 51 S. E. 615 (1905).

65. Kennison v. State (Neb. 1908), 115 N. W. 280.

66. Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 (1887).

67. State v. Jones, 86 S. C. 17, 67 S. E. 160 (1910).

68. Brown v. State, 62 N. J. L. 666, 4 Atl. 811 (1898).

69. Peri v. People, 65 Ill. 17 (1872).

70. State v. Rainsberger, 71 Iowa 746, 31 N. W. 865 (1887).

as that use was made of a deadly weapon for the purpose of self-defence.⁷¹ Where the inference of malice may be fairly drawn from the evidence of the prosecution the burden of evidence is upon the defence to rebut the presumption⁷² but the burden of proof to establish malice beyond a reasonable doubt is upon the prosecution throughout.⁷³

71. The fact that the alleged self-defence was effected by the use of a greatly superior weapon is by no means conclusive of malice. *People v. Barry*, 31 Cal. 357 (1866).

72. *Com. v. York*, 9 Metc. 93, 43 Am. Dec. 373 (1845).

73. *Daniel v. State*, 126 Ga. 541, 55 S. E. 472 (1906).

CHAPTER XV.

PSEUDO-PRESUMPTIONS.

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§ 469. *Pseudo-presumptions*.¹— Especially fertile in confusion among various applications of the term presumption are those where no inference of fact² or assumption of administration³ is involved. It has seemed convenient to speak of these as pseudo or false presumptions. General maxims of jurisprudence, paraphrases of well settled rules of substantive law or procedure more frequently stated in some other form, metaphysical transpositions of familiar canons of administration, such are the *pseudo* presumptions. Usually, they are spoken of as presumptions of law.⁴

Of this class are the presumptions against carriers,⁵ or the presumption of

1. 2 Chamberlayne, Evidence, § 1159.

2. *Supra*, §§ 414 *et seq.*; 2 Chamb., Ev., §§ 1026 *et seq.*

3. *Infra*, §§ 486 *et seq.*; 2 Chamb., Ev., §§ 1184 *et seq.*

4. *Supra*, §§ 444 *et seq.*; 2 Chamb., Ev., §§ 1082 *et seq.* Com. v. Frew, 3 Pa. Co. Ct. R. 492 (1886). 2 Chamb., Ev., § 1159. Presumption as to time deed was delivered, see note, Bender ed., 41 N. Y. 412. Presumption that one presenting note indorsed in blank is bona fide holder, see note, Bender ed., 128

N. Y. 35. Presumption from recitals in judgment as to service of process, see note, Bender ed., 147 N. Y. 363.

5. A presumption of negligence against a sleeping car company arises from the theft of articles in a sleeping car at night. Robinson v. Southern R. Co., 40 App. D. C. 549, L. R. A. 1915 B 621 (1913). In a suit against a carrier where the defence is an act of God consisting of a snow-slide the burden of proof remains on the plaintiff to prove negligence. The mere fact that the avalanche caused the

payment from lapse of time,⁶ or the presumption from *prima facie* proof of a will,⁷ or that an agent was acting in the scope of his employment,⁸ or of ownership⁹ in certain cases; or that an employment is at will when on a weekly or monthly salary.¹⁰

§ 470. [Pseudo-Presumptions]; Conclusive Presumptions.¹¹—Among *pseudo*-presumptions of law may properly be classed the so-called “conclusive” presumptions.¹² Many of the rules of substantive law may be paraphrased into the language of evidence by the simple expedient of saying that the result which the substantive law decrees shall follow the existence of a particular fact is “conclusively presumed” to result from proof of it. Thus the rule that stockholders are required by law to know the articles of incorporation of their company may be put into the form of saying that they are conclusively presumed to do so.¹³ Occasionally, the language of an ordinary presumption of law is invoked for the same purpose. Thus the substantive law relating to

accident does not raise any presumption of negligence on the part of the defendant. *Topping v. Great Northern R. Co.*, 81 Wash. 166, 142 Pac. 425, L. R. A. 1915 F 1174 (1914). The carrier by proving the damage was due entirely to an act of God overcomes the *prima facie* case of the shipper and the burden shifts to the shipper to show that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment. *St. Louis & San Francisco R. Co. v. Dreyfus*, 42 Okla. 401, 141 Pac. 773, L. R. A. 1915 D 547 (1914). There is much difference of opinion as to the burden of proof where a carrier takes goods under a limited liability contract that it is liable only for negligence. Many modern cases hold that such a contract puts on the shipper the burden of showing that the carrier was negligent, but there is a strong minority which holds that the carrier still has the burden of proof. *McGrath v. Northern Pac. R.*, 121 Minn. 258, 141 N. W. 164, L. R. A. 1915 D 644 (1913). Presumption of carrier's negligence from action, see note, Bender ed., 95 N. Y. 583.

6. The presumption of payment from lapse of time applies even to a claim by the government, which can of course rebut the presumption by affirmative evidence. *Chesapeake & D Canal Co. v. United States*, 139 C. C. A. 406, 223 Fed. 926, L. R. A. 1916 B 734 (1915). Presumption of payment from lapse of time, see note, Bender ed., 94 N. Y. 387.

7. The presumption or *prima facie* case made out by an *ex parte* probate of a will

when contested becomes of no avail as soon as evidence is introduced in opposition thereto. *Kilgore v. Gannon*, 185 Ind. 682, 114 N. E. 446, L. R. A. 1917 E 530 (1916).

8. The court may presume from evidence that an automobile involved in an accident was owned by the defendant and driven by his chauffeur that he was acting in the scope of his employment but mere evidence that he was the servant of the defendant is not enough as this is no evidence that he was acting in the scope of his employment. *White Oak Coal Co. v. Rivoux*, 88 Ohio St. 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091 (1913).

9. Evidence that a wagon that ran over the plaintiff was plainly marked with the name of the defendant is *prima facie* evidence that it belonged to him. *Dennery v. Great Atlantic & Pacific Tea Co.*, 82 N. J. L. 517, 81 Atl. 861, 39 L. R. A. (N. S.) 574 (1911).

10. The authorities generally state the doctrine that an employment upon a weekly or monthly salary is presumed to be a hiring at will and the burden of proving that the hiring was for a year or other definite period is on the party who claims it. *Reasnor v. Watts Ritter & Co.*, 73 W. Va. 342, 80 S. E. 839, 51 L. R. A. (N. S.) 629 (1913).

11. 2 Chamberlayne, Evidence, §§ 1160, 1161.

12. See *Lyon v. Guild*, 52 Tenn. (5 Heisk.) 175 (1871); *State v. Pilling*, 53 Wash. 464, 102 Pac. 230 (1909); *U. S. v. Searcy*, 26 Fed. 435 (1885). 2 Chamb., Ev., § 1160.

13. *Schickler v. Wash. Brewery Co.*, 33 App. D. C. 35 (1909).

judgments may be stated in the language of presumption.¹⁴ So also the legal incapacity of a child under seven years of age to appreciate and avoid danger may be said to be conclusively presumed.¹⁵ *On the other hand*, these conclusive presumptions have been spoken of as if they were the true and typical presumption of law.¹⁶

§ 471. [Conclusive Presumptions]; Scope of Presumptions of this Class; Fictions.¹⁷—The conclusive presumption may also cover legal fictions. An example is furnished in the rule pertaining to the jurisdiction of the federal courts in actions based on the diversity of citizenship in which corporations are concerned as parties. It was early held that a corporation was not a “citizen” within the language of the constitution of the United States.¹⁸ In this case it will, it is said, be conclusively presumed that all stockholders of the corporation are citizens of the state under the laws of which the corporation came into existence,¹⁹ even in cases where the corporation is organized under the laws of the United States.²⁰

§ 472. [Conclusive Presumptions]; Lost Grant.²¹—In the law of real property, adverse use of an easement or other incorporeal hereditament for a period of twenty years, raises a presumption that a grant of the same has been made in accordance with the user and that the instrument has been subsequently lost.²² This presumption of a grant “can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant.”²³ *A fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant.”²⁴

When Conclusive.—The presumption which, as thus stated, may properly be regarded as a true presumption of law, has frequently been spoken of as a *conclusive presumption*.²⁵ This is the prevailing rule in America by

14. The law presumes that a judgment, until reversed, is a correct judicial determination of the rights of the parties. *Jenner v. Murphy*, 6 Cal. App. 434, 92 Pac. 405 (1907).

15. *Sullenberger v. Chester Traction Co.*, 33 Pa. Super. Ct. 12 (1907).

16. *Row v. Allentown*, 34 N. H. 351, 365, 69 Am. Dec. 489 (1857); *Territory v. Lucero*, 8 N. M. 543, 46 Pac. 18 (1896). 2 Chamb., Ev., § 1161.

17. 2 Chamberlayne, Evidence, § 1162.

18. *Muller v. Dows*, 94 U. S. 444 (1876).

19. *Manufacturers, etc., Bank v. Baack*, 2 Abb. (U. S.) 232 (1871); *Muller v. Dows*, *supra*; 2 Chamb., Ev., § 1162, n. 2, and cases cited.

20. *Id.*

21. 2 Chamberlayne, Evidence, §§ 1163–1163b.

22. *Anthony v. Kennard Bldg. Co.*, 188 Mo.

704, 87 S. W. 921 (1905); *Carter v. Tinicum Fishing Co.*, 77 Pa. 310 (1875); *Fletcher v. Fuller*, 120 U. S. 534, 7 S. Ct. 667, 30 L. ed., 757 (1887); 2 Chamb., Ev., § 1163, n. 1, and cases cited.

A grant from the State to a party may be presumed from uninterrupted possession for twenty years. *Caruth v. Gillespie*, 109 Miss. 679, 68 So. 927 (1915).

23. *Lee Conservancy Board v. Button*, 12 Ch. D. 383, 406, 409, C. A. 6 Ap. Ca. 685, D. P. (1878).

24. *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 109 (1822); *Gardner v. Hodgsons, &c., Brewery Co.*, A. C. 229, 240 (1903).

25. *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879 (1886); *Chicago v. Chicago, etc., R. Co.*, 152 Ill. 561, 38 N. E. 768 (1894); *O'Brien v. Goodrich*, 177 Mass. 32, 58 N. E. 151 (1900); *Chase v. Middleton*, 123 Mich. 647, 82 N. W.

analogy to the statutes of prescription relating to corporeal hereditaments. The enjoyment of an incorporeal hereditament exclusive and uninterrupted for a time sufficient to acquire title to the soil by adverse possession, affords a conclusive presumption of a grant to be applied as a *presumptio juris et de jure*.²⁶

Inference of Fact.—Certain American courts do not agree to the conclusiveness or even as to the *prima facie* quality of the presumption to the effect that the user shown to have existed was under a lost grant. They regard it as simply an inference of fact of greater or less probative weight according to the circumstances of the particular case.²⁷

§ 473. [Conclusive Presumptions]; Presumption of Malice in Libel.²⁸—An illustration of the frequent process by which a rule of substantive law is placed in the convenient phraeology of evidence, is found in the law of libel. Thus, it is said that “the deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, raises a conclusive presumption of malice.”²⁹ A precisely equivalent expression would probably have been that in case of the deliberate intentional publication of defamatory matter the existence of actual malice is immaterial.³⁰ Or, more shortly, that one who intentionally and deliberately publishes defamatory matter regarding a given individual is, under the law of libel, responsible to him

612 (1900); *Lewis v. New York, etc., R. Co.*, 162 N. Y. 202, 56 N. E. 540 (1900); *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146 (1903); *Carter v. Tinicum Fishing Co.*, *supra*; 2 Chamb., Ev., § 1163a, n. 1, and cases cited from 33 American jurisdictions.

26. The grounds of policy for the attainment of which this rule of substantive law has been evolved are cautiously stated by Sir William Grant: “Presumptions do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says [*Eldridge v. Knott*, 1 Cowp. 214 (1774)], merely for the purpose, and from a principle, of quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must forever remain imperfect, and in many respects unavailable, when from length of time it has become impossible to discover in whom the legal estate if outstanding is actually vested.” *Hillary v. Waller*, 12 Vesey, Jr. 239, 252 (1806). This statement of the law is cited with approval in *Fletcher v. Fuller*, 120 U. S. 534 (1886).

27. For example, user of a fishery for a long period was held to raise merely an inference of fact, the weight of which should

have been submitted to the jury. *Carter v. Tinicum Fishing Co.*, *supra*. Where the origin of the easement is known a lost grant is not to be presumed. *Clafin v. Boston, etc., R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638 (1892). “Such a question is a mixed question of fact and law, to this extent, that the facts being found, it is for the court to advise the jury, whether in their nature and quality they are sufficient to raise the presumption proposed the weight of the evidence being for the jury.” *Valentine v. Piper*, 22 Pick. (Mass.) 85, 94 (1839). 2 Chamb., Ev., § 1163b.

28. 2 Chamberlayne, Evidence, § 1164.

29. 1 Greenl., Ev., § 18; *Rocky Mountain News Printing Co. v. Fridborn*, 46 Colo. 440, 104 Pac. 956 (1909); *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655 (1897); *Sheibley v. Nelson*, 84 Neb. 393, 121 N. W. 458 (1909); *Fry v. Bennett*, 5 Sandf. (N. Y.) 54 (1851); 2 Chamb., Ev., § 1164, n. 1, and cases cited.

30. *Smurthwaite v. News Pub. Co.*, 124 Mich. 377, 83 N. W. 116 (1900); *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416 (1904); *Cady v. Brooklyn Union Pub. Co.*, 51 N. Y. Supp. 198, 23 Misc. 409 (1898); 2 Chamb., Ev., § 1164, n. 2, and cases cited.

in damages. No actual malice is essential to the recovery of compensatory damages.³¹ The only apparent necessity for using the phraseology of presumption is that it effectively conceals the administrative process by which a rule in the law of libel requiring actual malice as a constituent element of liability has been quietly judicially legislated into one which does not.³²

Express Malice.—Where a privilege is claimed and established, the same use of the terminology of evidence is employed in stating that the presumption of malice from deliberate publication no longer obtains. “Where the words spoken or written are shown to be within a confidential or privileged communication, the presumption of malice no longer exists; but the plaintiff in such a case must show express malice, and cannot rely on the presumption of malice which the law attaches in all other cases to the utterance or publication of the words spoken or written.”³³

§ 474. [Conclusive Presumptions]; Death of Attesting Witnesses in case of Ancient Writings.³⁴—The so-called conclusive presumption of law may form an alternative statement to a rule of procedure or practice. As a rule of procedure, the court does not require the production of the attesting witnesses in proving the execution of a document thirty years old.³⁵ The rule of procedure or practice is a common and satisfactory one.³⁶ This very sensible rule of convenience may be put into the form of saying that the subscribing witnesses to writings thirty years old are conclusively presumed to be dead;—so that execution of such a deed,³⁷ will³⁸ or other document³⁹ need not be proved. The question is one of procedure not of logic, and the phraseology of “presumption” is, therefore, misleading.⁴⁰

31. Childers v. San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40 (1894); Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103 (1904); Prewitt v. Wilson, 128 Iowa 198, 103 N. W. 365 (1905); Faxon v. Jones, 176 Mass. 206, 57 N. E. 359 (1900); O'Brien v. Bennett, 76 N. Y. Supp. 498, 72 App. Div. 367 (1902); 2 Chamb., Ev., § 1164, n. 3, and numerous cases cited.

32. 2 Chamb., Ev., § 1164.

33. Dillard v. Collins, 25 Gratt. (Va.) 343 (1874). To the same effect, see Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907). See also, 2 Chamb., Ev., § 1164a, and cases cited.

Malice in other Connections.—The technical nature of the so-called conclusive presumption of malice as a statement of a proposition of substantive law, is made clear by the fact that in all cases where the existence of malice is a constituent or material fact, it must be proved as any other psychological fact would be. For example, in an indictment for maliciously placing obstructions on the tracks

of a railroad, State v. Hessenkamp, 17 Iowa 45 (1864); Com. v. Bokeman, 105 Mass. 53 (1870); or in cases charging malicious mischief, Com. v. Williams, 110 Mass. 401 (1872); express malice must be proved.

Burden on plaintiff.—In an action of slander if the occasion is privileged the burden is on the plaintiff to prove malice. Doane v. Grew, 220 Mass. 171, 107 N. E. 620, L. R. A. 1915 C 774 (1915).

34. 2 Chamberlayne, Evidence, § 1165.

35. See Attesting Witnesses, *infra*, § 1100. See also *infra*, §§ 1103–1107.

36. Henthorne v. Doe, 1 Blackf. (Ind.) 157 (1822); Clark v. Owens, 18 N. Y. 434 (1858); McReynolds v. Longenberger, 51 Pa. 13, 31 (1868); 2 Chamb., Ev., § 1165, n. 2, and cases cited.

37. Green v. Chelsea, 24 Pick. (Mass.) 71 (1831).

38. Jackson v. Blanshan, 3 Johns (N. Y.) 292, 3 Am. Dec. 485 (1808).

39. McReynolds v. Longenberger, *supra*.

40. Settle v. Alison, 8 Ga. 201 (1850).

Need of Corroboration.—It has been required by certain courts that some evidence of the genuine character of a document be furnished to the tribunal as a preliminary to the application of the presumption under consideration.⁴¹

Effect of Circumstances of Suspicion.—Where circumstances of suspicion surround the genuine character of a document thirty years old, should the evidence in the case explain and account for these circumstances to the satisfaction of the presiding judge, he may admit the writing to the benefit of the rule of procedure.⁴²

§ 475. [Pseudo-Presumptions]; Consequences of Conduct.⁴³—It is said that each person is presumed to intend the natural consequences of his acts,⁴⁴ though not necessarily all the results which actually do follow from them, though they might reasonably have been foreseen. In like manner, it has been announced, with regard to acts embodied in documents,⁴⁵ that it will be presumed that he who executes an instrument, whether by signing it himself in the usual way,⁴⁶ or by means of his mark,⁴⁷ or through some one who is directed to do so⁴⁸ understands the nature, force and effect, of the writing. An obvious peculiarity of this so-called “presumption” is that it is in no sense an inference of fact.⁴⁹ It is apparently a paraphrase for the statement of a very ordinary rule of substantive law to the effect that one who does an

41. *Fairly v. Fairly*, 38 Miss. 280 (1859). “If possession has accompanied the deed, for that length of time, that is enough. If not, other circumstances may be resorted to for the purpose of raising the necessary presumption in favor of the deed.” *Clark v. Owens*, 18 N. Y. 434 (1838). Possession under the deed in question by a predecessor in title has been deemed sufficient. *Burgin v. Chenault*, 9 B. Mon. (Ky.) 285 (1848).

42. *Walton v. Coulson*, 1 McLean (U. S.) 120 (1831)

43. 2 Chamberlayne, Evidence, §§ 1166, 1167.

44. *Lane v. People*, 142 Ill. App. 571 (1908); *Ampersand Hotel Co. v. Home Ins. Co.*, 115 N. Y. Supp. 480, 131 App. Div. 361 (1909); *Timm v. Bear*, 20 Wis. 254 (1871); 2 Chamb., Ev., § 1166, n. 1, and cases cited.

Intent to Defraud.—An insolvent buyer who knows at the time of his purchase that his financial condition is such that it is and will be impossible for him to pay for his purchases is conclusively presumed to have bought them with an intention not to pay for them: and a persuasive legal presumption to that effect arises from the fact that such a purchaser's affairs were in such a condition at the time of the purchase of the property that he could then have had no reasonable expect-

tation of paying for it. *Gillespie v. Piles & Co.*, 173 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1 (1910).

45. *Perrin v. U. S. Express Co.*, 78 N. J. L. 515, 74 Atl. 462 (1909). The inference may be rebutted. *McKittrick v. Greenville Traction Co.*, 84 S. C. 275, 66 S. E. 289 (1909).

46. *Green v. Maloney*, 7 Houst. (Del.) 22, 30 Atl. 672 (1884); *Mattocks v. Young*, 66 Me. 459 (1876); *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 373 (1852); 2 Chamb., Ev., § 1166, n. 3, and cases cited.

47. *Lipphard v. Humphrey*, 28 App. Cas. (D. C.) 355 (1906); *Doran v. Mullen*, 78 Ill. 342 (1875).

48. *Harris v. Story*, 2 E. D. Smith (N. Y.) 363 (1854).

49. *Board of Water Com'rs of City of New London v. Robbins & Potter*, 82 Conn. 623, 74 Atl. 938 (1910); *Clem v. State*, 31 Ind. 480 (1860); *Thomas v. People*, 67 N. Y. 218 (1876); 2 Chamb., Ev., § 1166, n. 6, and cases cited. The happening of an event does not in the least indicate that such was the result intended. *State v. Hersom*, 90 Me. 273, 38 Atl. 160 (1897); *U. S. v. Breese*, 173 Fed. 402 (1909); *Nicol v. Crittenden*, 55 Ga. 497 (1875).

act prohibited by law takes the risk of all the natural consequences of his act, and cannot, except where intent is an element of the liability charged,⁵⁰ escape responsibility for the consequences of his conduct by saying that they were not embraced within the scope of his intention. So understood, the maxim is undoubtedly correct.

Presumption of Law Repudiated.—Not unnaturally certain courts have distinctly repudiated the existence of any presumption of law so fantastic as this. It has been treated, so far as probative at all, as a mere inference of fact.⁵¹

§ 476. [Pseudo-Presumptions]; Good Character.⁵²—It is a familiar rule of procedure, elsewhere considered,⁵³ that unless and until the accused in a criminal case shall open the issue of character, no inference shall be drawn that he did the act in question because he had traits of character which would permit or predispose him to do it. By a *pseudo*-presumption, this procedural rule has been paraphrased into language appropriate to the law of presumptions, as if, in short, instead of a rule of law it were a teaching of experience. It is said, that until the defendant introduces evidence of good character the law requires that the jury should not presume it to be bad.⁵⁴ A similar but somewhat more accurate statement is to the effect that in the absence of evidence on the subject of character, there is no presumption of law⁵⁵ as to whether it shall be assumed to be good or bad⁵⁶ and that, consequently, the whole matter is one of fact to be determined simply by the inferences to be logically drawn from the evidence.⁵⁷ In point of fact, moreover, there is no presumption that it is either good or bad.⁵⁸

50. The rule that in certain criminal cases the psychological fact of intent must be established by the prosecution beyond a reasonable doubt has been put into the rather confusing form of saying that the presumption of law that a person intends the natural and usual consequences of his acts will prevail unless the jury entertain a reasonable doubt whether such intention actually existed. *Wells v. Territory*, 14 Okl. 436, 78 Pac. 124 (1904).

51. 2 Chamb., Ev. § 1167; *Madden v. State*, 1 Kan. 340, 356 (1863); *Stokes v. People*, 53 N. Y. 104, 179 (1873); *State v. Swayze*, 30 La. Ann. pt. 2, 1323 (1878). Courts which have repudiated a presumption of malice from killing by the deliberate use of a deadly weapon have shared this view. *Supra*, § 468; 2 Chamb., Ev., §§ 1138 *et seq.*

52. 2 Chamberlayne, Evidence, § 1168.

53. §§ 1029 *et seq.*; 4 Chamb., Ev., §§ 3275 *et seq.*

54. *State v. Dockstader*, 42 Iowa 436 (1876); *State v. Smith*, 50 Kan. 69, 31 Pac. 784 (1892); *Ackley v. People*, 9 Barb. (N.

Y.) 609 (1850); 2 Chamb., Ev., § 1168, n. 2, and cases cited.

55. §§ 1037 *et seq.*; 4 Chamb., Ev., §§ 3310 *et seq.*

56. *Griffin v. State*, 165 Ala. 29, 50 So. 962 (1909); *Addison v. People*, 193 Ill. 405, 62 N. E. 235 (1901).

57. *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662 (1875); *Addison v. People*, *supra*. License to practice as an attorney does not give rise to a necessary inference of good character. *Haynes v. State*, 17 Ga. 465 (1855).

58. *Gater v. State*, 141 Ala. 10, 37 So. 692 (1904). It is probable that much of this presumption as to character is, in reality, an offshoot of the more general "presumption of innocence." §§ 478 *et seq.*, *infra*; 2 Chamb., Ev. §§ 1172 *et seq.*; *U. S. v. Gnthrie* (Ohio 1909), 171 Fed. 528.

There is no presumption of good character in favor of an accused which as would a fact stands as witness for him, but the presumption of a good character may not be a basis of inference for the purpose of add-

§ 477. [Pseudo-Presumptions]; Knowledge of Law.⁵⁹—"Every one," it is said, "is presumed to know the law."⁶⁰ It has been said in a criminal case that the accused is thus "presumed to know the law."⁶¹ It has even been authoritatively announced that a person is "conclusively presumed" to know the law of the forum.⁶²

Instances of Application.—Governmental regulations of a particular department, as that of the post office,⁶³ will be "presumed," it is said, to be known to the persons employed therein so far as they are thereby affected. A member of the general public is "presumed" to be acquainted only with the public laws of the state⁶⁴ or country in which he resides or carries on business.⁶⁵ One dealing with a city and living therein is presumed to have knowledge of the ordinances enacted by and in force in that municipality.⁶⁶ Any person is "presumed" to have an accurate knowledge of the meaning of the language which he employs orally or in writing, when entering upon a definite legal relation.⁶⁷ *On the contrary*, no one is "presumed" to know the by-laws of an academy,⁶⁸ what a foreign law is⁶⁹ or how a domestic court will construe a law of the forum.⁷⁰ Negligence will not be imputed even to a counsellor at law who, in giving advice, has adopted an erroneous but widely

ing weight to the presumption of innocence or its logical resultant. One presumption may not supplement or augment another where one is but a part of the other. *Durham v. State*, 128 Tenn. 636; 163 S. W. 447, 51 L. R. A. (N. S.) 180 (1913).

Chastity.—In an indictment for carnal knowledge of a woman of previously chaste character under a statute the state must prove the previous chastity of the woman and it is not enough to rely on a presumption of chastity. Although there is a presumption of chastity in most cases this gives way in a criminal case to the presumption of innocence. *State v. Kelly*, 245 Mo. 489, 150 S. W. 1057, 43 L. R. A. (N. S.) 476 (1912).

Presumption.—So in a trial for seduction under a statute making it a crime to seduce a woman of moral character the court cannot presume that the complainant is of moral character but this must be proved like any other fact in issue, as the proceeding is purely statutory. *State v. Holter*, 32 S. D. 43, 142 N. W. 657, 46 L. R. A. (N. S.) 376 (1913).

59. 2 Chamberlayne, Evidence, §§ 1160-1171.

60. *Saxton v. Perry*, 47 Colo. 263, 107 Pac. 281 (1910); *Hayes v. Martz*, 173 Ind. 270, 89 N. E. 303, 90 N. E. 309 (1910); *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512

(1876); *New York Cent. Ins. Co. v. Kelsey*, 13 How. Pr. (N. Y.) 535 (1856); 2 Chamb., Ev., § 1169, n. 1, and cases cited.

61. *Brunaugh v. State*, 173 Ind. 483, 90 N. E. 1109 (1910).

62. *State v. Corning State Sav. Bank*, 136 Iowa 79, 113 N. W. 500 (1907); *U. S. v. Smith*, 27 Fed. 854-857 (1886).

63. *East Tennessee, etc., R. Co. v. White*, 15 Lea (Tenn.) 340 (1885).

64. *Wadsworth v. Board of Sup'rs of Livingston County*, 115 N. Y. Supp. 8 (1909).

65. *Keystone Driller Co. v. San Francisco Super. Ct.*, 138 Cal. 738, 72 Pac. 398 (1903); *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205 (1870). But see *Stedman v. Davis*, 93 N. Y. 32 (1883).

66. *Hope v. City of Alton*, 116 Ill. App. 116, aff'd 214 Ill. 102, 73 N. E. 406 (1905); *Galbreath v. Moberly*, 80 Mo. 484 (1883); *City of Plattsmouth v. Murphy*, 74 Neb. 749, 105 N. W. 293 (1905).

67. *Long v. Newman*, 10 Cal. App. 430, 102 Pac. 534 (1909); *Newman v. Flowers' Guardian*, 134 Ky. 557, 121 S. W. 652 (1909); *People's Bank v. Hansbrough*, 89 Mo. App. 252 (1901).

68. *Boyers v. Pratt*, 1 Humphr. (Tenn.) 90 (1839).

69. *King v. Doolittle*, 1 Head (Tenn.) 77 (1858).

70. *Brent v. State*, 43 Ala. 297 (1869);

accepted construction of a provision of law.⁷¹ The more intricate and doubtful the provision of law may be, the less will the court feel inclined to enforce the maxim of jurisprudence made to do duty as a part of the law of evidence.⁷²

No Inference of Fact.— Confessedly, the proposition that every one is presumed to know the law rests upon no basis of fact.⁷³ For the most learned jurist or industrious judge to advance a serious claim to a knowledge of all the law would appear farcical.⁷⁴ That which cannot be truly predicated of the wisest and most skilled of mankind can scarcely be true, in any just sense connected with the reality of things, in case of the most ignorant or debased. “There is no presumption in this country,” says Mr. Justice Maule,⁷⁵ “that every person knows the law; it would be contrary to common sense and reason if it were so.”

Absence of Probative Force Demonstrated.— In general, where it is necessary to establish the fact of actual knowledge affirmative proof to that effect must be introduced.⁷⁶ No assistance in so doing can be derived from the pseudo-presumption itself.⁷⁷

Real Nature of Presumption.— The real nature of this so-called “conclusive presumption” is further shown by the limitations which have judicially been placed upon its scope and effect.⁷⁸ It becomes obvious that it is merely a semi-rhetorical paraphrase for the statement that actual knowledge of the existence of a law is, by the rules of the substantive law, immaterial, when the question arises as to the consequences of its violation, however important the state of his actual knowledge may be in connection with the moral aspect of his act. If one has seen fit to submit himself by residence or through doing business therein to the laws of a jurisdiction, he will not be excused from liability, in case he shall violate such law, by the mere fact of ignorance as to what it is.⁷⁹ It is equally clear that he who joins a business or municipal

Miller v. Proctor, 20 Ohio St. 442 (1870); New York, etc., Gas Coal Co. v. Graham, 226 Pa. 348, 75 Atl. 657 (1910).

71. Marsh v. Whitmore, 21 Wall. (U. S.) 178 (1874); Morrill v. Graham, 27 Tex. 646 (1864).

72. Miller v. Proctor, *supra*; 2 Chamb., Ev., § 1169a.

73. Ryan v. State, 104 Ga. 78, 30 S. E. 678 (1898); Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 645 (1886); Marsh v. Whitmore, *supra*; 2 Chamb., Ev., § 1170, n. 1, and cases cited.

74. Jones v. Randall, 1 Cowper 37 (1774).

75. Martindale v. Falkner, 2 C. B. 706, 719 (1846). Lord Mansfield in Jones v. Randall, *supra*, said, speaking of the contention that all the judges knew the laws, “as to the certainty of the law mentioned . . . it would be very hard upon the profession, if

the law was so certain that everybody knew it; the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort.”

76. Vogel v. Brown, 201 Mass. 261, 87 N. E. 686 (1909). See also Law v. Smith, 34 Utah 394, 98 Pac. 300 (1908).

77. Martindale v. Falkner, *supra*; Queen v. Mayor of Tewksbury, L. R. 3 Q. B. 629 (1868); Black v. Ward, 27 Mich. 191 (1873); 2 Chamb., Ev., § 1170.

78. See Brent v. State, *supra*; Cutter v. State, 36 N. J. L. 125 (1873); King v. Doolittle, *supra*.

79. Grumbine v. State, 60 Md. 355 (1883); Com. v. Emmons, 98 Mass. 6 (1867); U. S. v. Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. (U. S.) 200 (1873); 2 Chamb., Ev., § 1171, n. 4, and cases cited.

corporation cannot relieve himself from the binding effect of their regulations, duly adopted, on the ground that he did not understand what they were. That is for him to find out at his peril.⁸⁰ In other words, the so-called presumption of knowledge of law has precisely the same meaning as the equally familiar maxim, *Ignorantia legis neminem excusat*.⁸¹

§ 478. [Pseudo-Presumptions]; "Presumption of Innocence."⁸²— Few false presumptions of law have so wide a vogue or have created so intolerable a confusion in the law of evidence as the so-called "presumption of innocence." It is one invoked with extreme frequency, in civil⁸³ and still more often and with more important effect in criminal,⁸⁴ cases. A phraseology commonly employed in stating this pseudo-presumption of law is to the effect that in criminal cases, a person accused of crime is presumed to be innocent until proved to be guilty.⁸⁵ In like manner, it may be said, that since one accused of crime has the right to stand mute, no presumption is raised against him if he chooses to remain silent.⁸⁶

General Relations.— The administrative assumption against wrongdoing or in favor of legality and good faith⁸⁷ may well be regarded as the "presumption of innocence" in civil cases; while the so-called "presumption of innocence" fills with approximate accuracy the place of an administrative assumption in favor of legality and good faith in criminal cases.⁸⁸ The rule of procedure in question is, however, persistently treated by certain courts as a presumption of law. From this class, according to what appears to be the proper definition of the term presumption of law, it is excluded by the all-

80. *Balfour v. Ernest*, 5 C. B. (N. S.) 601, 28 L. J. C. P. 170 (1859).

81. *Topolewski v. Plankington Packing Co.*, 143 Wis. 52, 126 N. W. 554 (1910); *Black v. Ward*, *supra*.

82. 2 Chamberlayne, Evidence, § 1172.

83. *Russell v. Baptist Theological Union*, 73 Ill. 339 (1874); *State v. Scheve*, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927 (1902); *Grant v. Riley*, 44 N. Y. Supp. 238, 15 App. Div. 190 (1897); 2 Chamb., Ev., § 1172, n. 1, and cases cited. In a suit by the wife of a son against the father for alienating his affections the burden is on the plaintiff to show that in advising his son to leave the plaintiff the father was acting through malice as a parent has the presumption of good faith in his favor. *Gross v. Gross*, 70 W. Va. 317, 73 S. E. 961, 39 L. R. A. (N. S.) 261 (1912). Where death occurs under such circumstances that it may or may not have been caused by suicide it will be presumed to have been unintentional and the burden rests upon the other side to show the con-

trary. *Krogh v. Modern Brotherhood*, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404 (1913).

84. *People v. Arlington*, 131 Cal. 231, 63 Pac. 347 (1900); *Fitch v. People*, 45 Colo. 298, 100 Pac. 1132 (1909); *Raysor v. State*, 132 Ga. 237, 63 S. E. 786 (1909); *State v. Wilson*, 130 Mo. App. 151, 108 S. W. 1086 (1908); *People v. American Ice Co.*, 120 N. Y. Supp. 443 (1909); 2 Chamb., Ev., § 1172, n. 2, and cases cited.

85. *State v. Luff*, 24 Del. 152, 74 Atl. 1079 (1910); *State v. West*, 152 N. C. 832, 68 S. E. 14 (1910).

86. *People v. Emmons*, 13 Cal. App. 487, 110 Pac. 151 (1910).

87. §§ 495 *et seq.*; 2 Chamb., Ev., §§ 1219 *et seq.*

88. Thus it has been said that any presumption to be brought into play in construing a contract in a criminal case will be taken in favor of the accused. *Keller v. State* (Tex. Cr. App. 1905), 87 S. W. 669.

important fact that it possesses no basis of logical force, i.e., or probative relevancy; and by the further characteristic that it persists in operation even after a reasonably satisfactory amount of evidence has been introduced against the accused.⁸⁹

§ 479. [Presumption of Innocence]; An Overestimated Rule.⁹⁰— Much stress⁹¹ has frequently been laid, usually in a rhetorical way, upon this statement of a legal rule as to the criminal burden of proof as if some logical weight were being adduced in the prisoner's favor by reason of this so-called "presumption."⁹²

Constitutional Right.— It has even been suggested that it indicates a constitutional right of one accused of crime, which is infringed when the legislature sees fit to establish rules that certain facts shall give rise to a *prima facie* inference as to the existence of another, and so, as is claimed, impair the logical value of the presumption of innocence, by casting the burden of proof (burden of evidence often being intended)⁹³ upon the accused. The validity of this contention has, however, been steadily denied by the courts,⁹⁴ with rare exceptions.⁹⁵

Time Covered by Presumption.— This presumption of innocence is stoutly alleged to accompany the accused in verdict, not ceasing when the case is submitted to the jury.⁹⁶ It has been claimed to continue even when the accused was proved to have been in the company of one who committed the crime,⁹⁷ or that the codefendants of the accused have already been convicted on a separate trial. All this is said, paraphrasing a rule of substantive law or procedure, not to displace the presumption of innocence.⁹⁸

An Anomalous Survival from an Earlier Age.— The form of this pseudo-presumption and vigor of the language in which it is frequently couched, to say nothing of that by which it is maintained in the zeal of advocacy, are reminiscent of the rigor of the criminal laws and procedure of early England to which some slight reference is elsewhere made.⁹⁹

89. §§ 395 *et seq.*; 2 Chamb., Ev., §§ 939 *et seq.*; Hemingway v. State, 68 Miss. 371, 408 (1890); Hutto v. State, 7 Tex. App. 44 (1879). See Bowman v. Little, 101 Md. 273, 61 Atl. 1084 (1905); 2 Chamb., Ev., § 1172a, n. 3, and cases cited.

90. 2 Chamberlayne. Evidence, § 1173.

91. Frazier v. Com. (Ky. 1908), 114 S. W. 268; Gow v. Bingham, 107 N. Y. Supp. 1011, 57 Misc. 66 (1907); High v. State, 2 Okl. Cr. 161 (1909); 2 Chamb., Ev., § 1173, n. 1, and cases cited.

92. "This is a common topic of declamation." McKinley's Case, 33 St. Tr. 275 (1817).

93. § 393; 2 Chamb., Ev., § 936.

94. Santo v. State, 2 Iowa 165, 63 Am. Dec. 487 (1855); Com. v. Smith, 166 Mass. 370, 44 N. E. 503 (1896); State v. Kyle, 14 Wash. 550, 45 Pac. 147 (1896); 2 Chamb., Ev., § 1173, n. 4, and cases cited.

95. *In re Wong Hane*, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138 (1895).

96. People v. O'Brien, 106 Cal. 104, 39 Pac. 325 (1895).

97. State v. Farr, 33 Iowa 553 (1871).

98. Coxwell v. State, 66 Ga. 309 (1881).

99. § 616, *infra*; 2 Chamb., Ev., § 1617. See discussion of this topic in 2 Chamb., Ev., § 1173. See also, Bram v. U. S., 168 U. S. 532 (1897); Crane v. U. S., 162 U. S. 625, 646 (1895).

§ 480. [Presumption of Innocence]; Meaning of Phrase.¹— All that is properly contained in the expression “presumption of innocence” may be restated with a sufficient approximation to exactness in saying that in a criminal case it is the duty of the government, to prove every material allegation set forth in the indictment against the prisoner beyond a reasonable doubt.² The “presumption” is, therefore, as has been said, a mere assumption of procedure restating the burden of proof in criminal cases.³ This of necessity continues throughout the entire trial,⁴ without shifting,⁵ upon the state as being the party which has the affirmative of the issue.⁶

Scottish Law.— It may be observed that the Scotch law follows the English in construing the so-called presumption of innocence as a restatement of the burden of proof in criminal cases, and lends no color to the contention of certain American Courts, including the supreme court of the United States, that it is something more than this.⁷

A Double Aspect.— Viewed in a slightly different way, the presumption of innocence is the criminal counterpart of the presumption against fraud, illegality, etc., in civil causes. It presents, *mutatis mutandis*, the double aspect peculiar to the presumption against illegality.⁸

No Inference of Innocence.— There is, however, obviously in all this nothing in the nature of an *inference of fact* that the accused is, in reality, an innocent man *quoad* the charge against him. The general rule is all to which he has a right.⁹ Clearly, then, there is no presumption of law in the matter, that term being used as above defined, i.e.,¹⁰ as denoting the procedural assumption that a definite inference of fact in the substantive law has a *prima facie* probative force.

What Inertia Is Reasonable.— The seriousness of the consequences to the accused adds force to the so-called presumption of innocence. The affirmative

1. 2 Chamberlayne, Evidence. §§ 1174-1175.

2. State v. Lee (Del. Gen. Sess. 1909), 74 Atl. 4; O'Donnell v. Com., 108 Va. 882, 62 S. E. 373 (1908); Spick v. State, 140 Wis. 104, 121 N. W. 664 (1909); 2 Chamb., Ev., § 1174, n. 1.

3. § 395; 2 Chamb., Ev., § 939. “The burden of proof is on the prosecutor. All the presumptions of law *independent of evidence* are in favor of innocence; and every person is presumed to be innocent until he is proved guilty.” Com. v. Webster, 5 Cush. (Mass.) 295, 320 (1850). See also, 2 Chamb., Ev., § 1174, n. 2, and authorities cited.

4. People v. O'Brien, *supra*.

5. § 395; 2 Chamb., Ev., § 939.

6. It is a ruling as to pleading in criminal cases, analogous to that asserting that in civil cases the burden of evidence to es-

tablish illegality, fraud, wrongdoing and the like is on him who affirms its existence. In criminal cases, this is the prosecution. 2 Chamb., Ev., § 1174.

7. See discussion of McKinley's Case, 33 St. Tr. 275 (1817) and the case of Coffin v. United States, 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481 (1895), the dissenting opinion in the former of which is apparently relied upon by the Supreme Court of the United States as endorsing the position adopted by that tribunal. 2 Chamb., Ev., § 1174a.

8. 2 Chamb., Ev., § 1174b. See §§ 478, 495; 2 Chamb., Ev., §§ 1172a; 1222.

9. Hawes v. State, 78 Ala. 37, 7 So. 302 (1889); State v. Loper, 148 Mo. 217, 49 S. W. 1007 (1898); 2 Chamb., Ev., 1174c.

10. §§ 444 *et seq.*; 2 Chamb., Ev., §§ 1082, n. 3, 1085, ns. 1 *et seq.*

ease will be scrutinized more carefully, i.e., the inertia ¹¹ of the court materially increases.

No Inference of Fact.— This so-called “presumption of innocence” is, it would thus appear, based upon no inference of fact.¹² Clearly it is not a proposition of experience that persons accused of wrongdoing in either civil or criminal proceedings are, in point of fact, generally innocent of the crimes charged.¹³

§ 481. [Presumption of Innocence]; Valueless as Affirmative Proof.¹⁴— Treating the presumption of innocence as a logical inference, it would be natural and useful to offer it as affirmative *proof* of some fact, e.g., chastity.¹⁵ When so tested the “presumption” is found to have a procedural but no logical value. It has no probative force or weight. It provides a shield, but no sword, to the party in whose favor it is said to lie, viz., the defendant in a particular proceeding.¹⁶ This circumstance will be seen to be of marked importance in connection with the so-called conflict of presumptions.¹⁷

§ 482. [Presumption of Innocence]; Treatment of Prisoners in Judicial Administration.¹⁸— In case of a serious criminal charge, it is customary, following the dictates of experience and common sense, to proceed upon the basis that the one accused of a crime is guilty. For example, as soon as an indictment is found, the question of bail arises. No “presumption of innocence” appears at this stage. “After bill found, a defendant is presumed to be guilty to most, if not all purposes, except that of a fair and impartial trial before a *petit* jury. This presumption is so strong that, in the case of a capital felony, the party cannot be let to bail.”¹⁹ There can be no reasonable question but that, as a matter of experience, this logical inference of guilt from the finding of an indictment is amply justified.²⁰

11. § 409, *supra*; 2 Chamb., Ev., § 993. See 2 Chamb., Ev., § 1174d.

12. Harrison v. State, 144 Ala. 20, 40 So. 568 (1906); State v. Linhoff, 121 Iowa 632, 97 N. W. 77 (1903); Hammond v. Hammond (Tex. Civ. App. 1906), 94 S. W. 1067.

13. Still less, does a connection exist between innocence and an indictment for a criminal offence. *Ex parte* Alexander, 59 Mo. 598, 21 Am. Rep. 393 (1875); 2 Chamb., Ev., § 1175a, n. 2.

Distinguished from Character.— What is known as the presumption of innocence is not to be applied to a presumption of good character as the state may meet the presumption of innocence but may not meet that of good character for until the defendant has first introduced evidence on the subject of his good character the state may not enter the field. Price v. United States, 132 C. C. A. 1, 218

Fed. 149, L. R. A. 1915 D 1070 (1914).

14. 2 Chamberlayne, Evidence, § 1175a.

15. People v. O'Brien, 130 Cal. 1, 62 Pac. 297 (1900); Com. v. Whitaker, 131 Mass. 224 (1881); 2 Chamb., Ev., § 1175a, n. 1, and (1881); State v. McDaniel, 84 N. C. 863 cases cited.

16. West v. State, 1 Wis. 209 (1853); McArthur v. State, 59 Ark. 431, 27 S. W. 628 (1894).

17. *Infra*, §§ 496 *et seq.*; 2 Chamb., Ev., §§ 1224 *et seq.*

18. Chamberlayne, Evidence, § 1175b.

19. State v. Mills, 2 Dev. (N. C.) 421 (1830). To the same effect, see State v. Madison County Court, 136 Mo. 323 (1896); *Ex parte* Ryan, 44 Cal. 555 (1872); 2 Chamb., Ev., § 1175b, n. 1, and cases cited.

20. 2 Chamb., Ev., § 1175b. “Law presumes that the prisoner is innocent until he

§ 483. [Presumption of Innocence]; Weighing the Presumption of Innocence. — "A legal presumption is a rule of law — a reasonable principle, or an arbitrary dogma — declared by the court. . . . It could not be weighed as evidence."²¹ Presumption of innocence, it would thus appear, is incapable of being weighed by the jury in any scales of reason. The rule of substantive law or of procedure cannot itself be weighed. There is no inference of fact, proposition of logic or experience, back of it which can. Where an assumption is devoid of any inference of fact in its support, to weigh it against evidence is an act impossible of performance.²²

§ 484. [Presumption of Innocence]; Other Views.²³ — While the great weight of authority excludes the presumption of innocence from the presumptions of law, the courts are not unanimous in so holding. It cannot be questioned that there is authority from tribunals of high standing to the effect that the presumption of innocence is based upon *an inference of fact* to the benefit of which a person charged with crime or wrongdoing is entitled.²⁴ In other words, there is an inference of fact, possessing evidentiary value which, in a criminal case, remains in favor of the accused even after reasonably sufficient evidence has been introduced as to his guilt.

§ 485. [Pseudo-Presumptions]; Presumption of Survivorship.²⁵ — Unique, among pseudo-presumptions, is that which regulates judicial action as to whom may be taken to have survived longest among those who have perished in a common accident or calamity²⁶ where there is no evidence on the point. It is said that where several persons perish in a common disaster and no evidence is furnished as to which of these persons survived the others there is a presumption of law that they all perished at the same time.²⁷ This, if it means anything, must be understood as equivalent to saying that there is, in reality, no presumption of law at all, under such circumstances, as to the survivorship is found guilty, but it were well to wager four to one that the jury will be satisfied of his guilt. In 1883 there were 11,347 persons found guilty against 2,723 found not guilty."

21. *Lisbon v. Lyman*, 49 N. H. 553, 563 (1870).

22. See 2 Chamb., Ev., § 1175c, and notes for a discussion of this question.

23. 2 Chamberlayne, Evidence, § 1176.

24. *State v. Clark*, 83 Vt. 305, 75 Atl. 534 (1910); *Childs v. Merrill*, 66 Vt. 302, 20 Atl. 532 (1894); *Coffin v. U. S.* 156 U. S. 432 (1894). See also, *U. S. v. Davis*, 160 U. S. 469 (1895); *Cochran v. U. S.*, 157 U. S. 286 (1895); *North Carolina v. Gosnell*, 74 Fed. 734 (1896); 1 Greenleaf, Ev., § 34. See discussion of Greenleaf, McKinley's Case, the Coffin Case in Chamb., Ev., §§ 1176, 1176a, 1176b, 1176c, 1176d, wherein it is observed

that the Supreme Court of the United States itself does not seem, in later cases, to have considered that this proposition that the presumption of innocence constitutes a piece of evidence is to be seriously and carefully followed. See *Allen v. U. S.*, 164 U. S. 492, 500 (1896); *Coffin v. U. S.*, 162 U. S. 664 (1896); *Agnew v. U. S.*, 165 U. S. 36, 51 (1897).

25. 2 Chamberlayne, Evidence, §§ 1177-1183.

26. *Grand Lodge A. O. U. W. of Washington v. Miller*, 8 Cal. App. 25, 96 Pac. 22 (1908).

27. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874); *Balder v. Middeke*, 92 Ill. App. 227 (1900); *Walton & Co. v. Burchel*, 121 Tenn. 715, 121 S. W. 391; 2 Chamb., Ev., § 1177, n. 2, and cases cited.

and that he who desires to show that a particular one of the persons involved outlived any of the others has the burden of evidence to prove it to a *prima facie* extent.²⁸

Distribution of Funds, etc.—Certainly until survivorship is shown the action of the court in dealing with a fund or other *res* will take place as if no survivorship existed, i.e., as if all had actually perished at the same moment.²⁹

No Presumption of Law.—No inference of fact in connection with the question of survivorship is sufficiently cogent, frequent and uniform as to warrant making it the subject of a procedural rule of the nature of a presumption of law.³⁰ There is no *presumption of law*, properly so called in the matter.³¹ It will not be presumed as matter of law, that one of several persons survived the others.³²

Probative Facts.—The inferences of fact which may properly guide the judgment of the court in dealing with the question of survivorship are either deliberative or directly probative. Treating first of the probative facts, for example, A may have been seen alive at a time when B may safely be inferred to have been dead.³³ Thus where A is shown to have shot B and then killed himself, the fact that this second injury was of such a nature as to cause instant death, while B was still warm for many hours afterwards,³⁴ may settle the controversy in favor of the heirs of B. In case of a number of persons burned to death in a building it will be inferred that an old man in whose room a fire probably originated died before a middle aged man or children in whose direction the flames were burning.³⁵ As a matter of proof, the difficulty is to discover sufficient evidence to establish a *prima facie* case, i.e., one on which a court or jury would be justified as a matter of reason in acting.³⁶

28. *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132, 9 Am. St. Rep. 162 (1888); *U. S. Casualty Co. v. Kacer*, 169 Mo. 301, 69 S. W. 370, 92 Am. St. Rep. 641 (1902); *St. John v. Andrews Institute for Girls*, 102 N. Y. Supp. 808, 117 App. Div. 698; 2 Chamb., Ev., § 1177, n. 3, and cases cited.

29. *Middeke v. Balder*, 198 Ill. 590, 64 N. E. 1002, 59 L. R. A. (N. S.) 653 (1902), aff'g judg. 98 Ill. App. 525; *In re Lott*, 121 N. Y. Supp. 1102, 65 Misc. 422 (1909); *Young Women's Christian Home v. French*, 187 U. S. 401, 23 S. Ct. 184, 47 L. ed. 233 (1901); 2 Chamb., Ev., § 1178, n. 1, and cases cited.

30. *Cowman v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550 (1890); *Dunn v. New Amsterdam Casualty Co.*, 121 N. Y. Supp. 686 (1910); *Hilderbrandt v. Ames*, 27 Tex. Civ. App. 377, 66 S. W. 128 (1901); and cases generally cited in last note; 2 Chamb., Ev., § 1179, n. 1.

31. *Dunn v. New Amsterdam Casualty Co.*,

supra; *Males v. Sovereign Camp* (Tex. 1903), 70 S. W. 108 (1903); 2 Chamb., Ev., § 1179, n. 3, and cases cited.

32. *Smith v. Croom*, 7 Fla. 81 (1857); *Sup. Council R. A. v. Kacer*, 96 Mo. App. 93, 69 S. W. 671 (1902); and cases cited in last two notes; 2 Chamb., Ev., § 1179, n. 4, and cases cited.

33. *In re McInnes*, 104 N. Y. Supp. 147, 119 App. Div. 440, rev'g 100 N. Y. Supp. 440, 50 Misc. 88 (1907); *St. John v. Andrews Institute for Girls*, *supra*; 2 Chamb., Ev., § 1180, n. 2, and cases cited.

34. *Broome v. Duncan* (Miss. 1901), 29 So 394.

35. *Ehle's Estate*, 73 Wis. 445, 41 N. W. 627 (1889).

36. *In re Ridgway*, 4 Redf. Surr. (N. Y.) 226 (1880); *Pell v. Ball*, 1 Cheve (S. C.) Ch. 99 (1840); *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443 (1897).

Deliberative Facts.— Certain general characteristics of the persons involved in the accident, rather of a *deliberative* than a probative nature are still entitled to weight, seldom determinative, in judging of the probative facts themselves. A person of adult strength and matured judgment may, as a matter of probability, fairly be regarded ~~as more apt to~~ resist a severe and long continued physical strain³⁷ and better able to take advantage of such opportunities as are afforded for protecting and prolonging life than a child of tender years or an aged person of impaired bodily and mental faculties. In like manner, a man is likely to outlive a woman.³⁸ If death is by drowning, an experienced swimmer may well be taken to have survived one who was entirely unacquainted with the accomplishment.³⁹

Civil Law.— Much of the confusion attending the treatment of this subject will be found to have its origin in an attempt to transfer to the common law the view point and administrative expedients of the civil law, which abounds in a multitude of so-called presumptions, to which, although apparently mere inferences of fact of indeterminate value, a certain definite probative weight is attached, such as the inferences of fact to which reference is above made, that strength will survive weakness, men outlive women, resourceful persons have an opportunity of survival not afforded to ill trained minds and the like.⁴⁰ Certain American states, notably California⁴¹ and Louisiana,⁴² in which the doctrines of the civil law have a strong influence, continue in their statutory enactments,⁴³ to follow the rules of the Roman law or the later enactments of the continental Codes.

37. *Smith v. Croom*, *supra*; *Coye v. Leach*, 8 Metc. (Mass.) 371, 41 Am. Dec. 518 (1844).

38. *Moehring v. Mitchell*, 1 Barb. Ch. (N. Y.) 264 (1846).

39. *Fuller v. Linzee*, 135 Mass. 468 (1883), still, there is no presumption of law in the matter.

40. *Smith v. Croom*, *supra*; *Newell v. Nich-*

ols, 75 N. Y. 78, 31 Am. Rep. 424 (1878); 2 Chamb., Ev., § 1182, n. 2, and cases cited.

41. *Hollister v. Cordero*, 76 Cal. 640, 18 Pac. 855 (1888).

42. *Langles' Succession*, 105 La. 39, 29 So. 739 (1900).

43. Cal. Code Civ. Proc., § 1963; La. Civ. Code, arts. 936-939.

CHAPTER XVI.

ADMINISTRATIVE ASSUMPTIONS.

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§ 486. **Administrative Assumptions.**¹—The administrative assumption assumes, for procedural purposes, most often that of expediting trials,² that a particular fact has been *prima facie* established or will be assumed to exist. It is taken for granted that facts which present no features of inherent suspicion have come into existence under conditions of regularity, the assumption continuing until evidence is introduced on the point covered by it.³ It is sound administration, even where the ruling is not with regard to a matter of pleading,⁴ to assume that things apparently regular have been properly done; in other words that the party alleging irregularity, fraud or illegality has the burden of evidence to show it.

§ 487. [**Administrative Assumptions**]; **Presumptions of Law Contrasted.**⁵—Each of the two forms of procedural assumption, the assumption of administration and the presumption of law, operates only until affirmative evidence is introduced on the subject. They present also the common features of shifting the burden of evidence,⁶ a circumstance which probably accounts for the persistent manner in which they are confused.⁷ Chief among the characteristic

1. 2 Chamberlayne, Evidence, § 1184.

(1893); 2 Chamb., Ev., § 1184, n. 2, and cases cited.

2. §§ 304 *et seq.*; 1 Chamb., Ev., §§ 544 *et seq.*

4. *Infra*, § 487; 2 Chamb., Ev., § 1186.

3. Robertson v. Alameda Free Public Library, etc., 136 Cal. 403, 69 Pac. 88 (1902);

5. 2 Chamberlayne, Evidence, §§ 1185 1186.

Morrill v. Douglass, 14 Kan. 293 (1875); Befay v. Wheeler, 84 Wis. 135, 53 N. W. 1121

6. *Supra*, § 403; 2 Chamb., Ev., § 971.

7. The idea apparently is, that as a pre-

differences between assumptions of administration and the presumption of law is the circumstance that while the presumption of law is a rule in a particular branch of the substantive law, the assumption of administration is merely a general rule of convenience in judicial action applicable to all subjects alike. *The second highly important distinction* lies in the circumstance that while the presumption that a given inference of fact establishes a *prima facie* case, has a definite probative quality, an assumption of administration may simply take for granted the existence of a *fact*, there being no necessary logical inference whatever in the matter. *It may be added* that the presumption of law, as is elsewhere noticed,⁸ is, and to a still greater degree has been, in furtherance of the administrative canon of giving certainty and effectiveness to substantive law.⁹ The assumption of administration, on the contrary, is intended for the expediting of trials.¹⁰

§ 488. [Administrative Assumptions]; Identity of Person from Similarity of Name.¹¹—It is a convenient assumption of administration that, in the absence of innerent improbability, or proof to a contrary effect,¹² the same name at all times designates a given person¹³ or thing.¹⁴ This assumption is particularly valuable in connection with the proof of title,¹⁵ or other matters in which use is made of documentary evidence. A party having the burden of showing an identity in persons may well ask the presiding judge provisionally to assume identity from similarity and, *a fortiori* from identity of name.¹⁶

Assumption Displaced.—It is said that this assumption of administration may be overcome by a conflicting presumption of law, as that “of innocence”

sumption of law shifts the burden of evidence, every ruling of the court which shifts this burden must necessarily be a presumption of law.

8. *Supra*, § 445; 2 Chamb., Ev., § 1086.

9. *Supra*, § 305; 1 Chamb., Ev., § 556.

10. *Supra*, §§ 304 *et seq.*; 1 Chamb., Ev., §§ 544 *et seq.* 2 Chamb., Ev., § 1185. See discussion of Inferences of Fact Compared and Rulings as to the Burden of Proof, 2 Chamb., Ev., §§ 1185a, 1186.

11. 2 Chamberlayne, Evidence, §§ 1187–1191a.

12. *Garwood v. Garwood*, 29 Cal. 514 (1866); *Clark v. Pearson*, 53 Ga. 496 (1874); *Bayha v. Mumford*, 58 Kan. 445, 49 Pac. 601 (1897); *Liscomb v. Eldredge*, 20 R. I. 335, 38 Atl. 1052 (1897); 2 Chamb., Ev., § 1187, n. 1, and cases cited.

13. *Hendricks v. State*, 26 Ind. 493 (1866); *Grindle v. Stone*, 78 Me. 176, 3 Atl. 183 (1886); *Morris v. McClary*, 43 Minn. 346, 46 N. W. 238 (1890); *Hatcher v. Rocheleau*,

18 N. Y. 86 (1858); *Cross v. Martin*, 46 Vt. 14 (1873); 2 Chamb., Ev., § 1187, n. 2, and cases cited.

14. *Wilbur v. Clark*, 22 Mo. 503 (1856); *Barrow v. Philleo*, 14 Tex. 345 (1855); *Stahl v. Ertel*, 62 Fed. 920 (1893); 2 Chamb., Ev., § 1187, n. 3, and cases cited.

15. *Graves v. Colwell*, 90 Ill. 612 (1878); *Gilman v. Sheets*, 78 Iowa 499, 43 N. W. 290 (1889); *Geer v. Missouri Lumber, etc., Co.*, 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 480 (1895); *People v. Snyder*, 41 N. Y. 397 (1869); 2 Chamb., Ev., § 1187, n. 4, and cases cited.

16. *No necessary inference of fact.*—When evidence contrary to the truth of the assumption is introduced, there is said to be no presumption in the matter. *McMinn v. Whelan*, 27 Cal. 300, 317 (1865); *Graves v. Colwell*, *supra*; *Jackson v. Goes*, 13 Johns. (N. Y.) 518, 7 Am. Dec. 399 (1816); 2 Chamb., Ev., § 1187, n. 5, and cases cited.

so called,¹⁷ or by inferences arising from the validity of a contract.¹⁸ This displacement of the assumption is a necessary one.¹⁹ The assumption, moreover, is made only when the name is to be applied to a particular person involved.²⁰

Inferences of Fact.—While, as has been said,²¹ the administrative assumption that a given name used on different occasions indicates the same person does not, necessarily, rest upon any inference of fact, it may well do so. Certain affirmative or infirmative considerations may even be intrinsic in the name itself; others are extrinsic to it.²²

Corroborative.—Corroborative inferences of fact may be intrinsic to the name.²³ Where two names are presented to the consideration of the court, the inference that they designate the same individual is strong in proportion as the difference between the two are slight.²⁴ Conversely, the inference of identity is weak as the points of difference between the two names are numerous and marked.²⁵

Extrinsic.—Facts extrinsic to the name may found corroborative inferences of fact.²⁶ Facts of all kinds may corroborate the inference. Thus the document in question may have been produced from such appropriate custody as to be reinforced in probative effect by that circumstance.²⁷ The handwriting of two persons of the same or similar name may be so nearly alike in appearance as to confirm the inference.²⁸ That the person, whose name a given

17. *Wedgwood's Case*, 8 Me. 75 (1831). See also, *Com. v. Briggs*, 5 Pick. (Mass.) 429 (1827); *Bogue v. Bigelow*, 29 Vt. 179, 183 (1857); §§ 479 *et seq.*, *supra*; 2 Chamb., Ev., §§ 1172 *et seq.*

18. *Cooper v. Poston*, 1 Duv. (Ky.) 92, 85 Am. Dec. 610 (1863).

19. A mere ruling for administrative convenience naturally gives way before a rule of positive law, like the presumption of innocence or even when opposed by an inference of fact. See next section. 2 Chamb., Ev., § 1188.

20. If such name be a common one in the vicinity or if it be shown that there is more than one person to whom the name may properly be applied, there can be no assumption as to the person to whom the name should be applied by the jury. *People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843 (1906).

21. *Supra*, n. 13; 2 Chamb., Ev., § 1187, n. 5.

22. 2 Chamb., Ev., § 1189.

23. A name leads to an inference that it can properly be applied only to a single individual, i.e., warrants an assumption of identity, in proportion as it is unusual (Se-

well v. Evans, 4 Q. B. 626, 3 G. & D. 604, 7 Jur. 213, 12 L. J. Q. B. 276, 45 E. C. L. 626 (1843) elaborate or otherwise distinctive. But see, apparently to the contrary effect, *Mooers v. Bunker*, 29 N. H. 420, 431 (1854).

24. *Loveman v. Birmingham Ry. L. & P. Co.*, 149 Ala. 515, 43 So. 411 (1907) ("Schuler" for "Schulern"); *Einstein v. Holladay-Klotz Land & Lumber Co.*, 132 Mo. App. 82, 111 S. W. 859 (1908) (initials "J. W." & "W. J."); 2 Chamb., Ev., § 1190, n. 3, and cases cited.

25. *Spreyne v. Garfield Lodge No. 1 of U. Slav. Benev. Soc.*, 117 Ill. App. 253 (1905); *Greenberg v. Angerman*, 84 N. Y. Supp. 244 (1903).

26. *Bennett v. Libhart*, 27 Mich. 489 (1873); *Hoffman v. Metropolitan L. Ins. Co.*, 119 N. Y. Supp. 978, 135 App. Div. 739 (1909); 2 Chamb., Ev., § 1190, n. 5, and cases cited.

27. 2 Chamb., Ev., § 1190, n. 6, and cases cited. *Bailie v. Western Live Stock & Land Co. (Tex. Civ. App.)*, 119 S. W. 325 (1909).

28. 2 Chamb., Ev., § 1190, n. 7, and cases cited.

designation is claimed to be, promptly answered when addressed by it²⁹ and other facts circumstantially probative may furnish evidence in the same direction.

Infirmative.— On the other hand, the probative force of the inference of identity from similarity of names is greatly diminished by introducing facts inconsistent with the truth of the assumption.³⁰

Extrinsic.— Extrinsic facts, as well as those intrinsic in the name itself, may tend to destroy the truth of the assumption, removing any element of probative force from the inference of fact upon which it may have been based, and, very possibly, establishing that the persons designated were, in fact, different individuals. For example, it may be shown that while the two persons have been assumed, on account of their similarity or identity of name to be the same person, they were actually employed at the time in different occupations, or filled different stations in life.³¹

Initials.— Where the surname and given name employed on the two occasions are identical³² the inference of identity arises. Where the same initial takes the place of the given name, the inference of identity is normally weaker.³³ The identity of family name and similarity of initials is not sufficient to create a *prima facie* inference.³⁴ On the contrary, where the same family name and surname are used on two occasions insertion in both of the same middle initial adds force to the inference of identity.³⁵

Dissimilarity.— The presence of two middle initials consisting of a different letter tends, very strongly, to negative the inference of identity.³⁶ The same result by no means follows where one name has a middle initial and the other has none.³⁷

29. *Garrett v. State*, 76 Ala. 18 (1884); 2 Chamb., Ev., § 1190, n. 8, and cases cited.

30. *Stevenson v. Murray*, 87 Ala. 442, 6 So. 301 (1888); *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727 (1895); 2 Chamb., Ev., § 1191, n. 1, and cases cited.

31. *Richardson v. People*, 85 Ill. 495 (1877); *Ellsworth v. Moore*, 5 Iowa 486 (1857); 2 Chamb., Ev., § 1191, n. 3, and cases cited. It may appear, in the same way, that the use of the similar or identical name occurred at intervals so widely separate in point of time as to render it highly improbable that the same person could have been present on both occasions. *Sitler v. Gehr*, 105 Pa. 577, 51 Am. Rep. 207 (1884). It has been said that slight evidence is needed to overcome the assumption of identity of person from identity or similarity of name. *Morris v. McClary*, 43 Minn. 346, 46 N. W. 238 (1890).

32. *Sperry v. Tebbbs*, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181 (1888).

33. *Pearce v. Albright*, 12 N. M. 202, 76 Pac. 286 (1904).

34. *Bennett v. Libhart*, *supra*; *Kane v. Sholars* (Tex. Civ. App. 1905), 90 S. W. 937. See also, *White v. Bates*, 234 Ill. 276, 84 N. E. 906 (1908); 2 Chamb., Ev., § 1191a, n. 3, and cases cited.

35. *Paxton v. Ross*, 89 Iowa 661, 57 N. W. 428 (1894).

36. *Amba v. Chicago, etc., R. Co.*, 44 Minn. 266, 46 N. W. 321 (1890). On the other hand, the middle initial has been held to be immaterial. *Alabama Steel & Wire Co. v. Griffin* (Ala. 1907), 42 So. 1034; *Illinois Cent. R. Co. v. Hasenwinkle*, 232 Ill. 224, 83 N. E. 815 (1908). See also 2 Chamb., Ev., § 1191a, n. 5, and cases cited.

37. *Hunt v. Stewart*, 7 Ala. 525 (1845); *State v. Loser* (Iowa 1905), 104 N. W. 337. See, however, *Lucas v. Current River Land & Cattle Co.*, 186 Mo. 448, 85 S. W. 359 (1905).

§ 489. [Administrative Assumptions]; Property from Possession.³⁸—“Men generally own the property they possess.”³⁹ In certain connections, therefore, possession of either real⁴⁰ or personal⁴¹ property, will be assumed to indicate the owner. In order that the assumption should be made or the inference of fact arise, it is essential that the possession should be consistent, however, with the fact of ownership.⁴² The presumption or inference is, as a matter of course, rebuttable.⁴³

§ 490. [Administrative Assumptions]; Regularity.⁴⁴—Presumptions of regularity, so called, are in many instances, assumptions of administration;—although, as has been seen,⁴⁵ an inference of fact may also be present. As is usual in such cases,⁴⁶ the rule has been put into the alternative forms of saying either (a) that there is no presumption of official irregularity⁴⁷ or, (b) that he who alleges irregularity has the burden (of evidence) to prove it.⁴⁸ Such an inference of fact may be corroborated by any evidence, as, for example, long failure to complain of the existence of any irregularity.⁴⁹

No Probative Force.—While an inference of fact may be present, in general, what is presented is a mere assumption entirely devoid of probative force.⁵⁰ This conclusively appears when the attempt is made to draw logical

38. 2 Chamberlayne, Evidence, § 1192.

39. McEwen v. City of Portland, 1 Or. 300 (1860).

40. Jackson v. Waltermire, 5 Cow. (N. Y.) 299 (1826); Ward v. McIntosh, 12 Ohio St. 231 (1861); Bradshaw v. Ashley, 180 U. S. 59, 21 S. Ct. 297, 45 L. ed 423 (1901); 2 Chamb., Ev., § 1192, n. 2, and cases cited.

41. Amick v. Young, 69 Ill. 542 (1873); Miller v. Marks, 20 Mo. App 369 (1886); Jennings v. Brooklyn Heights R. Co., 106 N. Y. Supp. 279, 121 App Div. 587 (1907); Wausau Boom Co. v. Plumer, 35 Wis. 274 (1874); 2 Chamb., Ev., § 1192, n. 3, and cases cited. The assumption has been spoken of as merely a presumption of fact, and characterized as being “the lowest species of evidence.” Rawley v. Brown, 71 N. Y. 85 (1877)

42. Where the property is apparently that of another no inference arises to the effect stated. Gregg v. Mallett, 111 N. C. 74, 15 S. E. 936 (1892). Should the possession of several persons be concurrent it will be assumed that he whose exercise of acts of dominion is most marked is the actual owner. Reid v. Butt, 25 Ga. 28 (1858); Curran v. McGrath, 67 Ill. App. 566 (1896).

43. Amick v. Young, *supra*; Trevorrow v. Trevorrow, 65 Mich. 234, 31 N. W. 908 (1887); New York v. Lent, 51 Barb. (N. Y.)

19 (1868); Philadelphia Trust, etc., Co. v. Philadelphia, etc., R. Co., 177 Pa. 38, 35 Atl. 688 (1896); 2 Chamb., Ev., § 1192, n. 9, and cases cited.

44. 2 Chamberlayne, Evidence, §§ 1193–1196.

45. *Supra*, §§ 422 *et seq.*; 2 Chamb., Ev., §§ 1049 *et seq.*

46. *Infra*, §§ 495 *et seq.*; 2 Chamb., Ev., § 1219 *et seq.*

47. Pottsville Safe-Deposit Bank v. Schuylkill County, 190 Pa. 188, 42 Atl. 539 (1899); Scottish Commercial Ins. Co. v. Plummer, 70 Me. 540 (1880).

48. Scott v. State, 43 Fla. 396, 31 So. 244 (1901); A. H. Hugh Printing Co. v. Yeatman, 22 Ohio Cir. Ct. 584, 12 Ohio Cir. Dec. 477 (1901); 2 Chamb., Ev., § 1193, n. 4, and cases cited.

49. Belcher v. Belcher, 21 Ky. L. Rep 1460, 55 S. W. 693 (1900); McFate's Appeal, 105 Pa. 323 (1884); Holmes v. Cleveland, etc., R. Co., 93 Fed 100 (1861); 2 Chamb., Ev., § 1193, n. 5, and cases cited

50. Board of Water Com'rs, etc., v. Robins & Potter, 82 Conn. 623, 74 Atl. 938 (1910); Rogers v. Clark Iron Co., 104 Minn 198, 215 (1908) Befay v. Wheeler, 84 Wis. 135 (1893); 2 Chamb., Ev., § 1194. Contra: People v. Siemson, 153 Cal. 387, 95 Pac. 863 (1908).

inference from the "presumption" as to the existence of other facts,⁵¹ as the irregularity of the official in question on another occasion,⁵² the improper conduct of some other person,⁵³ or to supply a fact which the record shows to be absent.⁵⁴ Such an attempt inevitably fails.⁵⁵

Ancient Facts.—"There is a time when the rules of evidence must be relaxed. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain."⁵⁶ In dealing with ancient facts the administrative canon of expediting trials⁵⁷ is reinforced by the other principles of administration that the actor in any case will be required⁵⁸ and, within the limits of sound reasoning, permitted⁵⁹ to present to the court the best and fullest case that it is within his power to offer. It follows that where the fact in question comes to the tribunal from a time beyond living memory, roughly placed by a rule of procedure or substantive law at thirty years, it will readily be assumed that all conditions necessary to its legal validity existed.⁶⁰ The greater the elapsed interval, the more strongly and comprehensively the assumption of regularity will be applied by the courts.⁶¹ It results that even in case of formal documents⁶² a shorter interval than 30 years may operate to give a proponent the benefit of the administrative assumption of regularity.⁶³

§ 491. [Administrative Assumptions]; Regularity; Order of Events.⁶⁴—In much the same way, it will be assumed that the events which the evidence relates occurred in the order which will make them effective for the accomplishment of the legal result which the actors had in view.⁶⁵ Among such results are those embodied in documents.⁶⁶ Acts which would invalidate or fail to

51. *L. S. v. Ross*, 92 U. S. 281, 23 L. ed. 707 (1875).

52. *Foster v. Berry*, 14 R. I. 601 (1884); *Randall v. Collins*, 52 Tex. 435 (1880).

53. *Houghton County Sup'rs v. Rees*, 34 Mich. 481 (1876).

54. *Hathaway v. Clark*, 5 Pick. (Mass.) 490 (1827); *Gibson v. Martin*, 7 Humphr. (Tenn.) 127 (1846).

55. *U. S. v. Ross*, *supra*. *A fortiori*, such an assumption cannot be used to forfeit a party's rights or deprive him of his property. *Christ v. Fent*, 16 Okl. 375, 84 Pac. 1074 (1906); *Irwin v. Mayes*, 31 Tex. Civ. App. 517, 73 S. W. 33 (1903).

56. *Richards v. Elwell*, 48 Pa. 361 (1864).

57. §§ 304 *et seq.*; 1 Chamb., Ev., §§ 544 *et seq.*

58. §§ 227 *et seq.*; 1 Chamb., Ev., §§ 465 *et seq.*

59. §§ 149 *et seq.*; 1 Chamb., Ev., §§ 334 *et seq.*

60. *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597 (1863); *Van Pelt v. Parry*, 218

Mo. 680, 118 S. W. 425 (1909); *Richards v. Elwell*, *supra*; *Strange v. Oconto Land Co.*, 136 Wis. 516, 117 N. W. 1023 (1908); 2 Chamb., Ev., § 1195, n. 5, and cases cited.

61. *Cooper v. Turner*, 2 Stark. 438 (1819); 2 Chamb., Ev., § 1196, n. 1, and cases cited.

62. *Wood v. Frickie*, 120 La. 180, 45 So. 96 (1907); *Pope v. Patterson*, 78 S. C. 334, 58 S. E. 945 (1907).

63. *Enton v. Coney Island & B. R. Co.*, 121 N. Y. Supp. 793 (1910). *Prima facie inference after a shorter period*. See *Cobleigh v. Young*, 15 N. H. 493 (1844); *Austin v. Austin*, *supra*; *Williams v. Mitchell*, 112 Mo. 300 (1892). No similar assumption is made where the evidence in question is matter of public record. *Brunswick First Parish v. McKean*, 4 Me. 508 (1827).

64. 2 Chamberlayne, Evidence, § 1197.

65. *Fitzgerald v. Barker*, 85 Mo. 13 (1884); *Hughes v. Debnam*, 53 N. C. 127 (1860); 2 Chamb., Ev., § 1197, n. 1, and cases cited.

66. *Brunke v. Gruben*, 84 Neb. 806, 122 N. W. 37 (1909); *Talbot v. Talbot*, 23 N. Y. 17

affect a legal result in accordance with the time, as related to that result, at which it took place will be assumed to have been done when the actor might properly have done as he did.⁶⁷ In other words, conditions precedent to proper and legal action will be presumed to have occurred at a suitable time.⁶⁸ Events will be assumed to have occurred in the natural order in which such events usually happen.⁶⁹ The assumption applies equally to the performance of an act or the happening of an event subsequent to the act in question and essential to its validity; it will be taken that the act has been done or the event has happened.⁷⁰

§ 492. [Administrative Assumptions]; Judicial Proceedings.⁷¹—Where the act is one relating to the doings of any judicial tribunal,⁷² board, magistrate⁷³ or officer,⁷⁴ it will be assumed that all facts existed necessary to give the act in question full legal⁷⁵ or logical⁷⁶ validity. The conduct involved must, for the operation of the assumption, be regular, official and in due performance of judicial duty.⁷⁷

Courts of Record.—The assumption of regularity is made with marked frequency in connection with proceedings of courts of record⁷⁸ when acting within the scope of what is known or proved to have been their jurisdiction.⁷⁹ Every act of a court of competent jurisdiction is presumed to have been rightfully done.⁸⁰ In other words, he who would impeach the accuracy of judicial proceedings of a court of record must introduce evidence to that effect.⁸¹ The rule applies equally to the proceedings of general or special⁸² terms of court, and to the proceedings of a probate court.⁸³

(1861); 2 Chamb., Ev., § 1197, n. 2, and cases cited.

67. *Eades v. Maxwell*, 17 U. C. Q. B. 173 (1859); *State v. Hannibal, etc.*, R. R., 113 Mo. 297 (1893).

68. *Appeal of Gardner*, 81 Conn. 171, 70 Atl. 653 (1908).

69. *Collins v. German-Amer. Mut. Life Ass'n*, 112 Mo. App. 209, 86 S. W. 891 (1905).

70. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516, 83 N. W. 729 (1900); *Com. v. Atlantic, etc.*, R. Co., 53 Pa. 9 (1866); 2 Chamb., Ev., § 1198, n. 1, and cases cited.

71. 2 Chamberlayne, Evidence, § 1199–1201.

72. *Howcott v. Smart*, 125 La. Ann. 50, 51 So. 64 (1910); *Austin v. Marchant*, 21 Wis. 526, 99 N. W. 320 (1904).

73. *Infra*, § 493; 2 Chamb., Ev., § 1206.

74. *Infra*, § 493; 2 Chamb., Ev., § 1209.

75. *Mabb v. Stewart*, 143 Cal. xviii, 77 Pac. 402 (1904).

76. *Danforth v. Egan*, 23 S. D. 43, 119 N. W. 1021 (1909).

77. *Fouke v. Jackson County*, 84 Iowa 616, 51 N. W. 71 (1892). The assumption, for example, does not cover *ex parte* proceedings, *Morton v. Reeds*, 6 Mo. 64 (1839); still less, those which are extra judicial. *Fouke v. Jackson County*, *supra*; *Houston v. Perry*, 3 Tex. 390 (1848).

78. *Otto v. Young*, 227 Mo. 193, 127 S. W. 9 (1910).

79. *Walker v. Newman*, 146 Ill. App. 450 (1909); *State v. Vaile*, 122 Mo. 33, 26 S. W. 672 (1894); *Broadway Trust Co. v. Mannheim*, 95 N. Y. Supp. 93, 47 Misc. 415 (1905); *Wilson v. State* (Cr. App. Okl. 1910), 109 Pac. 289; 2 Chamb., Ev., § 1200, n. 2, and cases cited.

80. *State v. Peloquin*, 106 Me. 358, 76 Atl. 888 (1910); *Pearson v. Breeden*, 79 S. C. 302, 60 S. E. 706 (1908); *Beale v. Com.*, 25 Pa. 11 (1855).

81. *Worley Adm. v. Hineman*, 6 Ind. App. 240 (1892); *State v. Lewis*, 22 N. J. L. 564 (1849); 2 Chamb., Ev., § 1200, n. 4, and cases cited.

82. *Merchant v. North*, 10 Ohio St. 251

Inferior or Foreign Tribunals.—The rule has been extended to tribunals of inferior jurisdiction,⁸⁴ such as county⁸⁵ or district⁸⁶ courts. It applies also to justices of the peace⁸⁷ and to other committing magistrates.⁸⁸ The assumption is the same regarding the proceedings of foreign courts.⁸⁹

§ 493. [Administrative Assumptions]; Public Officers.⁹⁰—The court will assume, in the absence of intrinsic improbability, or facts bearing adversely in the matter, that public officers or persons purporting to act as such,⁹¹ have been regularly and duly elected,⁹² that they have complied with all the forms of law necessary to qualify them to act as they have done⁹³ and that the acts themselves, as they are brought to the attention of the tribunal, were regularly and properly performed.⁹⁴ This assumption is a general one and applies to all officials acting under national⁹⁵ or state⁹⁶ authority.⁹⁷ That is to say, the law presumes, in the absence of evidence to the contrary, that public officers,⁹⁸ of all grades, have properly performed their duties,⁹⁹ and will do so in

(1859); *Stockslager v. U. S.* 116 Fed. 590, 54 C. C. A. 46 (1902).

83. *Floyd v. Ricketson*, 129 Ga. 668, 59 S. E. 909 (1907); *McKillop v. Post*, 82 Vt. 403, 74 Atl. 78 (1909); *Brown v. Hannah*, 152 Mich. 33, 115 N. W. 980 (1908).

84. *Argo v. Barthand*, 80 Ind. 63 (1881); *Hiatt v. Simpson*, 35 N. C. 72 (1851); *Merritt v. Baldwin*, 6 Wis. 439 (1858); 2 Chamb., Ev., § 1201, n. 1, and cases cited.

85. *Young's Adm'r v. Chesapeake & Ohio Ry. Co.*, 136 Ky. 784, 125 S. W. 241 (1910); *Frost v. Board of Com'rs of Teller County*, 43 Colo. 43, 95 Pac. 289 (1908).

86. *Stull v. Masilonka*, 74 Neb. 309, 104 N. W. 188 (1905); *Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682 (1904).

87. *Gilman v. Weiser*, 140 Iowa 554, 118 N. W. 774 (1908).

88. *People v. Warner*, 147 Cal. 546, 82 Pac 196 (1905).

89. *Christian, etc., Grocery Co. v. Coleman*, 125 Ala. 158, 27 So. 786 (1900); *Covenay v. Phiscator*, 132 Mich. 258, 93 N. W. 619 (1903). The preliminary facts as to jurisdiction are more carefully scrutinized except, perhaps, in case of persons resident in the foreign country or sister state. *Com v. Blood*, 97 Mass. 538 (1867).

90. 2 Chamberlayne, Evidence, §§ 1202-1210.

91. *Payne v. Treadwell*, 16 Cal. 220 (1860).

92. *Blanchard v. Dow*, 32 Me. 557 (1851).

93. *Story v. De Armond*, 77 Ill. App. 74 (1898); *Nelson v. People*, 23 N. Y. 293

(1861); *Gregg v. Mallett*, 111 N. C. 74 (1892); 2 Chamb., Ev., § 1202, n. 3, and cases cited.

94. *Gibson v. Patterson*, 75 Ga. 549 (1885); *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32, 96 N. W. 984 (1903); *Ivy v. Yancy*, 129 Mo. 501, 31 S. W. 937 (1895); *Brown v. Helsley* (Neb. 1901), 96 N. W. 187; *People v. Crane*, 125 N. Y. 535, 26 N. E. 736 (1891); *Watkins v. Havighorst*, 13 Okl. 128, 74 Pac. 318 (1903); 2 Chamb., Ev., § 1202, n. 4, and cases cited.

95. *Montgomery v. State*, 55 Fla. 97, 45 So. 879 (1908); *Erhardt v. Ballin*, 150 Fed. 529, 80 C. C. A. 271 (1906).

96. *Buchanan v. James*, 130 Ga. 546, 61 S. E. 125 (1908); *Whiting v. Malden & M. R. Co.*, 202 Mass. 298, 88 N. E. 907 (1909); *Wenster v. Purcell*, 186 N. Y. 549, 79 N. E. 1118 (1906), aff'g 94 N. Y. Supp. 1050, 106 App. Div. 360; *State v. Rose*, 140 Wis. 360, 122 N. W. 751 (1909); 2 Chamb., Ev., § 1202a, n. 2, and cases cited.

97. *State ex rel. Abbott v. Adecock*, 225 Mo. 335, 124 S. W. 1100 (1910); *State v. Clark*, 32 Nev. 145, 104 Pac. 593 (1909); *State v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203 (1910).

98. *In re Sheriff of Monmouth County* (N. J. Sup 1906). 69 Atl 305.

99. *Atwater v. O'Reilly*, 81 Conn. 367, 71 Atl. 505 (1908); *In re Thorp's Will*, 150 N. C. 487, 64 S. E. 379 (1909); *Craft v. Lent*, 103 N. Y. Supp. 366, 53 Misc. 481 (1907); 2 Chamb., Ev., § 1202a, n. 5, and cases cited.

future.¹ The same assumption has been made in case of the officials of another state.² The assumption applies also in criminal cases.³

Executive; National or State.—The official acts of the chief executive of a nation, state⁴ or territory will be assumed to have been regularly and properly done.⁵ The same assumption will be made in case of high executive officers,⁶ as the secretary of state,⁷ the surveyor-general⁸ or officials of the public land office.⁹ The rule applies equally in case of important official boards,¹⁰ as boards of equalization,¹¹ civil service commissioners¹² or the like.¹³ The official acts of military officers of the government¹⁴ stand in the same position.¹⁵

County.—Important county officers,¹⁶ as county commissioners,¹⁷ notaries public,¹⁸ registers of deeds,¹⁹ registers of probate,²⁰ supervisors,²¹ treasurer,²² and the like,²³ will be assumed to have done their official acts with exactness and regularity. The assumption, like others, furnishes no inference of fact;²⁴

1. *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924 (1909).

2. *State v. Lawson*, 14 Ark. 114 (1853); *Roberts v. Pillow*, 1 Hemp. (U. S.) 624 (1851).

3. *Montjoy v. State*, 78 Ind. 172 (1881); *People v. Otto*, 101 N. Y. 690, 5 N. E. 788 (1886); *Wilson v. State*, 16 Tex. App. 497 (1884); 2 Chamb., Ev., § 1202a, n. 9, and cases cited.

4. *Flores v. Hovel* (Tex. Civ. App. 1910), 125 S. W. 606; *Plank Road Co. v. Bruce*, 6 Md. 457, 466 (1854).

5. *State v. Dahl*, 140 Wis. 301, 122 N. W. 748 (1909).

6. A different ruling has been made in certain states. *Milwaukee Ext., etc., Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995 (1908).

7. *Erford v. City of Peoria*, 229 Ill. 546, 82 N. E. 374 (1907); *Paxton v. State*, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689 (1899).

8. *Barnhart v. Ehrhart*, 33 Or. 274, 54 Pac. 195 (1898); *Buchanan v. Barnsley* (Tex. Civ. App. 1908), 112 S. W. 118.

9. *Crawford County Bank v. Baker*, 95 Ark. 438, 130 S. W. 556 (1910); *Houseman v. International Nav. Co.*, 214 Pa. 552, 64 Atl. 379 (1906); 2 Chamb., Ev., § 1202b, n. 6, and cases cited.

10. *Balden v. State*, 122 Tenn. 704, 127 S. W. 134 (1910).

11. *State ex rel. Hammer v. Wiggins Ferry Co.*, 208 Mo. 622, 106 S. W. 1005 (1907); *In re Webster*, 94 N. Y. Supp. 1050, 106 App. Div. 360 (1905).

12. *People v. City of Chicago*, 127 Ill. App. 118 (1906).

13. *Motley v. Wilson*, 26 Ky. L. Rep. 1011, 82 S. W. 1023 (1904) (election commissioners).

14. *Drehman v. Stifel*, 41 Mo. 184, 97 Am. Dec. 268 (1867); *Chapman Tp. v. Herrold*, 50 Pa. 106 (1868).

15. Soldiers may come within the provisions of the rule when engaged on public business. e.g., recruiting. *Wolton v. Gavin*, 16 Q. B. 48, 20 L. J. Q. B. 73 (1850).

16. *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204 (1906).

17. *Thrash v. Com'rs of Transylvania County*, 150 N. C. 693, 64 S. E. 772 (1909).

18. *People v. Sanders*, 114 Cal. 216, 46 Pac. 155 (1896); *Black v. Minneapolis, etc., R. Co.*, *supra*; *McAndrew v. Radway*, 34 N. Y. 511 (1866); 2 Chamb., Ev., § 1203, n. 3, and cases cited.

19. *Childers v. Pickenpaugh*, 219 Mo. 376, 118 S. W. 453 (1909).

20. *Willets v. Mandlebaum*, 28 Mich. 521 (1874).

21. *In re Drainage Dist. No. 3, Hardin Co.* (Iowa 1909), 123 N. W. 1059; *Thayer v. McGee*, 20 Mich. 195 (1870).

22. *Holtsclaw v. State*, 46 Ind. App. 238, 92 N. E. 121 (1910).

23. *Smith v. Cox*, 82 S. C. 1, 65 S. E. 222 (1909) (auditor); *Green County v. Quinlan*, 211 U. S. 582, 29 S. Ct. 162 (1909).

24. *Chicago, etc., Ry. Co. v. Perry County*, 87 Ark. 406, 112 S. W. 977 (1908).

no probative force exists in any assumption, whether of law or of administration.²⁵

Municipal.—The Mayor or alcalde²⁶ or other city official²⁷ of any municipality will be assumed to have performed his official acts in due and proper form.²⁸ The officials assessing municipal taxes will, in like manner be assumed to have done their legal duty.²⁹ Town officers,³⁰ including those in charge of the charities of the town,³¹ will be taken, in the absence of evidence, to have discharged their official duties in a lawful and proper manner. In a similar way, the officers,³² as assessors,³³ collectors,³⁴ whose duties relate to taxation; or those, like town clerks,³⁵ treasurers,³⁶ trustees,³⁷ or township committees,³⁸ whose province is more executive or financial in its nature, are all conceded the benefit of the same administrative assumption. Village officers stand in the same position.³⁹

Legislative.—In much the same manner, a reasonable presumption is to be made in favor of the action of any legislative body⁴⁰ or of its officers. The same judicial action is taken in cases of municipal councils,⁴¹ or similar bodies.

Judicial; Judges.—The fully official acts of judges of general jurisdiction are distinctively assumed to have been regular.⁴² When the necessary facts of jurisdiction are established, the same assumption is made in favor of the judicial proceedings of judges of inferior courts, as county judges⁴³ or justices of

25. *Appling v. State*, 95 Ark. 185, 128 S. W. 866 (1910).

26. *Payne v. Treadwell*, 16 Cal. 220 (1860).

27. *Roemheld v. City of Chicago*, 131 Ill. App. 76 (1907); *City of Syracuse v. Roscoe*, 123 N. Y. Supp. 403, 66 Misc. 317 (1910); *Connor v. City of Marshfield*, 128 Wis. 280, 107 N. W. 639 (1906).

28. *Doe d. Bowley v. Barnes*, 8 Q. B. 1037 (1846); 2 Chamb., Ev., § 1204, n. 3, and cases cited. The act assumed to have been regularly done must, however, be one relevant to some issue in the case. *Hill v. Sheridan*, 128 Mo. App. 415, 107 S. W. 426 (1908); 2 Chamb., Ev., § 1204.

29. *Southland Lumber Co. v. McAlpin*, 126 La. 906, 53 So. 45 (1910); *People v. O'Donnell*, 94 N. Y. Supp. 884, 106 App. Div. 526, 47 Misc. 267 (1905).

30. *Wyatt v. Burdett*, 43 Colo. 208, 95 Pac. 336 (1908).

31. *Red Willow County v. Davis*, 49 Neb. 796, 69 N. W. 138 (1896).

32. *Adams v. Osgood*, 60 Neb. 779, 84 N. W. 257 (1900); *Eureka Hill Min. Co. v. Eureka*, 22 Utah 447, 63 Pac. 654 (1900).

33. *State v. Savage*, 65 Neb. 714, 91 N. W. 716 (1902).

34. *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597 (1862); *Downer v. Woodbury*, 19 Vt. 329 (1847).

35. *State v. Potter*, 52 Vt. 33 (1879).

36. *Murray v. Smith*, 28 Miss. 31 (1854); *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. 295, aff'g 6 N. Y. Supp. 336 (1891).

37. *Miles v. Bough*, 3 Q. B. 845, 43 E. C. L. 1001 (1842).

38. *Mercer County Traction Co. v. United New Jersey, etc., Co.*, 64 N. J. Eq. 588, 54 Atl. 819 (1903).

39. *Bekkedahl v. Village of Westby*, 140 Wis. 230, 122 N. W. 727 (1909).

40. *Bryant v. City of Pittsfield*, 196 Mass. 530, 85 N. E. 739 (1908); 2 Chamb., Ev., § 1204a.

41. *Duniway v. City of Portland*, 81 Pac. 945, 47 Or. 103, 81 Pac. 945 (1905); *State v. Muttly*, 39 Wash. 624, 82 Pac. 118 (1905); *Grand Trunk W. Ry. Co. v. City of South Bend*, 174 Ind. 203, 91 N. E. 809 (1910).

42. *Figge v. Rowley*, 84 Ill. App. 238, aff'd. 185 Ill. 234, 57 N. E. 195, (1899); *Den v. Applegate*, 23 N. J. L. 115 (1851); 2 Chamb., Ev., § 1205, n. 2, and cases cited.

43. *Staples v. Llano Co.* (Tex. Civ. App.), 28 S. W. 569 (1894).

the peace.⁴⁴ Court officials or magistrates, such as auditors,⁴⁵ commissioners,⁴⁶ referees,⁴⁷ occupy the same position. Subordinate public officials exercising judicial functions, e.g., coroners,⁴⁸ or notaries public⁴⁹ have been regarded as equally within the purview of the rule.

Attorneys.—The official acts of attorneys at law, as officers of the court, will receive the benefit of the assumption of regularity.⁵⁰ Thus, his acts for his client will be assumed to have been authorized by the latter⁵¹ and to have been done without intent to injure him.⁵² His conduct will be in every case assumed to have been carried on under a due sense of responsibility for good faith to the court.⁵³ *A fortiori*, the public prosecutors⁵⁴ and district attorneys⁵⁵ will be taken to have well and truly performed their official duty.

Clerks.—Conspicuous among judicial officers whose acts will be assumed to have been regular until shown to be otherwise are clerks of the court,⁵⁶ or their deputies, appointed by virtue of some provision of law.⁵⁷ The assumption goes so far as to take for granted that these officers have done their legal and other appropriate duties in the entry, filing⁵⁸ and docketing⁵⁹ of papers, or the like. Clerks of subordinate judicial tribunals, as the clerk of a grand jury⁶⁰ may receive the benefit of the same assumption.

Sheriffs and Other Officers.—It will be assumed that the acts of sheriffs,⁶¹

44. *Shattuck v. People*, 5 Ill. 477 (1843); *Hourtienne v. Schnoor*, 33 Mich. 274 (1876); 2 Chamb., Ev., § 1206, n. 2, and cases cited.

45. *Chelmsford Foundry Co. v. Shepard*, 206 Mass. 102, 92 N. E. 75 (1910); *Hightower v. State*, 58 Miss. 636 (1881); 2 Chamb., Ev., § 1206, n. 3, and cases cited.

46. *Regent v. People*, 96 Ill. App. 189 (1901); *Kobs v. Minneapolis*, 22 Minn. 159 (1875); *Lyman County v. State*, 11 S. D. 391, 78 N. W. 17.

47. *Story v. De Armond*, 77 Ill. App. 74 (1898); *Leonard v. Root*, 15 Gray (Mass.) 553 (1860); *Lewis v. Greider*, 49 Barb. (N. Y.) 606 (1867).

48. *Woods v. State*, 63 Ind. 353 (1878); *People v. Dalton*, 61 N. Y. Supp. 263, 46 App. Div. 264 (1899).

49. *Pardee v. Schanzlin*, 3 Cal. App. 597, 86 Pac. 712 (1906); *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa 32, 96 N. W. 984 (1903); 2 Chamb., Ev., § 1206, n. 7.

50. *Fambles v. State*, 97 Ga. 625, 25 S. E. 365 (1895); *Bowman v. Powell*, 127 Ill. App. 114 (1906); *Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209 (1900); 2 Chamb., Ev., § 1207, n. 1, and cases cited.

51. *Stone v. Missouri Pac. R. Co.*, 75 Kan. 600, 90 Pac. 25 (1907).

52. *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159 (1909).

53. *Older v. Superior Court*, 10 Cal. App. 564, 102 Pac. 829 (1909).

54. *State v. Matejousky*, 22 S. D. 30, 115 N. W. 96 (1908).

55. *Winnek v. Mace*, 148 Cal. 270, 82 Pac. 1046 (1905).

56. *Powers v. Hitchcock*, 129 Cal. 325, 61 Pac. 1076 (1900); *Morse v. Hewett*, 28 Mich. 481 (1874); *McPherson v. Commercial Nat. Bank*, 61 Neb. 695, 85 N. W. 895 (1901); *Schermerhorn v. Talman*, 14 N. Y. 93 (1856); 2 Chamb., Ev., § 1208, n. 1, and cases cited.

57. *Miller v. Lewis*, 4 N. Y. 554 (1851).

58. *Woods v. Sargent*, 43 Colo. 268, 95 Pac. 932 (1908).

59. *Burke v. Kaltenbach*, 109 N. Y. Supp. 225, 125 App. Div. 261 (1908).

60. *State v. Pitkin*, 137 Iowa 22, 114 N. W. 550 (1908). No probative force necessarily resides in this assumption or with the facts as to which it is made, and should the assumption of regularity be invoked as affirmative proof, it necessarily fails. *Drennen v. People*, 222 Ill. 592, 78 N. E. 937 (1906).

61. *San Francisco Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 701, 106 Pac. 111 (1910); *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084 (1909); *Simon v. Craft*, 182 U. S. 427, 21 S. Ct. 836, 45 L. ed. 1165 (1900); 2 Chamb., Ev., § 1209, n. 1, and cases cited.

deputy sheriffs,⁶² police officers and constables⁶³ connected with the service of legal process are regularly and properly done. The same assumption is made as to other acts of these officers of the law,⁶⁴ and as to the regularity of the official acts of other court officers,⁶⁵ and persons connected, even more remotely with court proceedings, e.g., jury commissioners.⁶⁶

Performance of Conditions.—Everything essential to the validity of a judicial act will be assumed to have existed.⁶⁷ For example, if notice is required, it will be taken for granted that it was duly given.⁶⁸ If process is to be served upon a given individual in order that a subsequent legal act relating to him should be valid, it will, in the absence of evidence on the subject, be assumed that it has been done.⁶⁹ If the actor must, in order to do a valid act, have made a preliminary finding,⁷⁰ it will be assumed that he has made it.

§ 494. [Administrative Assumptions]; Relation Between Foreign and Domestic Law.⁷¹—The existence of a foreign law presents a question of fact⁷² and the matter is one entirely for evidence when evidence is furnished.⁷³ When there is no evidence before the court on this point, the judge must assume that the foreign law is similar to an analogous provision in some system of law with which he is acquainted,⁷⁴ providing that such an assumption is reasonably possible.⁷⁵

Foreign Law Assumed to be the Same as that of the Forum; Common Law.—Where both the courts of the forum and those of the foreign state or country are under the common law, it will be assumed by the courts of the forum, in all cases where the provision is not shown to be statutory⁷⁶ and no direct

62. *Massachusetts Breweries Co. v. Herman*, 106 Me. 524, 76 Atl. 943 (1910); *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507 (1909).

63. *McLane v. Moore*, 51 N. C. 520 (1859).

64. Thus, it will be assumed that a sheriff in giving a deed under a sale made by him acted within his legal powers. *Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175 (1906); *Ivy v. Yancey*, 129 Mo. 501, 31 S. W. 937 (1895).

65. Accuracy of stenographic report of official stenographer, *quaere*, *Hutchinson v. State*, 28 Ohio Cir. Ct. R. 595 (1906).

66. *Louisville, etc., Ry. Co. v. Schwab*, 31 Ky. L. Rep. 1313, 105 S. W. 110 (1907); *Com. v. Hughes*, 33 Pa. Super. Ct. 90 (1907).

67. *Kavanaugh v. City of St. Louis*, 220 Mo. 496, 119 S. W. 552 (1909); *State v. Savage*, 65 Neb. 714, 91 N. W. 716 (1902); *People v. Johnson*, 46 Hun (N. Y.) 667 (1887); 2 Chamb., Ev., § 1210, n. 1, and cases cited.

68. *Colorado Fuel, etc., Co. v. State Bd. and Com'rs*, 14 Colo. App. 84, 60 Pac. 367 (1899); *Morgan v. Neville*, 74 Pa. 52 (1873);

Thompson v. State, 23 Tex. Civ. App. 370, 56 S. W. 603 (1900); 2 Chamb., Ev., § 1210, n. 2, and cases cited.

69. *Best v. Vanhook*, 11 Ky. L. Rep. 753, 13 S. W. 119 (1890); *Steinhardt v. Baker*, 163 N. Y. 410, 57 N. E. 629 (1900).

70. *Mercer County Traction Co. v. United New Jersey, etc., Co.*, 64 N. J. Eq. 588, 54 Atl. 819 (1903).

71. 2 Chamberlayne, *Evidence*, §§ 1211-1218.

72. § 23, *supra*; 1 Chamb., Ev., § 41.

73. *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360 (1892).

74. *Ham v. St. Louis & S. F. R. Co.*, 149 Mo. App. 200, 130 S. W. 407 (1910); 2 Chamb., Ev., § 1211.

75. In case of certain foreign countries not under Civil or Common Law like Turkey, or other Mohammedan lands such an assumption would be, for most tribunals, an impossible one. *Aslanian v. Dostumian*, 174 Mass. 328, 54 N. E. 845, 75 Am. St. Rep. 348, 47 L. R. A. 495 (1899).

76. *Crane v. Blackman*, 126 Ill. App. 631

evidence is presented on the point, that the legal or equitable⁷⁷ rule of such foreign nation,⁷⁸ state,⁷⁹ colony, or territory⁸⁰ which is also under common law jurisprudence, is the same as its own.⁸¹

Construction.—A similar assumption based upon like reasons, will at times be made as to a similarity in *construction* of the common law between two states⁸² or federal jurisdictions which are both under the common law, or between a state or, under like conditions, between a territorial jurisdiction and that covered by a federal court.⁸³ Although the court of the forum, where the foreign law is statutory,⁸⁴ is not in a position to make any assumption in the matter whatever, it will feel obliged to assume that the common law of the forum governs as to points regarding the foreign law as to which there is no evidence.⁸⁵ In general, it is to be observed that where the foreign state is said to be under the common law, the system of law to which reference is made is not the common law of England but that of the forum.⁸⁶

(1906); *Jordan v. Pence*, 123 Mo. App. 321, 100 S. W. 529 (1907).

77. *Standard Leather Co. v. Mercantile, etc., Co.*, 131 Mo. App. 701, 111 S. W. 631 (1908).

78. *Gordon v. Knott*, 199 Mass. 173, 85 N. E. 184 (1908); *Mexican Cent. R. R. v. Eckman*, 205 U. S. 538, 27 S. Ct. 791, 51 L. ed. 920 (1907); *Vazakas v. Vazakas*, 109 N. Y. Supp. 568 (1908); 2 Chamb., Ev., § 1212, n. 3, and cases cited.

79. *Hoxie v. New York, etc., R. Co.*, 82 Conn. 352, 73 Atl. 754 (1909); *Scholten v. Barber*, 217 Ill. 148, 75 N. E. 460 (1905); *Miller v. Aldrich*, 202 Mass. 109, 88 N. E. 441 (1909); *Moreland v. Moreland*, 108 Va. 93, 60 S. E. 730 (1908); 2 Chamb., Ev., § 1212, n. 4, and cases cited. *Beard v. Chicago & R. Co.*, 134 Minn. 162, 158 N. W. 816, L. R. A. 1916 F 866 (1916); *Southworth v. Morgan*, 205 N. Y. 293, 98 N. E. 490, 51 L. R. A. (N. S.) 56 (1912); *Holbrook v. Libby*, 113 Me. 389, 94 Atl. 485, L. R. A. 1916 A 1167 (1915).

Presumption foreign law.—The common law of a sister state originally colonized from England or formed from territory ceded from England is presumed the same as that of another common-law state in the absence of evidence to the contrary. There is no such presumption as to the statutes of a sister state for they must be proved under proper allegations before the courts can take cognizance of them. *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 90 N. E. 722, 42 L. R. A. (N. S.) 1115 (1912).

80. *St. Louis & S. F. R. Co. v. Johnson*, 74

Kan. 83, 86 Pac. 156 (1906); *Keagy v. Wellington Nat. Bank*, 12 Okl. 33, 69 Pac. 811 (1902).

81. The presumption that the common law is in force in another state applies only to states carved out of English territory. *Mathieson v. St. Louis & S. F. R. Co.*, 219 Mo. 542, 118 S. W. 9 (1909). See also, 2 Chamb., Ev., § 1214, ns. 3, 4.

82. *Thomas v. Clarkson*, 125 Ga. 72, 54 S. E. 77 (1906); *Missouri, K. & T. Ry. Co. v. Wise* (Tex. Civ. App.), 106 S. W. 465, judg. aff'd (Tex. Sup. 1908), 109 S. W. 112.

83. It will, for example, be presumed, in the absence of proof, that the construction placed on the common law by the supreme court of a territory is the same as that of the supreme court of the United States. *El Paso & S. W. Ry. Co. v. Smith*, 50 Tex. Civ. App. 10, 108 S. W. 988 (1908).

84. 2 Chamb., Ev., § 1215, ns. 6, 7.

85. Thus, in construing a foreign statute involving a question as to the limitation of actions in the foreign state, regarding which no evidence is furnished, the domestic court is justified, and indeed obligated, in assuming that the period of limitations in the foreign state is the same as that which prevails in its own jurisdiction. *Missouri, etc. Co. of Texas v. Harriman Bros.* (Tex. Civ. App. 1910), 138 S. W. 932.

86. *Hazen v. Mathews*, 194 Mass. 388, 68 N. E. 838 (1903); *Spencer v. Busch*, 98 N. Y. Supp. 690, 50 Misc. 284 (1906); *White v. Richeson* (Tex. Civ. App. 1906), 94 S. W. 202.

Inertia of the Court.—The assumption that the law of the foreign state or country is the same as the common law of the forum is made with especial ease when the foreign state has formed part of the jurisdiction of the forum⁸⁷ and has adopted the same system of jurisprudence.⁸⁸ The inertia of the court⁸⁹ may, however, be increased by the circumstances of the case as well as thus diminished by them. The judge will, for example, decline as a rule, to assume a similarity which would result in working a forfeiture,⁹⁰ voids a transaction otherwise valid,⁹¹ or subjects the party to some similar penalty.⁹²

Statutory Law.—The general uniformity in statutory regulation in the several states of the American Union and between England and her self-governing colonies has induced certain states in the American Union to rule that the law of a sister state will be assumed, in the absence of evidence on the subject, to be the same as the statute law of the forum;⁹³ and has led English courts to hold that the same rule should apply to the laws of one British colony in the courts of another.⁹⁴ In connection with the assumption to which reference has previously been made⁹⁵ that the common law of the foreign state will be assumed to be the same as the common law of the forum, this amounts to saying that in these tribunals the law of a sister state⁹⁶ or foreign country⁹⁷ will be taken in all cases where no evidence is furnished to be that of the forum.⁹⁸

Foreign Law Not Assumed to be the Same as that of the Forum.—Among

87. *State v. Patterson*, 24 N. C. 346, 38 Am. Dec. 699 (1842).

88. *Dormitzer v. German Sav., Etc., Soc.*, 23 Wash. 132, 62 Pac. 862 (1900).

89. *Supra*, § 409; 2 Chamb., Ev., § 993.

90. *Fred Miller Brewing Co. v. De France*, 90 Iowa 395, 57 N. W. 959 (1894); *Citizens' Sav. Bank v. Couse*, 124 N. Y. Supp. 79 (1910); *Hull v. Augustine*, 23 Wis. 383 (1868); 2 Chamb., Ev., § 1213, n. 4, and cases cited. CONTRA: *Leake v. Bergen*, 27 N. J. Eq. 360 (1876); *McCraney v. Alden*, 46 Barb. (N. Y.) 272 (1866).

91. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844 (1887); *Smith v. Whitaker*, 23 Ill. 367 (1860). But see *Terry v. Robins*, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663 (1901).

92. *Louisiana, etc., R. Co. v. Phelps*, 70 Ark. 17, 65 S. W. 709 (1901); *Atchison, etc., R. Co. v. Betts*, 10 Colo. 431, 15 Pac. 821 (1887); 2 Chamb., Ev., § 1213, n. 6, and cases cited.

93. *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323 (1908); *McMillan v. American Express Co.*, 123 Iowa 236, 98 N. W. 629 (1904); *Peter Adams Paper Co. v. Cassard*, 206 Pa. 179, 55 Atl. 949 (1903);

Moehlenpah v. Mayhew, 138 Wis. 561, 119 N. W. 826 (1909); 2 Chamb., Ev., § 1214, n. 1, and cases cited. *Droge Elevator Co. v. W. P. Brown Co.*, 172 Iowa 4, 151 N. W. 1048.

94. *Langdon v. Robertson*, 13 Ont. 497 (1887).

95. 2 Chamb., Ev., § 1212.

96. *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204 (1909); *Reid, Murdoch & Co. v. Northern Lumber Co.*, 146 Ill. App. 371 (1909); *Taber v. Seaboard Air Line Ry.*, 81 S. C. 317, 62 S. E. 311 (1908); *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836 (1909); 2 Chamb., Ev., § 1214, n. 4, and cases cited.

97. *Lilly-Bracket Co. v. Sonnemann*, 157 Cal. 192, 106 Pac. 715 (1910); *Galard v. Winans*, 111 Md. 434, 74 Atl. 626 (1909); 2 Chamb., Ev., § 1214, n. 5, and cases cited.

98. *Fidelity Ins. Co. v. Nelson*, 30 Wash. 340, 70 Pac. 961 (1902). It has even been deemed that a domestic court could safely assume also that the construction given to the statute in the two jurisdictions has been the same. *Howe v. Ballard*, 113 Wis. 375, 89 N. W. 136 (1902).

Occidental nations the two general systems of jurisprudence are those of the civil and of the common law. If the foreign state is under the common law and the state of the forum is not, the only assumption reasonably to be indulged in is that the matter is to be adjusted under the common law.⁹⁹ Conversely, where the forum is under the common law and the foreign state is not, no assumption of similarity can be indulged by the courts of the former.¹ In other words, the common law is not to be presumed to be in force in any state or country where English institutions have not been established.²

When Foreign Law is Statutory.—A domestic court, where the foreign law is shown to be statutory, can make no administrative assumption as to what the provision of the foreign law is;³ *provided* that the domestic rule is one of the common law.

Civil Law Assumed to Govern.—Where the forum is under the common law and the foreign state is under the civil the permissible assumption is that the case is governed by the provisions of the latter system.⁴ A court administering the civil law will naturally assume that the law on a given point of a foreign jurisdiction in which the civil law prevails is the same as its own on any given point.⁵

Common Law.—While, as has been said, there is a likeness between the statutes passed by the American States on any given subject or between the statutory legislation of England and her colonies, a great diversity in particulars is so obvious as to have induced many eminent courts to decline to assume the existence of any provision in a foreign state or country similar to that contained in a domestic statute.⁶ This is the usual rule adopted where the statutory departure from the common law rule adopted in the jurisdiction of the forum has been radical⁷ or recent. As in cases arising under the common

99. *Martin v. Boler*, 13 La. Ann. 369 (1858); 2 Chamb. Ev., § 1215.

1. *Watford v. Alabama & Florida Lumber Co.*, 152 Ala. 178, 44 So. 567 (1907).

2. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 100 N. W. 532 (1904). It will not be assumed that the common law prevails in states which, like Idaho, were never under the law of England. *McManus v. Oregon Short Line R. Co.*, 118 Mo. App. 152, 94 S. W. 743 (1906). See also, 2 Chamb., Ev., § 1213, n. 6. Under such circumstances, the court of the forum, in the absence of evidence as to what the law of the foreign state is, will determine the matters in issue according to its own laws.

3. *Cormo v. Boston Bridge Works*, 205 Mass. 366, 91 N. E. 313 (1910). The statute or written law of a foreign state or country can only be considered in so far as it is proved to the court of the forum. Supreme

Ruling of Fraternal Mystic Circle v. Wood, 114 Ill. App. 431 (1904); *Com. v. Stevens*, 196 Mass. 280, 82 N. E. 33 (1907); *Hain v. St. Louis & S. F. R. Co.*, 136 Mo. App. 17, 117 S. W. 108 (1909).

4. See *Dempster v. Stephens*, 63 Ill. App. 126 (1895).

5. *Mexican Cent. R. Co. v. Olmstead* (Tex. Civ. App. 1900), 60 S. W. 267; *Mexican Cent. R. Co. v. Glover*, 107 Fed. 356, 46 C. C. A. 334 (1901); 2 Chamb., Ev., § 1216.

6. *Baltimore, etc., R. Co. v. Hollenbeck*, 161 Ind. 452, 69 N. E. 136 (1903); *Cherry v. Sprague*, 187 Mass. 113, 67 L. R. A. 33, 72 N. E. 456 (1904); *State v. Clark*, 178 Mo. 20, 76 S. W. 1007 (1903); *Patton v. Patton*, 123 N. Y. Supp. 329 (1910); 2 Chamb., Ev., § 1217, n. 1, and cases cited.

7. *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33 (1900); *Dewelman v. Brazier*, 193 Mass. 588, 79 N. E. 812 (1907);

law,⁸ the court of the forum will not assume a similarity of statutory provision where the effect of so doing would be to work a forfeiture.⁹

Common Law of the Forum.—Where the law of the forum is statutory and assumption of uniformity is not taken, the judge is thus almost necessarily obliged to assume that in the foreign state the matter in question is governed by the common law.¹⁰ This means that the presiding judge will do one of two things. (1) He may regard as applicable to the situation¹¹ the common law of England,¹² including the law Merchant,¹³ and English statutory law passed prior to the Declaration of Independence of the American Colonies and adopted by them as suited to their condition.¹⁴ (2) Or, he may apply the common law of England as understood in the forum, i.e., as affected by local usage or construction,¹⁵ the common law as it would have been had no statute been passed. Of the two, the latter is the easier and more usual course.¹⁶

§ 495. [Administrative Assumptions]; Wrongdoing Not Assumed.¹⁷—The administrative presumption of regularity is most readily made by the court when it is the legal duty of the actor to be regular and where his failure to do so would be an illegal,¹⁸ immoral¹⁹ or criminal act. At times it is affirmative, as that there is a presumption against fraud or wrongdoing, or in favor of good faith or legality, that every one is presumed to be innocent, etc.²⁰ In other cases, the form is negative, fraud or illegality is not presumed, there is no presumption in favor of fraud, wrongdoing will not be inferred, and the like. As a canon of administration, it amounts to saying that there will be no as-

Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359 (1906).

8. 2 Chamb., Ev., § 1213.

9. Citizens' Sav. Bank v. Couse, 124 N. Y. Supp. 79 (1910); Fidelity Ins., etc., Co. v. Nelson, 30 Wash. 340, 70 Pac. 961 (1902); 2 Chamb., Ev., § 1217, n. 4, and cases cited. CONTRA: Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56 (1905).

10. Baltimore, etc., R. Co. v. Hollenbeck, *supra*; Robb v. Washington and Jefferson College, *supra*; 2 Chamb., Ev., § 1218, n. 1, and cases cited.

11. Engstrand v. Kleffman, 86 Minn. 403, 90 N. W. 1054 (1902); State v. Shattuck, 69 Vt. 403, 38 Atl. 81, 60 Am. St. Rep. 936, 40 L. R. A. 428 (1897).

12. Schlee v. Guckenhimer, 179 Ill. 593, 54 N. E. 302 (1899); Crandall v. Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458 (1901); Casola v. Kugelman, 54 N. Y. Supp. 89, 33 App. Div. 428 (1898); 2 Chamb., Ev., § 1218, n. 3, and cases cited.

13. Reed v. Wilson, 41 N. J. L. 29 (1879);

Low v. Learned, 34 N. Y. Supp. 68, 13 Misc. 150 (1895).

14. Bradley v. Peabody Coal Co., 99 Ill. App. 427 (1902).

15. Robinson v. Yetter, 238 Ill. 320, 87 N. E. 363 (1909); Matter of Hamilton, 27 N. Y. Supp. 813, 76 Hun 200 (1894); 2 Chamb., Ev., § 1218, n. 6, and cases cited.

16. 2 Chamb., Ev., § 1215, n. 3.

17. 2 Chamberlayne, Evidence, §§ 1219-1223.

18. *In re Darrow's Estate*, 118 N. Y. Supp. 1082, 64 Misc. 224 (1909); Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284 (1906); 2 Chamb., Ev., § 1219, n. 1, and cases cited. 2 Chamb., Ev., § 1222.

19. Etna Indemnity Co. of Hartford v. George A. Fuller Co., 111 Md. 321, 73 Atl. 738, 74 Atl. 369 (1909); Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 62 S. E. 1057 (1908); 2 Chamb., Ev., § 1219, n. 2, and cases cited.

20. Jensen v. Montgomery, 29 Utah 89, 80 Pac. 504 (1905).

sumption made against a person's good faith or good conduct in the absence of evidence.

Fiduciary Conduct.—Fiduciaries are, it is said, presumed to have acted in good faith and performed their duties, and not to have permitted breaches of trust.²¹

Professional Duty.—In connection with matters of professional, as distinguished from legal or moral duty, the same assumption, in modified form, will be made.²²

No Probative Force.—Certain courts have held that there is a probative force in the "presumption" or assumption itself.²³ This is clearly an error. There can be no probative weight in a mere administrative assumption.²⁴

Good Character.—In much the same way, it is said in a civil case, that the character of a person is presumed to be good,²⁵ or that a person accused of crime is presumed to have a good character. In either case the actual ruling is to the effect that if either side desires to have it appear that the character of the person in question is other than good, he has the burden of evidence to prove it so.

Fraud.—It is said that there is a presumption against fraud.²⁶ An equivalent expression apparently is that good faith will be presumed.²⁷ The meaning is not varied when it is announced that fraud is never presumed.²⁸ The real purport of the expression is to the effect that "He who alleges fraud must prove it."²⁹

Illegality.—It is said that there is a presumption against illegality,³⁰ that

21. *McCreery v. First Nat. Bank*, 55 W. Va. 663, 47 S. E. 890 (1904). This rule of practice or administration is applied to the officers of corporations. *Keady v. United Rys. Co.*, 57 Or. 325, 108 Pac. 107 (1910).

22. A surveyor, for example, will be assumed to have run out correctly the meander line of a piece of land bounded by water. *Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089 (1906).

23. *Mordhurst v. Ft. Wayne, etc., Traction Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105 (1904); *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532 (1894); *James River, etc., R. Co. v. Littlejohn*, 18 Gratt. (Va.) 53 (1867).

24. 2 Chamb., Ev., § 1219. That operates, so far as it operates at all, in advance of the introduction of evidence and amounts merely to saying that he who alleges illegality will, as a matter of administration, be required to prove it. *Id.*, n. 9.

25. *Goggans v. Monroe*, 31 Ga. 331 (1860); *Kennedy v. Holladay*, 25 Mo. App. 503 (1887); 2 Chamb., Ev., § 1220.

26. *Levy v. Scott*, 115 Cal. 39, 46 Pac. 892 (1896); *Webb v. Marks*, 10 Colo. App. 429,

51 Pac. 518 (1897); *Creeden v. Mahoney*, 193 Mass. 402, 79 N. E. 776 (1907); 2 Chamb. Ev., § 1221, n. 1, and cases cited.

27. *Weybrick v. Harris*, 31 Kan. 92, 1 Pac. 271 (1883); *State v. Washington Steam Fire Co.*, 76 Miss. 449, 24 So. 877 (1899); 2 Chamb., Ev., § 1221, n. 2, and cases cited.

28. *Smith v. Collins*, 4 Ala. 394, 10 So. 334 (1891); *Little Rock Bank v. Frank*, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65 (1896).

Fraud may be inferred.—While fraud will not be *presumed*, it may, as a matter of course, be inferred from circumstances. "The word 'presumed,' however, has an entirely different meaning from the word 'inferred.'" *Bannon v. Ins. Co. of North America*, 115 Wis. 250-259, 91 N. W. 666 (1902). See also, *Morford v. Peck*, 46 Conn. 380 (1878); *State, to Use of Erhardt v. Estel*, 6 Mo. App. 6 (1878); 2 Chamb., Ev., § 1221, n. 3.

29. *Parkhurst v. McGraw*, 24 Miss. 134 (1852).

30. *Deering v. Peterson*, 75 Minn. 118, 77 N. W. 568 (1898); *State v. Hannibal, etc.*,

there is a presumption in favor of legality,³¹ that it will be presumed that all facts necessary to legality in a given transaction in point of fact existed.³² With substantially identical meaning, it may be said that where a particular situation is presented to the court, such an explanation of it will be adopted, if possible, as is consistent with legality.³³ Without perceptible difference in the intended meaning, the rule, whatever it may be, is frequently put in a negative form. The law is said to make no presumption against legality,³⁴ or it is said that there is no presumption that illegality exists.³⁵ A more intelligible expression of identical meaning would be to the effect that he who relies upon the existence of illegality has either the burden of proof to establish it or the burden of evidence as to it if he be the non-actor.³⁶

Corporations.—The presumption of right acting, or against illegality,³⁷ applies as to the conduct of all corporations, domestic or foreign, municipal³⁸ or private.

No probative force attaches to the assumption, whatever may be true of the facts on which it rests or with which it deals.³⁹

§ 496. *Conflict of Presumptions; Civil Cases.*⁴⁰—In civil cases, the administrative assumption most frequently employed is that against illegality,⁴¹ practically a “presumption of innocence” in civil proceedings.⁴² Thus it may be said that the presumption from the possession of a note or other negotiable instrument that it has been paid⁴³ is not sufficient to overcome the presumption against fraud.⁴⁴ The presumption against fraud, being, in this connection a

R. Co., 113 Mo. 297, 21 S. W. 14 (1892); Spaulding v. Arnold, 125 N. Y. 194, 26 N. E. 295, aff'g 6 N. Y. Supp. 336 (1891); 2 Chamb., Ev., § 1222, n. 2, and cases cited.

31. *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106 (1900); *Hartwell v. Root*, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232 (1822); *Hays v. Hill*, 23 Wash. 730, 63 Pac. 576 (1901); 2 Chamb., Ev., § 1222, n. 3, and cases cited.

32. *Friend v. Smith Gin Co.*, 59 Ark. 86, 26 S. W. 374 (1894); *Korn v. Schedler*, 11 Daly (N. Y.) 234 (1882).

33. *Fisher v. Melnerney*, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68 (1902); *Osborn v. Welton*, 146 Mo. 185, 47 S. W. 986 (1898); *Green v. Benham*, 68 N. Y. Supp. 243, 57 App. Div. 9 (1900); 2 Chamb., Ev., § 1222, n. 5, and cases cited.

34. *Sheffield v. Balmer*, 52 Mo. 474, 14 Am. Rep. 439 (1873).

35. *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430 (1878); *Luttrell v. State*, 40 Tex. Cr. 451, 51 S. W. 930 (1899).

36. *Friend v. Smith Gin Co.*, *supra*; *Baxter v. Ellis*, 57 Me. 178 (1869).

37. *United Shoe Mach. Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567 (1908).

38. *Inhabitants of Wellington v. Inhabitants of Carinna*, 104 Me. 252, 71 Atl. 889 (1908).

39. Thus, the fact that the registration of ballots remains unchanged between the time of a balloting and a recount of the votes cannot be affirmatively established as a fact by means of the assumption against illegality. *Trumbull v. Board of Canvassers of City of Jackson*, 140 Mich. 529, 103 N. W. 993 (1905). See as to rules of pleading and administration, 2 Chamb., Ev., § 1223.

40. 2 Chamberlayne, Evidence, §§ 1224, 1225.

41. *Supra*, § 495; 2 Chamb., Ev., § 1222. Chamb., Ev., § 1224.

42. *Supra*, § 478; 2 Chamb., Ev., § 1172, n. 1.

43. *Supra*, § 425; 2 Chamb., Ev., § 1056, n. 3.

44. *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556, 25 S. W. 868 (1894).

mere statement as to the burden of proof,⁴⁵ or evidence,⁴⁶ the ruling is, in reality, one to the effect that such possession does not, as a matter of evidence, establish a *prima facie* case, in a matter so greatly enhancing the inertia of the court.⁴⁷ So of the presumption against illegality.⁴⁸ It amounts, as has been seen, to the statement that he who claims illegality must allege it in his pleadings or establish it in his proof by a required preponderance of the evidence. Thus on an action involving bigamy, the party having the burden of evidence as to that fact produces facts tending to show the existence of a former marriage at an early date and asks the jury to infer from the so-called presumption against change that the earlier relation still continued at the time of the second marriage. This inference does not constitute, under the circumstances, a *prima facie* case. The burden of evidence is not sustained. In announcing a ruling to this effect, the customary form of expression is to say that the presumption of continuance does not overcome the presumption against illegality or in favor of right conduct or whichever of several alternative⁴⁹ expressions the judge may see fit to adopt.⁵⁰

A Contrary View.—In view of the fact that inferences alone possess probative force, it seems clear that in establishing the existence of a particular fact, rules of procedure, whether of assumption or otherwise must be denied all weight and the whole question regarded as one for the use of evidence. For this reason the contention that where, in a civil case, the presumption of the continuance of life tends to show a subsequent marriage to be bigamous, the presumption of innocence requires that probative force should be denied the presumption of continuance of life, has been vigorously repudiated by courts of high authority.⁵¹

§ 497. [Conflict of Presumptions]; Criminal Cases; Knowledge of Law.⁵²—When the proposition of substantive law that ignorance of a law furnishes no excuse for its violation is paraphrased into the language of logic by saying

45. *Supra*, § 495; 2 Chamb., Ev., § 1221.

46. *Supra*, §§ 402 *et seq.*; 2 Chamb., Ev., §§ 967 *et seq.*

47. *Supra*, § 409; 2 Chamb., Ev., § 993.

48. *Supra*, § 495; 2 Chamb., Ev., § 1222.

49. *Excelsior Mfg. Co. v. Owens, supra.*

50. *Case v. Case*, 17 Cal. 598 (1861); *Stein v. Stein*, 66 Ill. App. 526 (1896); *Klein v. Laudman*, 29 Mo. 259 (1860); *Clayton v. Wardell*, 4 N. Y. 230 (1850); 2 Chamb., Ev., § 1225, n. 11, and cases cited. See general discussion of conflict of presumptions, 2

51. Thus, in a case involving a pauper settlement acquired by a second marriage and residence in the defendant town, the defense being that of a prior marriage to a man who had abandoned the pauper several years before and not shown to be dead, any such

administrative effect is denied to the so-called "presumption of innocence." "The presumption of innocence is not based upon facts, but is independent of all evidence. The presumption of continued life rests upon facts proved: and those established facts, while they raise the presumption of continued life, rebut the presumption of innocence." *Hyde Park v. Canton*, 136 Mass. 505 (1881). In such a case, as in any other, entirely regardless of any presumption of innocence in a civil or criminal case, the logical inferences as to actual continuance of life should receive careful consideration. *Murray v. Murray*, 6 Or. 17 (1876); 2 Chamb., Ev., § 1225.

52. 2 Chamberlayne, *Evidence*, §§ 1226, 1227.

that "everyone is presumed to know the law,"⁵³ the effect of its application to a criminal case upon the rights of a defendant may well be stated as being that the presumption of knowledge of law is sufficient to overcome the presumption of innocence.⁵⁴ In reality the ruling is as to the sufficiency of certain facts to meet a legal requirement as to the quantum of proof.

§ 498. [Conflict of Presumptions]; "Presumption of Innocence."⁵⁵— Any actual "conflict" between a rule of substantive law relating to procedure like the "presumption of innocence," and the logical effect of certain facts in creating belief in the mind is intrinsically impossible. When it is said, therefore, that a given fact, or set of facts does or does not overcome the "presumption of innocence," the most that can be rationally meant by the court is a ruling as to the evidentiary value of certain evidence as constituting a *prima facie* case. For example, it is said of every incriminating fact which the government introduces to show the guilt of the accused that it conflicts with the "presumption of innocence." Of every material proposition which it succeeds in establishing beyond a reasonable doubt, it is asserted that the prosecution has *pro tanto*, overcome the defendant's "presumption of innocence."⁵⁶ On the contrary, where a given set of facts does not establish guilt beyond a reasonable doubt, it is said that the presumption of innocence still protects the accused.⁵⁷ It would thus be entirely possible, were any advantage to be so gained, to state the probative value of any incriminating facts brought against the accused in a criminal case in terms of their effect upon this so-called "presumption of innocence."⁵⁸ On the other hand, the insufficiency of certain facts in a criminal proceeding to make or mar a *prima facie* case may, in much the same way, be

53. *Supra*, § 477; 2 Chamb., Ev., § 1169.

54. *Dunlop v. U. S.*, 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 709 (1896); 2 Chamb., Ev., §§ 1226, 1227.

55. 2 Chamberlayne, Evidence, §§ 1228-1231.

56. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890); *State v. Shelley*, 166 Mo. 616, 60 S. W. 430 (1901); *Dunlop v. U. S.*, *supra*.

57. *Dalton v. U. S.*, 154 Fed. 461, 83 C. C. A. 317 (1907).

58. Thus, the fact that the government need not, as part of its original case, introduce evidence that the accused is sane (*supra*, § 424, n. 11; 2 Chamb., Ev., § 1052, n. 1), may be put in the form of saying that the presumption of sanity is sufficient to overcome the "presumption of innocence." *Dunlop v. U. S.*, *supra*. In like manner, the administrative canon that the court will assume that official duty is properly performed or the circumstance that an inference of fact may reasonably be drawn, in the absence of evidence to the contrary, convincing the mind

beyond a reasonable doubt, from the observed regularity of certain public offices (*Dunlop v. U. S.*, *supra*), or from the proposition of experience that books of public account are usually correct (*Hemingway v. State*, *supra*) can, were it desirable, readily be put into the form of saying that the presumption or regularity (*supra*, §§ 490 *et seq.*; 2 Chamb., Ev., §§ 1193 *et seq.*) overcomes the "presumption of innocence." So, on an indictment for adultery, it is a familiar proposition of experience that the defendant's wife was alive at the time of the alleged unlawful act may logically be shown by proof of her being alive shortly before, on the presumption that life once shown to exist, continues for a reasonable time. *Supra*, § 420; 2 Chamb., Ev., § 1042. *Com v McGrath*, 140 Mass. 296, 6 N. E. 515 (1885). This may be stated by saying that "the presumption of life outweighs the presumption of innocence which the law indulges." *Howard v. State*, 75 Ala. 27 (1883).

announced in terms of their effect upon this "presumption of innocence," so called.⁵⁹

Continuance of Life.—As has incidentally been intimated, an inference or presumption with which the so called "presumption of innocence" is said, with special frequency, to "conflict" is that of the continuance of life.⁶⁰ The ruling by a presiding judge that the person alleging that a given individual was alive at a certain time must prove it, or introduce evidence tending to do so, is spoken of as one to the effect that the presumption of the continuance of life does not overcome the presumption of innocence.⁶¹ Should the judge's ruling be to the contrary effect, it will probably be found that he is said to have held that the presumption of innocence overcomes the presumption of continuance.⁶²

Bigamy.—For example, where one of a married couple remarries in the absence of affirmative evidence of the death of the other party and is subsequently indicted for bigamy, it is for the prosecution to establish the fact that the absent consort was actually alive at the time of the second marriage. To make this proof, it cannot, after a short interval, rely upon any logical inference or presumption that a person once shown to be alive continues to be so.⁶³ So, also, on an indictment for bigamy, where it is sought to prove the former marriage by evidence of cohabitation and recognition of the accused as a husband or wife,⁶⁴ a ruling that the inference from such evidence does not establish beyond a reasonable doubt the constituent fact of the existence of the former marriage at the time of the alleged offense may be announced by saying that such facts do not overcome the presumption of innocence.

No Presumption in the Matter.—The more rational rule has been announced, by many courts even in criminal cases, to the effect that under circumstances raising a conflict between the so called "presumption of innocence" and the inference or presumption of the continuance of life, the only

59. Where the government establishes a fact which fails for some reason, logical or legal, to support beyond a reasonable doubt, a material allegation in the indictment, it may be said that the presumption from such a fact does not overcome the presumption of innocence. *People v. Blackman*, 127 Cal. 248, 59 Pac. 573 (1909); *Lockhart v. White*, 18 Tex. 102 (1856). So, on an indictment for impersonating an elector, the assumption that registration proceedings are regular (*State v. Shelley, supra*), may not be received as establishing beyond a reasonable doubt a material allegation in the government's case. Under such circumstances, the court may, and frequently does, say that the presumption of regularity does not overcome the presumption of innocence. 2 Chamb., Ev., § 1228.

60. *Supra*, § 420; 2 Chamb., Ev., § 1042.

61. *Ashbury v. Sanders*, 8 Cal. 62, 88 Am. Dec. 300 (1857); *Reedy v. Mullizen*, 155 Ill. 636, 40 N. E. 1028 (1905); *Smith v. Knowlton*, 11 N. H. 191 (1840); 2 Chamb., Ev., § 1229, n. 4, and cases cited.

62. 2 Chamb., Ev., § 1229.

63. *Squire v. State*, 46 Ind. 459, 467 (1874); *Murray v. Murray*, 6 Or. 17 (1876); *Rex v. Twynning*, 2 B. & Ald. 386, 20 Rev. Rep. 480 (1819). See also, *Smith v. Knowlton, supra*; *Chapman v. Cooper*, 5 Rich. (S. C.) 452 (1852); 2 Chamb., Ev., § 1230, n. 1, and cases cited.

64. *Green v. State*, 21 Fla. 403, 58 Am. Rep. 670 (1885).

question raised is as to what evidence is admissible on the subject of the continuance of life. In other words, the whole subject is one of evidence, there being in reality, no conflict of presumptions in the matter.⁶⁵ The same fact, in this connection, is found to possess a very different probative value under varying circumstances.⁶⁶

65. *Rex v. Harborne*, 2 A. & E. 540, 1 Hurl. & W. 36, 29 E. C. L. 255 (1835). See also, *State v. Plym*, 43 Minn. 385 (1890); *Howard v. State*, 75 Ala. 27 (1883).

66. *Rex v. Harborne*, *supra*; 2 Chamb., Ev., § 1231.

CHAPTER XVII.

ADMISSIONS: JUDICIAL.

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§ 499. **Admissions Defined.**¹—An admission may be shortly defined as a statement² to whomsoever addressed, by the party to the action against whom it is offered,³ or by some one for whose statements, in this connection, he is legally

1. 2 Chamberlayne Evidence. §§ 1232-1235a.

2. This definition eliminates the implied statement as to the existence of a probative or *res gestæ* fact arising from the acts of a party, "admissions by conduct," so called.

§§ 559 *et seq.*; 2 Chamb., Ev., §§ 1392 *et seq.*
Other definitions: See 2 Chamb., Ev., § 1233, n. 1, and cases cited.

3. *Infra*, §§ 533 *et seq.*; 2 Chamb., Ev., §§ 1311 *et seq.*

responsible,⁴ as to the existence of a probative or *res gestae*⁵ fact.⁶ If oral, it must be satisfactorily proved⁷ by some one who heard it.⁸ Admissions may be classed as judicial or extra-judicial. The judicial admission is one made on the record or in connection with the judicial proceedings in which it is offered. An extra-judicial admission is one in *pais*, not made in court for the purposes of the case on trial in which it is offered.⁹ "If a party has chosen to talk about a particular matter, his statement is evidence against himself."¹⁰ One who comes into court as a party is held to explain any statements he may have made in the matter. The extra-judicial admission will readily be distinguished from the ordinary declaration against interest, an exception to the rule excluding hearsay, considered elsewhere.¹¹

4. *Infra*, §§ 539 *et seq.*, 540 *et seq.*; 2 Chamb., Ev., §§ 1329 *et seq.*, 1337 *et seq.*

5. Moore v. Crosthwait, 135 Ala. 272, 33 So. 28 (1902); McBlain v. Edgar, 65 N. J. L. 634, 48 Atl. 600 (1901); Hart v. Pratt, 19 Wash. 560, 53 Pac. 711 (1898).

6. Confession distinguished.—As distinguished from "admission" the term "confession" will be confined to the acknowledgment of guilt in a criminal case or of facts from which guilt must necessarily be inferred. *Supra*, § 583; 2 Chamb., Ev., § 1476. State v. Crowder, 41 Kan. 101, 21 Pac. 208 (1889); State v. Picton, 51 La. Ann. 624, 25 So. 375 (1899); Musgrave v. State, 28 Tex. App. 57, 1 S. W. 927 (1889); State v. Carr, 53 Vt. 37 (1880). "The term admission is usually applied in civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent." People v. Velarde, 59 Cal. 457 (1881); Colburn v. Town of Groton, 66 N. H. 151, 22 L. R. A. 763, 28 Atl. 95 (1890); State v. Porter, 32 Or. 135, 49 Pac. 964 (1897). A contrary view has been held by certain courts. Merriweather v. Com., 118 Ky. 870, 82 S. W. 592 (1904); Notara v. De Kamalaris, 49 N. Y. Supp. 216, 22 Misc. 37 (1898). See also, 2 Chamb., Ev., § 1233, n. 5.

7. Arnold v. Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 61 (1902); Stevens v. Equitable Mfg. Co., 29 Tex. Civ. App. 168, 67 S. W. 1041 (1902); 2 Chamb., Ev., § 1233, n. 6, and cases cited. The exact words of the declaration are not required. Nissley v. Brubaker, 192 Pa. 388, 43 Atl. 967 (1899). Where the statement in question is made by means of the telephone any reasonable identification of the declarant is sufficient. Lord Electric Co. v. Morrill, 178 Mass. 304, 59 N. E. 807 (1901).

8. Chapman v. Twitchell, 37 Me. 59 (1853). See also, Calvert v. Friebus, 48 Md. 44 (1878).

9. 2 Chamb., Ev., § 1233. An admission made in the course of judicial proceedings in a case other than that in which it is offered, though of record or in connection with judicial proceedings in another case is properly classed as extra-judicial. The conditions of admissibility are, to a certain extent, the same in both classes of admissions. 2 Chamb., Ev., §§ 1293-1309; *infra*, § 499; 2 Chamb., Ev., § 1235.

10. 2 Chamb., Ev., § 1234, n. 3, and cases cited.

11. *Infra*, §§ 880 *et seq.*; 4 Chamb., Ev., §§ 2762 *et seq.* The following are the principal marks of distinction. (a) The admission is the statement of a party; the declaration against interest is made by a third person. (b) To be admissible at all the declaration against interest must contravene, to the knowledge of the declarant, his pecuniary or proprietary interest. In case of an admission, such a state of affairs would enhance the probative weight, it would not, however, be essential to admissibility. To secure that, it is sufficient that the statement should be the voluntary act of the party and cover a probative or *res gestae* fact. (c) The declaration against interest is secondary evidence and is incompetent unless the declarant is shown to be dead, absent from the jurisdiction, or unavailable for some other sufficient cause. The admission, on the contrary, is primary evidence and is competent though the declarant be present in court and ready to testify. Guy v. Hall, 3 Murph. (N. C.) 150 (1819). CONTRA: Giblehouse v. Strong, 3 Rawle (Pa.) 437 (1832). (d) An admission may be made at any time. Turner v. Patterson, 5 Dana (Ky.) 292 (1837). The declara-

§ 500. [Admissions]; Probative Force.¹²— The force and effect of a judicial admission, as well as its competency, are determined by procedural rules. On the other hand, the probative force of an extra-judicial admission is determined by logic. Substantive law goes no further in this connection than to determine that the existence of the statement will be received as evidence of the fact asserted in it,¹³ either in an action at law or in a suit in equity.¹⁴ It will not, in this connection, be deemed material whether the extra-judicial admission were made before or after¹⁵ suit is brought. They are rated entirely at their logical value. Logic may have its appropriate effect in case of the judicial admission when used as *probatio* rather than as *levamen probationis*. When used as proof, the more deliberate and, as it is said, solemn, nature of the circumstances under which the judicial admission is made may confer upon it a probative force not characteristic of the average extra-judicial admission.¹⁶

§ 501. Formal Judicial Admissions.¹⁷— A formal judicial admission is rather part of the procedure of the trial than in any way connected with the making of proof. Not only in actions conducted according to the course of the common law, but in special¹⁸ or statutory proceedings, as those of bankruptcy¹⁹ or probate,²⁰ may such formal judicial admissions be made. Exhibiting such an admission to the tribunal is not to produce proof. It is not even to prove a *prima facie* case. It is final, conclusive, irrebutable by evidence. It is a fact to which procedure assigns a definite value.

Levamen Probationis.— A formal judicial admission in a pleading, stipulation, or by statement in open court, if authorized, is a complete *levamen probationis*. That was precisely the object for which it was made, to substitute the statement for evidence of the fact covered by it.²¹

tion against interest is incompetent if made *post litem motam*. (e) The admissibility of a declaration against interest is governed by the rules of sound reason. That of the admission is determined largely by procedure. 2 Chamb., Ev., § 1235.

12. 2 Chamberlayne, Evidence, §§ 1236, 1237

13. Roche v. Llewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147 (1903); Powers v. Powers, 25 Ky. L. Rep. 1468, 78 S. W. 152 (1904); Wilson v. Wilson, 137 Pa. 269, 20 Atl. 644 (1890); 2 Chamb., Ev., § 1236, n. 1. and cases cited.

14. Brandon v. Cabiness, 10 Ala. 155 (1846); Smith v. Burnham, 2 Sumn. (U. S.) 612 (1837).

15. Marshall v. Sheridan, 10 Serg. & R. (Pa.) 268 (1823); Morris v. Vanderen, 1 Dall. (U. S.) 64 (1782).

16. Kirkpatrick v. Metropolitan St. Ry. Co., 211 Mo. 68, 109 S. W. 682 (1908).

17. 2 Chamberlayne, Evidence, § 501.

18. McRainy v. Clark, 4 N. C. 698 (1818); Brown v. Moore, 6 Yerg. (Tenn.) 272 (1834).

19. Dupuy v. Harris, 6 B. Mon. (Ky.) 534 (1846); Lyon v. Phillips, 106 Pa. 57 (1884); Rankin v. Bushby (Tex. Civ. App. 1894), 25 S. W. 678.

20. Beal v. State, 77 Ind. 231 (1881); State v. Richardson, 29 Mo. App. 595 (1888); Potter v. Ogden, 136 N. Y. 384, 33 N. E. 228 (1893); 2 Chamb., Ev., § 1238, n. 3, and cases cited.

21. Chouteau Land & Lumber Co. v. Chrisman, 204 Mo. 371, 102 S. W. 973 (1907). In like manner and for the same reasons, a confession of judgment for a portion of the amount claimed is a judicial admission of the plaintiff's right of action and constitutes

Control of Court.— But the admitting party is not necessarily precluded by it. The entire matter is within the administrative function of the court.²² If an admission has been made imprudently and by mistake, the court may relieve parties from the consequences of their mistake, by allowing them to withdraw the admission; ²³ or they may be allowed to alter the admissions contained in their pleadings, by an amendment. But until the court exercises its administrative power to permit it, which will be done with caution,²⁴ a formal judicial admission constitutes a controlling fact in the case, binding upon parties ²⁵ and the court ²⁶ alike. While a party is at liberty to tender a formal judicial admission to his adversary, neither of the litigants can be compelled in a civil case to accept the offer.²⁷ Nor can the government,²⁸ or defendant in a criminal case be required to forego, without good administrative reasons, the advantages in proving a case in a complete and orderly manner.²⁹

Limitations Upon Effect.— The effect of a formal judicial admission is limited to the purposes of the pending trial and, if so worded,³⁰ to those of additional trials,³¹ or proceedings, if any, growing out of or otherwise connected with the principal case.³² Unless extended by its terms to later cases, it then becomes simply a statement which the party has made and which is to be weighed solely upon the basis of logic, by determining how justifiable or necessary is the inference that the party made the declaration because it was true.³³ When thus considered the circumstances under which the judicial ad-

complete proof against the party making it. *The Citizens Light & Power Co. v. St. Louis*, 34 Can. S. C. R. 495 (1904). 2 Chamb., Ev., § 1239.

22. *Supra*, §§ 72 *et seq.*; 1 Chamb., Ev., §§ 174 *et seq.*; *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600 (1895); *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40 (1878); 2 Chamb., Ev., 1240, n. 1, and cases cited.

23. *Hays v. Hynds*, 28 Ind. 531 (1867); *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209 (1902); 2 Chamb., Ev., § 1240, n. 2, and cases cited.

24. *Prestwood v. Watson*, *supra*; *Holley v. Young*, *supra*.

25. *Id.*; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638 (1857); *Waldron v. Waldron*, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453 (1895).

26. *Urquhart v. Butterfield*, 37 Ch. D. 357, 57 L. J. Ch. 521 (1888).

27. *Jones v. Downs*, 82 Conn. 33, 72 Atl. 589 (1909); *Dunning v. Maine Cent. R. Co.*, 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208 (1897); *Whiteside v. Lowney*, 171 Mass. 431, 50 N. E. 931 (1898).

28. *Com. v. Costello*, 120 Mass. 358 (1876);

People v. Thomson, 103 Mich. 80, 61 N. W. 345 (1894).

29. *Dunning v. Maine Cent. R. Co.*, *supra*; *Whiteside v. Lowney*, *supra*.

Under Code pleading, the formal judicial admission of the earlier type of pleading may be resolved into a statement of fact to which will be accorded practically the force of an extra-judicial admission. So regarded, the same ruling may be applied to it as to other extra-judicial admissions, to wit, that in the absence of an estoppel the declarant may explain or even controvert the truth of his declaration. *Dressner v. Manhattan Delivery Co.*, 92 N. Y. Supp. 800 (1905).

30. *Central Branch Union, etc., R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163 (1882); *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun 365, 22 N. Y. Supp. 348 (1893); 2 Chamb., Ev., § 1241, n. 1, and cases cited.

31. *Home Ins. Co. v. Field*, 53 Ill. App. 119 (1893); *Elwood v. Lannon*, 27 Md. 200 (1867); 2 Chamb., Ev., § 1241, n. 2, and cases cited.

32. *Shipman v. Haynes*, 15 La. 363 (1840).

33. *Phillips v. Middlesex County*, 127 Mass.

mission was made may be such as to deprive it of all force whatever.³⁴ The general rule is that unless such admissions are closely identified with the party³⁵ or expressly ratified by him,³⁶ their operation will not be extended to other cases, by implication.³⁷ It follows that where a person not *sui juris* is represented in court, the formal judicial admission made for him by one acting in a representative capacity, as guardian *ad litem*,³⁸ while sufficient for the purposes of the case, will not affect the person under guardianship in another action. Nor will such an admission continue to operate in the case itself after having been withdrawn.³⁹

Canons of Construction.—Judicial admissions should receive a reasonable construction.⁴⁰ The rule has even been stated to be that where the concession of counsel is ambiguous, its meaning should be determined by the party who made it.⁴¹ Where fair play requires it, as where reliance has justifiably been placed upon a concession, it may be construed most strongly against the admitting party.⁴²

§ 502. [Admissions]; Form of Admissions.⁴³—While formal judicial admissions are most frequently made in writing, as in confessions of judgment,⁴⁴ pleadings,⁴⁵ stipulations,⁴⁶ and the like, the admission, though formal, may with equal effect be made orally;—as where formal proof is waived in open court, *ore tenus*,⁴⁷ or the defendant in a criminal case pleads guilty.⁴⁸

§ 503. [Admissions]; Pleadings; In Same Case.—The allegations of a pleading are considered, (1) as constituting the issue in the case and (2) as independently and probatively relevant, i.e., as furnishing *per se* deliberative facts from which inferences may rationally be drawn and, (3) in its assertive capacity, i.e., when viewed as an admission.⁴⁹

262 (1879); Potter v. Ogden, *supra*; 2 Chamb., Ev., § 1241, n. 4, and cases cited.

34. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31 (1892); Adeo v. Howe, 15 Hun (N. Y.) 20 (1878); Weisbrod v. Chicago, etc., R. Co., 20 Wis. 419 (1866).

35. Haller v. Worman, 3 L. T. Rep. (N. S.) 741 (1861).

36. Nichols, etc., Co. v. Jones, 32 Mo. App. 657 (1888).

37. Hardin v. Forsythe, 99 Ill. 312 (1880); McKinney v. Salem, 77 Ind. 213 (1881); Cutler v. Cutler, *supra*.

38. Finn v. Hempstead, 24 Ark. 111 (1863); Hiatt v. Brooks, 11 Ind. 508 (1858).

39. Geraty v. National Ice Co., 44 N. Y. Supp. 659, 16 App. Div. 174 (1897).

40. Thus, it will not be assumed, without strong reason, that an admission by counsel covers the point on which the entire case

turns. Hoffman v. Bloomsburg, etc., R. Co., 143 Pa. 503, 22 Atl. 823 (1891).

41. Wright v. Dickinson (Mich. 1889), 42 N. W. 849.

42. Scammon v. Scammon, 33 N. H. 52 (1856). An admission may be construed by the acts of the parties. Akers v. Overbeck, 41 N. Y. Supp. 382, 18 Misc. 198 (1896).

43. 2 Chamberlayne, Evidence, § 1243.

44. Earnest v. Hoskins, 100 Pa. 551 (1882).

45. *Infra*; 2 Chamb., Ev., §§ 1244 *et seq.*

46. *Infra*, §§ 514 *et seq.*; 2 Chamb., Ev., §§ 1261 *et seq.*

47. Waldron v. Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453 (1895).

48. Com. v. Ayers, 115 Mass. 137 (1874); Meyers v. Dillon, 39 Or. 581, 65 Pac. 867, 66 Pac. 814 (1901); 2 Chamb., Ev., § 1243, n. 5, and cases cited; see *post*, § 525a.

49. See discussion of the distinctions made in 2 Chamb., Ev., § 1244.

§ 504. [Admissions; Pleadings]; Constituting the Issue.⁵⁰—The actual or constructive⁵¹ admissions contained in a pleading,⁵² so far as determinative of the issues, are without probative value.⁵³ Such allegations, therefore, cannot be read in evidence as proof of facts.⁵⁴ It is in this sense that the phrase "pleadings are not evidence" is true. They are merely part of the procedure of the trial and though conclusive until changed by amendment⁵⁵ of the issue, possess no logical or probative value. This issue the court notices though the pleadings are not formally introduced into evidence.⁵⁶ For similar reasons, no use can be made of the allegations of one pleading upon the issue raised by another, though the latter be filed in the same action.⁵⁷

§ 505. [Admissions; Pleadings]; Deliberative Facts.⁵⁸—The allegation in a pleading may throw important light upon the good faith of a party. The fact that a particular claim or denial⁵⁹ is or is not made at a particular time may be a significant, independently relevant circumstance in itself considered,⁶⁰ except so far as it shall appear that the statements are substantially the work of counsel.⁶¹

§ 506. [Admissions; Pleadings]; Use as Admissions.⁶²—The personality of a party may, however, shine through the pleadings⁶³ in the form of a definite statement of fact, apparently asserted for no controlling forensic reason⁶⁴ but relied on because it is true or claimed to be so by the party himself.⁶⁵ Declarations of the latter class are evidentiary in an assertive capacity, as admissions

50. 2 Chamberlayne, Evidence, § 1245.

51. *Lee v. Heath*, 61 N. J. L. 250, 39 Atl 729 (1897); *Starkweather v. Kittle*, 17 Wend. (N. Y.) 20 (1837).

52. The writ may be regarded as a pleading within the rule. *Southern R. Co. v. Mayes*, 113 Fed. 84, 51 C. C. A. 70 (1902).

53. *Colter v. Calloway*, 68 Ind. 219 (1879); *Shipley v. Reasoner*, 87 Iowa 555, 54 N. W. 470 (1893); *Holmes v. Jones*, 121 N. Y. 461, 466, 24 N. E. 701 (1890); 2 Chamb., Ev., § 1245, n. 4, and cases cited.

54. *Craig v. Burris*, 4 Pen (Del.) 156, 55 Atl. 353 (1902).

55. *Brooks v. Brooks*, 90 N. C. 142 (1884).

56. *Colter v. Calloway*, *supra*; *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450 (1895); *Holmes v. Jones*, *supra*.

57. *Craig v. Burris*, *supra*; *Kimball v. Bel-lows*, 13 N. H. 58 (1842); *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931 (1901); 2 Chamb., Ev., § 1245, n. 8, and cases cited. If counsel do not agree as to the construction of the pleadings, a question of law is presented, and it becomes the duty of the court to construe them, to determine their legal effect and

meaning and to instruct the jury accordingly. *Tisdale v. Delaware & Hudson Canal Co.*, 116 N. Y. 416, 419, 22 N. E. 700 (1889). Admissions are to be taken as a whole. *Hensel v. Hoffman*, 74 Neb. 382, 104 N. W. 603 (1905).

58. 2 Chamberlayne, Evidence, § 1246.

59. *Roscoe Lumber Co. v. Standard Silica Co.*, 70 N. Y. Supp. 1130, 62 App. Div. 421 (1901); *Tisdale v. D. & H. Canal Co.*, *supra*.

60. *Infra*, §§ 837 *et seq.*; 4 Chamb., Ev., §§ 2574 *et seq.*

61. *Larry v. Herrick*, 58 N. H. 40 (1876); *Baldwin v. Gregg*, 13 Metc. (Mass.) 253 (1847); 2 Chamb., Ev., § 1246.

62. 2 Chamberlayne, Evidence, § 1247.

63. *Aultman v. Martin*, 49 Neb. 103, 68 N. W. 340 (1896); *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152 (1895).

64. *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156 (1890); *Sims v. La Prairie Mut. F. Ins. Co.*, 101 Wis. 586, 77 N. W. 908 (1899).

65. *Johnson v. Zufeldt*, 56 Wash. 5, 104 Pac. 1132 (1909); *Pence v. Sweeney*, 3 Ida. 181, 28 Pac. 413 (1891).

and may be used by the opposing party,⁶⁶ unless otherwise provided by statute,⁶⁷ on any issue to which the evidence of the fact stated is relevant.⁶⁸ Good faith to the party whose declarations are used requires that the entire statement be introduced in evidence, not garbled by the omission of qualifying declarations.⁶⁹ This, however, is the limit of the right.

Administrative Details.—It is not material whether the declarant is plaintiff⁷⁰ or defendant;⁷¹ whether the statement is offered on the original or any subsequent⁷² hearing of the cause or on proceedings in an appellate court.⁷³ Nor is it important whether the pleadings are in abatement⁷⁴ or in bar or, indeed, whether they are still pleadings in the case at all.⁷⁵

§ 507. [Admissions; Pleadings]; In Other Cases; Formation of Issue.⁷⁶—So far as the declaration in question has been made on account of its desirability for formulating a particular issue, the statement in a former pleading is *functus officio*⁷⁷ and of no further procedural validity in any subsequent case.⁷⁸

§ 508. [Pleadings]; Use as Admissions.⁸⁰—Unlike its procedural effect, the probative element, if any, contained in an allegation of a pleading, is inherent and goes with it under all circumstances, subject to retraction⁸¹ and the explanations of inadvertence, lack of knowledge and the like.⁸² The formal judicial admission so far as it represents the actual or endorsed statement of

⁶⁶ Lynch v Chicago & A. Ry. Co., 208 Mo. 1, 106 S. W. 68 (1907); White v. Smith, 46 N. Y. 418 (1871); Lindsay v. Dutton, 227 Pa. 208, 75 Atl. 1096 (1910); 2 Chamb., Ev., § 1247, n. 4, and cases cited.

⁶⁷ Taft v. Fiske, 140 Mass. 250, 5 N. E. 621 (1885).

⁶⁸ Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076 (1896); Blackington v. Johnson, 126 Mass. 21 (1878); 2 Chamb., Ev., § 1247, n. 6, and cases cited.

⁶⁹ Granite Gold Min. Co. v. Maginness, 118 Cal. 131, 50 Pac. 269 (1897); Shrady v. Shrady, 58 N. Y. Supp. 546, 42 App. Div. 9 (1899); 2 Chamb., Ev., § 1247, n. 7, and cases cited.

⁷⁰ Kankakee, etc., R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621 (1890); Lee v. Heath, 61 N. J. L. 250, 39 Atl. 729 (1897); Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520 (1871); 2 Chamb., Ev., § 1247, n. 9, and cases cited.

⁷¹ Farley v. O'Malley, 77 Iowa 531, 42 N. W. 435 (1889); Breese v. Graves, 73 N. Y. Supp. 167, 67 App. Div. 322 (1901); 2 Chamb., Ev., § 1247, n. 10, and cases cited.

⁷² Spnrlock v. Missouri, etc., R. Co., 125 Mo. 404, 28 S. W. 634 (1894).

⁷³ Warder, etc., Co. v. Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250 (1891); Folger v. Boyington, 67 Wis. 447, 30 N. W. 715 (1886).

⁷⁴ Witmer v. Schlatter, 2 Rawle (Pa.) 359 (1830).

⁷⁵ Hastings v. Speer, 15 Pa. Super. Ct. 115 (1900).

⁷⁶ 2 Chamberlayne, Evidence, § 1248.

⁷⁷ Starkweather v. Converse, 17 Wend (N. Y.) 20 (1837).

⁷⁸ Boileau v. Rutlin, 2 Exch. 665 (1848); 2 Chamb., Ev., § 1248, n. 3, and cases cited. For some consideration of the probative effect of the claims or denials made in pleadings as bearing upon the question of good faith, see Admissions by Conduct, *infra*, §§ 559 *et seq.*; 2 Chamb., Ev., §§ 1392 *et seq.*; see also, § 505, *supra*; 2 Chamb., Ev., § 1246.

⁸⁰ 2 Chamberlayne, Evidence, §§ 1249–1251.

⁸¹ Perry v. Simpson Waterproof Mfg. Co., 40 Conn. 313 (1873); Stowe v. Bishop, 58 Vt. 498 (1886).

⁸² Smith v. Fowler, 12 Lea (Tenn.) 163 (1883); Buzard v. McAnulty, 77 Tex. 438 (1890).

the party himself⁸³ is competent in another case as an extra-judicial admission. In other words, a pleading may contain the admission of the party which is competent in any subsequent cause⁸⁴ when properly introduced in evidence.⁸⁵ Under these circumstances, a statement possesses the probative force of an extra-judicial admission and is subject to the rules of procedure or canons of administration applicable to statements of this class.⁸⁶ For the same pervasive reason that a party is accountable for his statements, it is held to be not in the least necessary that the litigant offering the declaration should have had any connection with the suit in which the pleading was filed.⁸⁷

Conditions of Admissibility.—The essential conditions of admissibility in case of a prior pleading regarded as an extra-judicial admission are therefore two. (a) The statement offered must be made by a party to the suit in which it is tendered.⁸⁸ (b) The declaration must have been, when originally made, that of the party himself, based upon his personal knowledge; it must, in some way, to use a common but expressive phrase, “be brought home” to the party. The agency of counsel, for the purposes of the case in which the statement is made, may very properly bind the client for the time being,⁸⁹ but, outside the case, the latter is affected only by his own statements, those which he personally makes as and because he believes them to be true⁹⁰ or which for the same reason, he states through his counsel.⁹¹

Civil and Criminal Cases.—It is not material that the pleading offered in

83. *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004 (1894); *Long v. Lawson*, 7 Ga. App. 461, 67 S. E. 124 (1910). See also, *Stone v. Com.*, 181 Mass. 438, 63 N. E. 1074 (1902); *Starkweather v. Converse*, *supra*; 2 Chamb., Ev., § 1249, n. 3, and cases cited.

84. *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307 (1897); *Smith v. Paul Boyton Co.*, 176 Mass. 217, 57 N. E. 367 (1900); *Paxton v. State*, 60 Neb. 763, 84 N. W. 254 (1900); *Hutchins v. Van Vechten*, 140 N. Y. 115, 35 N. E. 446 (1893); *Limerick v. Lee*, 17 Okl. 165, 87 Pac. 859 (1906); 2 Chamb., Ev., § 1249, n. 4, and cases cited.

85. *Greenville v. Old Dominion Steamship Co.*, 104 N. C. 91, 10 S. E. 147 (1889); 2 Chamb., Ev., § 1249, n. 5, and cases cited.

86. *Murphy v. Hindman*, 58 Kan. 184, 48 Pac. 850 (1897); *Rich v. Minneapolis*, 40 Minn. 82, 41 N. W. 455 (1889); *Whitcher v. Morey*, 39 Vt. 459 (1867); *Clemens v. Clemens*, *supra*; 2 Chamb., Ev., § 1249, n. 6, and cases cited.

87. *Booth v. Lenox*, 45 Fla. 191, 34 So. 566 (1903); *Kirkpatrick v. Metropolitan St. Ry. Co.*, 211 Mo. 68, 109 S. W. 682 (1908); *Floyd v. Kulp Lumber Co.*, 222 Pa. 257, 71 Atl. 13

(1908); 2 Chamb., Ev., § 1249, n. 7, and cases cited. That the pleading was filed in a different jurisdiction is not regarded as material. *Kirkpatrick v. Metropolitan St. Ry. Co.*, *supra*.

88. *Infra*, §§ 533 *et seq.*; 2 Chamb., Ev., §§ 1310 *et seq.*

89. *Ayres v. Hartford F. Ins. Co.*, 17 Iowa 176, 85 Am. Dec. 553 (1864); *Dowzelot v. Rawlings*, 58 Mo. 75 (1874).

90. *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570 (1886); *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297 (1903); *Cook v. Burr*, 44 N. Y. 156 (1870); 2 Chamb., Ev., § 1250, n. 3, and cases cited.

91. *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670 (1887). It follows that a party's judicial admissions do not bind his codefendant, in another case. *McDermott v. Mitchell*, 47 Cal. 249 (1874); *Lunday v. Thomas*, 26 Ga. 537 (1858). That they must be clear and definite, upon knowledge [*Martin v. Campbell*, 11 Rich. Eq. (S. C.) 205 (1860)] and not proceed from information and belief [*New York v. Fay*, 53 Hun 553, 6 N. Y. Supp. 400 (1889)] is established also. 2 Chamb., Ev., § 1250, n. 7, and cases cited.

a civil case was originally filed in a criminal prosecution,⁹² although the pleas of guilty⁹³ or *nolo contendere*⁹⁴ more closely resemble admissions by conduct⁹⁵ and are, in effect, merely circumstantial evidence, not relevant upon a subsequent trial.

§ 509. **Code Pleading.**⁹⁶—The system of “Code pleading,” so called, by the close assimilation of its rules to those of equity has materially affected the relative importance of the rules of equity and common law pleading, at the expense of the latter. Under such a system the allegations of the pleader, more particularly those contained in the answer,⁹⁷ may well be more readily regarded as requiring less of the technical skill of counsel and correspondingly more of the actual knowledge and statement of the party.⁹⁸ The most obvious effect of the adoption of equity instead of common law pleading for use in jury trials is to increase the field of evidence in the case of pleadings, at the expense of that of procedure, making the allegations of a pleading of comparatively trifling effect in forming an issue when compared to their operation as admissions.⁹⁹

§ 510. **[Pleadings]; Law and Equity.**¹—The probative quality of the statement being inherent, and independent of particular conditions, other than that it should have been made by a present party, it is immaterial that a statement tendered in an action at law was originally made in a bill in equity,² answer in chancery³ or other equitable pleadings,⁴ or that the admission offered in a trial in equity was originally made in the pleadings of an action at law.

§ 511. **Equity Pleadings; Answer.**⁵—An answer to a bill in equity presents the personal actual admissions of the party, in contradistinction to the constructive admission of the common law in failing to deny the allegations of the previous pleading. The statements contained in the sworn answer of the defendant have therefore been customarily received as his admissions, as that term is understood in the law of evidence.⁶ The rule is the same whether the bill was for relief or discovery.⁷

92. *Birchard v. Booth*, 4 Wis. 67 (1885).

93. *Young v. Copple*, 52 Ill. App. 547 (1893); *State v. Rowe*, 61 Me. 171 (1873); 2 Chamb., Ev., § 1251, n. 2, and cases cited.

94. *White v. Creamer*, 175 Mass. 567, 56 N. E. 832 (1900); *State v. LaRose*, 71 N. H. 435, 52 Atl. 943 (1902).

95. *Infra*, §§ 559 *et seq.*; 2 Chamb., Ev., §§ 1392 *et seq.*; see *post*, § 525a.

96. 2 Chamberlayne, Evidence, § 1252.

97. *Boots v. Canine*, 94 Ind. 408 (1883).

98. *Id.*

99. 2 Chamb., Ev., § 1252.

1. 2 Chamberlayne, Evidence, § 1253.

2. *Callan v. McDaniel*, 72 Ala. 96 (1882);

Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138 (1890); 2 Chamb., Ev., § 1253, n. 1, and cases cited.

3. *Printup v. Patton*, 91 Ga. 422 (1893); *Radclyffe v. Barton*, 161 Mass. 327 (1894).

4. *Lowney v. Perham*, 20 Me. 235 (1841).

5. 2 Chamberlayne, Evidence, §§ 1254, 1255.

6. *Robbins v. Butler*, 24 Ill. 387, 427 (1860); *Broadup v. Woodman*, 27 Ohio St. 553 (1875); 2 Chamb., Ev., § 1254, n. 1, and cases cited.

7. *Judd v. Gibbs*, 3 Gray (Mass.) 539 (1855).

Bill.— It is natural that statements in bills of equity, which are most often the work of counsel, are deemed of less probative value,⁸ than those contained in the answer⁹ which is more directly moulded by information derived directly from the client. The bill in equity, while at first regarded in much the same light as the answer,¹⁰ and consequently as containing statements available as the admissions of the complainant, became, with the growth of equity practice, subject to a radical change. Formal and comprehensive charges, not in fact known to be true or relied on by the complainant as actually existing were gravely advanced with limitations imposed, not by the knowledge or conscience of the client but by the ingenuity and resourcefulness of his counsel.¹¹ With no semblance of fairness could such a pleading be held to contain the personal admission of the complainant.¹²

§ 512. [Pleadings]; State and Federal Courts.— Statements used in a pleading in a federal court may do service as admissions in a state court and the reverse is equally true.¹³

§ 513. [Pleadings]; Superseded or Abandoned; Evidence Rejected.¹⁴— While a party is no longer bound by pleadings which have been superseded by amendment, or otherwise, as pleadings in the case¹⁵ he is still affected by the statements contained in them¹⁶ as extra-judicial admissions,¹⁷ so far as they can fairly be considered as being his own.¹⁸ Many important considerations have influenced certain courts to hold that except where some special connection¹⁹ has been shown to exist between a party and a superseded²⁰ or abandoned²¹

8. *Miller v. Chrisman*, 25 Ill. 269 (1861); *Rankin v. Maxwell*, 2 A. K. Marsh (Ky.) 488, 12 Am. Dec. 431 (1820).

9. *Dee v. Steel*, 3 Campb. 115, 13 Rev. Rep. 768 (1811).

10. *Snow v. Phillips*, 1 Sid. 220 (1665).

11. *Adams v. McMillan*, 7 Port. (Ala.) 73 (1838); *Rankin v. Maxwell*, *supra*; 2 Chamb., Ev., § 1255, n. 4, and cases cited.

12. *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892); *Elliot v. Hayden*, 104 Mass. 180 (1870); 2 Chamb., Ev., § 1255, n. 5, and cases cited. CONTRA: *Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525 (1903).

13. *Kankakee, etc., Ry. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621 (1890); 2 Chamb., Ev., § 1256.

14. 2 Chamberlayne, Evidence, §§ 1257-1260.

15. *Boots v. Canine*, 94 Ind. 408 (1888); *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 459 (1895); *Strong v. Dwight*, 11 Abb. Pr. N. S. (N. Y.) 319 (1871); 2 Chamb., Ev., § 1257, n. 1, and cases cited.

16. *Bartlow v. Chicago, etc., R. Co.*, 243 Ill.

332, 90 N. E. 721 (1910); *Meriwether v. Publishers: Geo. Knapp & Co.*, 224 Mo. 617, 123 S. W. 1100 (1909); *Fogg v. Edwards*, 20 Hun (N. Y.) 90 (1880); 2 Chamb., Ev., § 1257, n. 2, and cases cited.

17. *McDonald v. Nugent*, 122 Iowa 651, 89 N. W. 506 (1904); *Watt v. Missouri, K. & T. Ry. Co.*, 82 Kan. 458, 108 Pac. 811 (1910); *O'Connell v. E. C. King & Son*, 26 R. I. 544, 59 Atl. 926 (1905); 2 Chamb., Ev., § 1257, n. 3, and cases cited.

18. *Burns v. Makby*, 43 Minn. 161, 45 N. W. 3 (1890); *Southern Pac. Co. v. Wellington* (Tex. Civ. App. 1900), 57 S. W. 856; 2 Chamb., Ev., § 1257, n. 4, and cases cited.

19. *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 360 (1886); *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245 (1896).

20. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076 (1896); *Corley v. McKeag*, 9 Mo. App. 38 (1880); 2 Chamb., Ev., § 1257, n. 12, and cases cited.

21. *Murphy v. St. Louis, etc., R. Co.*, 91 Ark. 159, 122 S. W. 636 (1909); *McDonald*

pleading, his statements contained in them will not affect him; — either in the same case,²² or on a retrial of it, or in any other judicial proceeding.²³

Evidence Admitted.— Other weighty considerations have induced other tribunals to hold that, unless the party objecting to the contemplated use of his statement can affirmatively show not only that he did not authorize it,²⁴ and that he never informed his legal adviser to the effect which the latter has pleaded,²⁵ but, further, that he at no time knew that the latter had pleaded as he has actually done,²⁶ the allegations of the former pleading will be received as the admission of the party,²⁷ to be given such weight as the jury may see fit to accord it.²⁸ The statement is admissible against the party even when offered in another case.²⁹

Minor Details.— It is not material that the pleading in question has been removed from the files³⁰ or has not been filed at all, provided a final determination to do so has been reached;³¹ nor what disposition was made of the case.³² The superseded or amended pleading in one of two ways: (1) as an admission of the party, tending to prove the fact asserted or (2) as a fact, the existence of which is inconsistent with his present position.³³

Verification by Oath, Etc.— In general, in any form of proceeding, the fact that a party has seen fit to swear to the truth of certain allegations,³⁴ or to verify them by his signature,³⁵ tends to show that the statements are made upon the personal knowledge or responsibility of the party. When an unverified

v. Nugent, *supra*; 2 Chamb., Ev., § 1257, n. 13, and cases cited.

22. Mahoney v. Hardware Co., 19 Mont. 377, 48 Pac. 545 (1897).

23. Demelman v. Burton, 176 Mass. 363, 57 N. E. 665 (1900); Woodworth v. Thompson, *supra*; Folger v. Boyington, 67 Wis. 447, 30 N. W. 715 (1886); 2 Chamb., Ev., § 1257, n. 13, and cases cited. For a statement of the considerations which have influenced the courts, see: 2 Chamb., Ev., § 1257, and cases cited in notes 5-10; Wenegar v. Bollenbach, 180 Ill. 222, 54 N. E. 192 (1899); Taft v. Fiske, 140 Mass. 250, 5 N. E. 621 (1885).

24. Anderson v. McPike, 86 Mo. 293 (1885); Galloway v. Antonio, etc., R. Co. (Tex. Civ. App. 1903), 78 S. W. 32.

25. Galloway v. Antonio, etc., R. Co., *supra*.

26. *Id.* See also, Baldwin v. Siddons, 46 Ind. App. 313, 92 N. E. 349 (1910); Bernard v. Pittsburg Coal Co., 137 Mich. 279, 11 Detroit Leg. N. 246, 100 N. W. 396 (1904).

27. O'Connor's Estate, 118 Cal. 69, 50 Pac. 4 (1897); Alabama M. R. Co. v. Guilford, 114 Ga. 627, 40 S. E. 794 (1902); Walser v. Wear, 141 Mo. 443, 42 S. W. 928 (1897); Breese v. Graves, 73 N. Y. Supp. 167, 67

App. Div. 322 (1901); 2 Chamb., Ev., § 1258, n. 7, and cases cited.

28. Willis v. Tozer, 44 S. C. 1, 21 S. E. 617 (1894).

29. Meriwether v. Publishers, etc., *supra*. For the reasons upon which these decisions are based, see: 2 Chamb., Ev., § 1258, notes 1, 2, 3; Boots v. Canine, *supra*; Keller v. Morton, 117 N. Y. Supp. 200, 63 Misc. 340 (1900); Folger v. Boyinton, *supra*.

30. Daub v. Englebach, 109 Ill. 267 (1884).

31. Matson v. Melchor, 42 Mich. 477, 4 N. W. 200 (1880).

32. Starns v. Hadnot, 45 La. Ann. 318, 12 So. 561 (1893); Gordon v. Parmelee, 2 Allen (Mass.) 212 (1861).

33. *In re O'Connor*, 118 Cal. 69, 50 Pac. 4 (1897); Folger v. Boyinton, 67 Wis. 447, 30 N. W. 715 (1886); 2 Chamb., Ev., § 1259, n. 4, and cases cited. A statute may be such in terms as to exclude their use for purposes even of impeachment. Taft v. Fiske, *supra*.

34. Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657 (1883); Pope v. Allis, 115 U. S. 363 (1885); 2 Chamb., Ev., § 1260, n. 2, and cases cited.

35. Central Bridge Corp. v. Lowell, 15 Gray (Mass.) 106 (1860); Cook v. Barr, 44 N. Y.

pleading is offered, the tendency of modern decisions is to reject the evidence.³⁶

§ 514. **Formal Judicial Admissions; Form of Admission; Stipulations.**³⁷—Stipulations may cover a variety of subjects, by way of waiving proof³⁸ and when executed within the professional function of the attorney³⁹ bind the client, in the case where filed, or any rehearing of the cause,⁴⁰ unless entered into for some special and temporary purpose,⁴¹ or specifically limited so as to possess, by express terms, a different effect.⁴² No limitation, however, is implied.⁴³ Stipulations may be effectively made at any time during the course of the employment of the attorney who executes them, either before⁴⁴ or after the joining of issue.

In Other Cases.—When a “case stated” or other declarations of a stipulation are offered as admissions of the litigant⁴⁵ in any case other than that in which the agreement was made⁴⁶ or in the same case after it has been withdrawn,⁴⁷ admissibility is to be determined by the test whether the statement is a personal declaration of the party himself,⁴⁸ or made by his counsel under the client’s immediate direction,⁴⁹ as and because it was true.⁵⁰ Otherwise, it will be rejected when offered in evidence in a subsequent case.⁵¹ The statement may be explained, qualified or controlled by the party at all times.⁵²

§ 515. **Informal Judicial Admissions.**⁵³—Under the general denomination of informal judicial admissions may be grouped statements of probative or *res gestae* facts made by a party in course of proceedings in court, as a witness, a deponent, an affiant or in any similar connection.⁵⁴ They are classed as judicial simply because made in the course of judicial proceedings by one who was

156 (1870); 2 Chamb., Ev., § 1260, n. 3, and cases cited.

36. Delaware County Com’rs v. Diebold S. & L. Co., 133 U. S. 473, 487, 10 S. Ct. 399 (1890).

37. 2 Chamberlayne, Evidence, §§ 1261, 1262.

38. Luther v. Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95 (1896).

39. Prestwood v. Watson, 111 Ala. 604, 20 So. 600 (1895); Virginia-Carolina Chemical Co. v. Kirven, 130 N. C. 161, 41 S. E. 1 (1902); 2 Chamb., Ev., § 1261, n. 2, and cases cited.

40. *Id.*; Central Branch Union Pac. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163 (1882); Gallagher v. McBride, 66 N. J. L. 360, 49 Atl. 582 (1901); 2 Chamb., Ev., 1261, n. 3, and cases cited.

41. Central Branch Union Pac. R. Co. v. Shoup, *supra*.

42. Perry v. Simpson Waterproof Mfg. Co.,

40 Conn. 313 (1873); Luther v. Clay, *supra*.

43. Luther v. Clay, *supra*; Central Branch Union Pac. R. Co. v. Shoup, *supra*.

44. Jones v. Clark, 37 Iowa 586 (1873).

45. Elting v. Scott, 2 Johns. (N. Y.) 157 (1807).

46. Luther v. Clay, *supra*; Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613 (1885).

47. King v. Shepard, 105 Ga. 473, 30 S. E. 634 (1898).

48. Isabelle v. Iron Cliffs Co., *supra*.

49. *Id.*; Nichols v. Jones, 32 Mo. App. 657 (1888); Elting v. Scott, *supra*; 2 Chamb., Ev., § 1262, n. 5, and cases cited.

50. Hart’s Appeal, 8 Pa. 32 (1848).

51. Elting v. Scott, *supra*; Hart’s Appeal, *supra*; 2 Chamb., Ev., § 1262, n. 7, and cases cited.

52. King v. Shepard, *supra*; City of Detroit v. C. H. Little Co., 146 Mich. 373, 109 N. W. 671, 13 Detroit Leg. N. 803 (1906).

then a party to the latter.⁵⁵ Where the declarant is not a party to the pending proceedings, as where a witness gives his testimony in the case,⁵⁶ they may be received as admissions, so far as they relate to a probative or *res gestae* fact, in any case where the declarant is himself a party but not as judicial admissions, informal or otherwise.⁵⁷

Probative Force.—As between formal and informal judicial admissions the effect, for the purposes of the trial in which they are made, is determined by procedure. When the attempt is made to use them, in another cause, as extrajudicial admissions the difference in probative force is entirely one of logic.⁵⁸ In the case in which it is given, the informal judicial admission is accorded by procedure the force of a *levamen probationis*, the quality of *prima facie* proof shifting the burden of evidence. In subsequent cases, it is available only so far as it appears to have been connected with the party himself, in his personal capacity rather than constitute the technical work of counsel. Even in cases, as oral testimony, where the admission may fairly be regarded as the statement of the party, the probative force will be largely affected by considerations as to the degree of deliberativeness employed and the like.⁵⁹

Adoption by Party; Oral Evidence.—A party may, in offering the testimony of a third person, so affirm the truth of its statements as to adopt them as his own. They thereupon become competent as his admissions,⁶⁰ and may be used as such in a subsequent suit. This is equally true whether the testimony is oral or in writing.⁶¹ In general, by calling a witness to prove a particular fact, a party impliedly asserts merely its existence.⁶² Only when the witness testifies as desired by the party calling him may his statement be regarded as an admission of the party. Where the proponent distinctly repudiates the statement of the witness in whole or in part⁶³ or the latter volunteers statements not germane to the subject on which he is called, or digresses to other subjects, the party is not affected by the repudiated or unexpected statements either by their being used against him in that case, or by their employment in any subsequent proceeding.⁶⁴

Written Statements.—As to written declarations, e.g., a deposition given by a third person in favor of a party and offered by him in evidence, the litigant

53. 2 Chamberlayne, Evidence, §§ 1263–1267.

54. See *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 56 (1903).

55. *Jones v. Dipert*, 123 Ind. 594, 23 N. E. 944 (1889); *Mercer v. King*, 13 Ky. L. Rep. 429 (1891).

56. *Wheat v. Summers*, 13 Ill. App. 444 (1883); *Padley v. Catterlin*, 64 Mo. App. 629 (1895); *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71 (1858); 2 Chamb., Ev., § 1263, n. 5, and cases cited.

57. 2 Chamb., Ev., § 1263, n. 6.

58. *Parsons v. Copeland*, 33 Me. 370, 54

Am. Dec. 628 (1851); *Rich v. Minneapolis*, 40 Minn. 82, 41 N. W. 455 (1889); 2 Chamb., Ev., § 1264, n. 1, and cases cited

59. *Houston v. Chicago, etc., Ry. Co.*, 118 Mo. App. 464, 94 S. W. 560 (1906).

60. *State v. Gilbert*, 36 Vt. 145 (1863); *Richards v. Morgan*, 10 Jur. (N. S.) 559, 564 (1864).

61. *Richards v. Morgan*, *supra*.

62. *Id.*; 2 Chamb., Ev., § 1265, n. 3, and cases cited.

63. *Richards v. Morgan*, *supra*.

64. *Wilkins v. Stidger*, 22 Cal. 232 (1863); *Martin v. Root*, 17 Mass. 222 (1821).

is affected by its statements, in the same or a subsequent suit; ⁶⁵ not by all which the deponent sees fit to say, but by such statements as the party has used for his own account, as part of his case, adopting, by using them, in a sense, as his own. ⁶⁶

Depositions.—Depositions made by others to which a party accords no actual or implied personal assent ⁶⁷ do not affect him.

§ 516. [Informal Judicial Admissions]; Form of Admissions; Oral; Testimony by Party. ⁶⁸—Statements contained in the evidence given by a party as a witness or adopted by him ⁶⁹ are primary in their nature ⁷⁰ and constitute informal judicial admissions which affect the party not only in the trial where given but in any other hearing of a suit ⁷¹ even upon appeal. ⁷² Such declarations are equally competent, unless the matter is regulated otherwise by statute, ⁷³ in a subsequent case, ⁷⁴ and although the parties, except the original declarant, are different in the two actions. ⁷⁵

Criminal Cases.—Apart from considerations of voluntariness in statement ⁷⁶ or the privilege against self-incrimination ⁷⁷ elsewhere considered, the defendant in a criminal case may properly make admissions of an informal judicial nature in connection with his testimony before a judicial tribunal, ⁷⁸ to the same effect as in civil cases, although all such evidence has been excluded by statute in certain jurisdictions. ⁷⁹

65. *Richards v. Morgan, supra.*

66. *Id.*; 2 Chamb., Ev., § 1266, n. 2, and cases cited.

67. 2 Chamb., Ev., § 1267; *Hallett v. O'Brien*, 1 Ala. 585 (1840); *Hovey v. Hovey*, 9 Mass. 216 (1812).

68. 2 Chamberlayne, Evidence, §§ 1268–1270.

69. *Beeckman v. Montgomery*, 14 N. J. Eq. 106 (1861).

70. *Matthews v. Story*, 54 Ind. 417 (1876). *The admission is competent* though the witness is present in court and the opposite party has a right to compel him to testify. *Buddee v. Spangler*, 12 Colo. 216 (1888); *German Nat. Bank v. Leonard*, 40 Neb. 676 (1894); *McAndrews v. Santee*, 57 Barb. (N. Y.) 193 (1869); 2 Chamb., Ev., § 1268, n. 2, and cases cited.

71. *Wiseman v. St. Louis, etc., R. Co.*, 30 Mo. App. 516 (1888); *Sternbach v. Friedman*, 78 N. Y. Supp. 318, 75 App. Div. 418 (1902).

72. *Chase v. Debolt*, 7 Ill. 371 (1845); *Stemmler v. City of New York*, 179 N. Y. 473, 72 N. E. 581 (1904).

73. *Com. v. Ensign*, 40 Pa. Super Ct. 157 (1909); *Daly v. Brady*, 69 Fed. 285 (1895). *A strict construction will be applied to such*

a limitation upon the admissibility of generally accepted evidence. *Dusenbury v. Dusenbury*, 63 How. Pr. (N. Y.) 349 (1882); *Lapham v. Marshall*, 3 N. Y. Supp. 601, 51 Hun 36 (1889).

74. *White v. Collins*, 90 Minn. 165, 95 N. W. 765 (1903); *Sternbach v. Friedman, supra*; *Com. v. Ensign, supra*; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, 52 Atl. 526 (1902); 2 Chamb., Ev., § 1268, n. 6, and cases cited.

75. *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71 (1858).

76. *Hardy v. U. S.*, 186 U. S. 224, 22 S. Ct. 889, 46 L. ed. 1137 (1901); *People v. Johnson*, 1 Wheel. Cr. (N. Y.) 193 (1828); 2 Chamb., Ev., § 1269, n. 1, and cases cited.

77. *Infra*, §§ 597 *et seq.*; 2 Chamb., Ev., §§ 1540 *et seq.*

78. *State v. Miller*, 35 Kan. 328, 10 Pac. 865 (1886); *People v. Banker*, 2 Park. Cr. (N. Y.) 26 (1823); *State v. Rowe*, 98 N. C. 629, 4 S. E. 506 (1887); 2 Chamb., Ev., § 1269, n. 3, and cases cited.

79. *Kirby v. Com.*, 77 Va. 681, 46 Am. Rep. 747 (1883); *State v. Hall*, 31 W. Va. 505, 7 S. E. 422 (1888).

*Committing Magistrates, Inferior Courts, etc., are within the rule.*⁸⁰ Where the statement is a voluntary one, the accused may make valid admissions before a grand jury.⁸¹ The court may have been the one in which a former trial of the declarant took place.⁸² The statement may have been originally made by the present party on a trial of an indictment against another.⁸³

Civil and Criminal Cases.—The admissions of accused used in a criminal case may have been originally made in a civil proceeding,⁸⁴ including those for divorce,⁸⁵ or in bankruptcy.⁸⁶

How Testimony May Be Proved.—The admissions of one accused of crime may be proved by parole. Should the magistrate certify that the accused declined to answer,⁸⁷ the actual testimony may still be proved by those who heard it. A civil pleading, however, filed in a civil case, unless distinctly shown to be under instructions from the client, will not be received in a criminal case as the admission of an accused.⁸⁸

Minor Details.—So long as it shall affirmatively appear that the statement was made by a party⁸⁹ or his duly authorized representative,⁹⁰ no formality is needed in giving the testimony. If the relevant portions of the testimony cannot be separated, all may be read to the jury.⁹¹ The evidence need not be given in response to questions, nor even in court.⁹² It is not even necessary that any legal warrant should have existed for taking it.⁹³

Explanation Permitted.—The party who has appeared as a witness is at liberty to explain or control his testimony⁹⁴ and to show, if he can, that he gave explanations at the time which were not reported.⁹⁵

80. *State v. Gilman*, 51 Me. 206 (1862) (coroner); *Reg. v. Coote*, L. R. 4 P. C. 599, 42 L. J. P. C. 45 (1872) (fire marshal); *Rex v. Merceron*, 2 Stark. 323 (1818) (committee of the legislature). *The fact of arrest* has been deemed immaterial. *State v. Van-Tassel*, 103 Iowa 6, 72 N. W. 497 (1897); *People v. Thayer*, 1 Park. Cr. (N. Y.) 595 (1825).

81. *People v. Sexton*, 132 Cal. 37, 64 Pac. 107 (1901); *Williams v. State*, 30 Ohio Cir. Ct. 342 (1907); 2 Chamb., Ev., § 1269, n. 8, and cases cited.

82. *Dumas v. State*, 63 Ga. 600 (1879); *Com. v. Reynolds*, 122 Mass. 454 (1877); *People v. McMahon*, 15 N. Y. 384 (1857); 2 Chamb., Ev., § 1269, n. 9, and cases cited.

83. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106 (1892); *People v. Gallagher*, 78 Mich. 512, 42 N. W. 1063 (1889); *People v. McMahon*, *supra*; 2 Chamb., Ev., § 1269, n. 10, and cases cited.

84. *Abbott v. People*, 75 N. Y. 602 (1878); *State v. Hopkins*, 13 Wash. 5, 42 Pac. 627 (1895).

85. *Crow v. State* (Tex. Cr. App. 1903), 72 S. W. 392.

86. *People v. Weiger*, 100 Cal. 352, 34 Pac. 826 (1893).

87. *Reg. v. Wilkinson*, 8 C. & P. 662, 34 E. C. L. 949 (1838).

88. *Farmer v. State*, 100 Ga. 41, 28 S. E. 26 (1896).

89. *Castleman v. Sherry*, 46 Tex. 228 (1876).

90. *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 56 (1903); *infra*, § 539; 2 Chamb., Ev., § 1328.

91. *Eaton v. New England Tel. Co.*, 68 Me. 63 (1878).

92. *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089 (1896).

93. *Rex v. Merceron*, *supra*.

94. *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (1905); *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211 (1904); 2 Chamb., Ev., § 1270, n. 7, and cases cited.

95. *Boardman v. Wood*, 3 Vt. 570 (1831).

Conditions of Admissibility.— The statement, offered as an admission, must, however, be complete in itself.⁹⁶ The testimony may be reported by the judge presiding at the trial⁹⁷ or by any one else who heard it, and need not, in order to be admissible, be all the party said on that particular point.⁹⁸

§ 517. [Informal Judicial Admissions]; Form of Admissions; Writings.— So an informal judicial admission, though commonly oral, may be in the written form as that of a letter.⁹⁹

§ 518. [Informal Judicial Admissions]; Affidavits.— The statements in an affidavit made or adopted¹ by a party in a given cause, are competent as informal judicial admissions.² They will be received in a subsequent trial or after removal to a federal court,³ or in another cause where the declarant, against whom the statement is offered is a party.⁴

Criminal Cases.— Unless deemed involuntary within the law excluding confession,⁵ such an affidavit may have been made in a criminal case, e.g., on a motion for a continuance,⁶ or for a change of venue.⁷

Invalid Affidavits.— It is not important whether the document itself is valid as an affidavit, e.g., whether the magistrate had jurisdiction⁸ or the affidavit itself was regularly taken.⁹

§ 519. [Informal Judicial Admissions]; Answers to Interrogatories.¹⁰— A party's answers to written interrogatories are competent against him as informal judicial admissions in the same¹¹ or any other¹² suit, and have even been accorded a *prima facie* weight.¹³ It is not important that the inter-

96. *Misner v. Darling*, 44 Mich. 438, 7 N. W. 77 (1880).

97. *Chase v. Debolt*, 7 Ill. 371 (1845); *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681 (1859).

98. *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498 (1902).

99. *Holderness v. Baker*, 44 N. H. 414 (1862); 2 Chamb., Ev., § 1271.

1. *Knight v. Rothschild*, 172 Mass. 546, 52 N. E. 1062 (1899); *Connecticut M. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 23 S. Ct. 294 (1903); 2 Chamb., Ev., § 1272, n. 1, and cases cited.

2. *Orr v. Travelers' Ins. Co.*, 120 Ala. 647, 24 So. 997 (1898); *Cornelissen v. Ort*, 132 Mich. 294, 93 N. W. 617 (1903); *Stickney v. Ward*, 46 N. Y. Supp. 382, 20 Misc. 667 (1897); 2 Chamb., Ev., § 1272, n. 2, and cases cited.

3. *National Steamship Co. v. Tugman*, 143 U. S. 28, 12 S. Ct. 361, 27 L. ed. 87 (1892).

4. *Knight v. Rothschild*, *supra*; *Rosenfeld v. Siegfried*, 91 Mo. App. 169 (1901); *Furniss*

v. Mutual L. Ins. Co., 46 N. Y. Super. Ct. 467 (1880); 2 Chamb., Ev., § 1272, n. 4, and cases cited.

5. *Infra*, § 583; 2 Chamb., Ev., § 1479.

6. *Behler v. State*, 112 Ind. 140, 13 N. E. 272 (1887); *Com. v. Starr*, 4 Allen (Mass.) 301 (1862); 2 Chamb., Ev., § 1272, n. 6, and cases cited.

7. *Boles v. State*, 24 Miss. 445 (1852); *Baker v. Hess*, 53 Ill. App. 473 (1893). CONTRA: *Behler v. State*, *supra*.

8. *Morrell v. Cawley*, 17 Abb. Pr. (N. Y.) 76 (1863).

9. *Davenport v. Cummings*, 15 Iowa 219 (1863).

10. 2 Chamberlayne. Evidence, § 1273.

11. *Jewett v. Rines*, 39 Me. 9 (1854); *Nichols v. Allen*, 112 Mass. 23 (1873).

12. *Jewett v. Rines*, *supra*; *Williams v. Cheney*, 3 Gray (Mass.) 215 (1855); 2 Chamb., Ev., § 1273, n. 2, and cases cited.

13. *Clairmont v. Dickson*, 4 L. C. Jur. 6 (1859).

rogatories themselves are not put in evidence¹⁴ or that they have failed of their original purpose because necessary formalities have been omitted.¹⁵

§ 520. [Informal Judicial Admissions]; Depositions.¹⁶— Statements made by a party in a deposition taken in the cause where offered, *de bene esse*,¹⁷ or in *perpetuam memoriam*,¹⁸ may constitute informal judicial admissions in that cause. If the statement is that of a party on his own knowledge or on information, for the accuracy of which he is willing to become responsible,¹⁹ it is admissible in the same or another²⁰ suit. A statement made by a specially instructed agent,²¹ will be received as if it were the declaration of the party himself.

Invalid Depositions.— The admission of the party is equally competent though the document is itself invalid,²² or if it is, as a matter of fact, suppressed,²³ because of noncompliance with prescribed forms²⁴ or for the reason that the justification for using it no longer continues.²⁵

§ 521. Judicial Admissions; By Whom Made.²⁶— The formal judicial admission is as a rule, the work of counsel,²⁷ the informal judicial admission being more often the individual act of the party. A formal judicial admission made or adopted²⁸ by the party, even when acting in a representative²⁹ or different³⁰ personal capacity, may be accepted by the court and given full effect,³¹ though made without the knowledge of his counsel.³²

§ 522. [Judicial Admissions]; Attorneys.³³— When a formal judicial admission is entered into by a legal representative, including any of his necessary agents within their appropriate sphere of action,³⁴ in good faith³⁵ and

14. *Cochran v. Chipman*, 11 Nova Scotia 254 (1876).

15. *Lynde v. McGregor*, 13 Allen (Mass.) 182 (1866); *Edwards v. Norton*, 55 Tex. 405 (1881).

16. 2 Chamberlayne, Evidence, § 1274.

17. *Meyer v. Campbell*, 20 N. Y. Supp. 705, 1 Misc. 283 (1892); *McGahan v. Crawford*, 47 S. C. 566, 25 S. E. 123 (1896).

18. *Faunce v. Gray*, 21 Pick. (Mass.) 243 (1838); *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233 (1891).

19. *Cambioso v. Maffet*, 2 Wash. (U. S.) 98 (1807); 2 Chamb., Ev., § 1274, n. 3, and cases cited.

20. *In re Arnold's Estate*, 147 Cal. 583, 82 Pac. 252 (1905); *Phillips v. Lindley*, 98 N. Y. Supp. 423, 112 App. Div. 283 (1906); *Hatcher v. Crews*, 78 Va. 460 (1884); 2 Chamb., Ev., § 1274, n. 4, and cases cited.

21. *Gardner v. Mault*, 10 A. & E. 464, 37 E. C. L. 255 (1839).

22. *Carr v. Griffin*, 44 N. H. 510 (1863).

23. *Parker v. Chancellor*, 78 Tex. 524, 15 S. W. 157 (1890).

24. *Carr v. Griffin*, *supra*.

25. *Moore v. Brown*, 23 Kan. 269 (1880); *Hatch v. Brown*, 63 Me. 410 (1874).

26. 2 Chamberlayne, Evidence, § 1275.

27. *Wilson v. Spring*, 64 Ill. 14 (1872); *Adams v. Utley*, 87 N. C. 356 (1882); 2 Chamb., Ev., § 1275, n. 1, and cases cited.

28. *Winter v. Walter*, 37 Pa. 155 (1860).

29. *Phillips v. Middlesex County*, 127 Mass. 262 (1879).

30. *Purcell v. St. Paul F. & M. Ins. Co.*, 5 N. D. 100, 64 N. W. 943 (1895).

31. *Com. v. Miller*, 3 Cush. (Mass.) 243 (1849).

32. *Pence v. Sweeney*, 3 Ida. 181, 28 Pac. 413 (1891).

33. 2 Chamberlayne, Evidence, §§ 1276-1281.

34. *Lord v. Wood*, 120 Iowa 303, 94 N. W. 842 (1903); 2 Chamb., Ev., § 1276, n. 1, and cases cited.

within the scope of his professional employment,³⁶ for the purposes of the case for which it was made,³⁷ it is binding upon the client.³⁸ This result follows equally whether the statement is made during the trial,³⁹ before it begins,⁴⁰ or after it is over.⁴¹

Acts in Pais.—Speaking generally, a client is not affected by the acts *in pais* of his legal adviser, or by the latter's statements, written⁴² or oral,⁴³ not relating to the handling and management of the case.

Matters of Procedure.—Speaking generally, matters of procedure are especially within the province of counsel, with which the client has, as a rule, but little to do.⁴⁴ In what way facts shall be handled, how they shall best be pleaded,⁴⁵ in what manner they shall be presented in the opening address, or in the closing argument, are beyond the ken of the client. What evidence shall be used to prove certain facts, to what effect particular witnesses would testify to if present,⁴⁶ all this, and much more, are within the purview of the art of advocacy, of which the client, as a rule, knows nothing.⁴⁷ The counsel alone can effectively judge as to when it is wise to insist upon full proof, and under what circumstances the formal requirements of evidence, regarding incidental matters,⁴⁸ may be waived. The due execution of uncontroverted documents, for example,⁴⁹ or the existence of really undisputed facts⁵⁰ may, under certain circumstances, be frankly conceded with benefit to the forensic fortunes of the litigant. Wide discretionary powers must necessarily be conferred upon the legal adviser.

35. *Williams v. Preston*, 20 Ch. D. 672, 51 L. J. Ch. 973 (1882).

36. *Dillon v. State*, 6 Tex. 55 (1851).

37. *Truby v. Seybert*, 12 Pa. 101 (1849); *Atchison, etc., Ry. Co. v. Sullivan* (Colo. 1909), 173 Fed. 456, 97 C. C. A. 1.

38. *Starke v. Kenan*, 11 Ala. 818; *Central Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163 (1882).

39. *Lord v. Bigelow*, 124 Mass. 185 (1878); *People v. Mole*, 82 N. Y. Supp. 747, 85 App. Div. 33 (1903).

40. *Lindley v. Atchison, etc., R. Co.*, 47 Kan. 432, 28 Pac. 201 (1891); *Ferson v. Wilcox*, 19 Minn. 449 (1873); 2 Chamb., Ev., § 1276, n. 7, and cases cited.

41. *The Harry*, 11 Fed. Cas. No. 6,147, 9 Ben. 524 (1878).

42. *Doe v. Richards*, 2 C. & K. 216 (1845). See *Loomis v. R. Co.*, 159 Mass. 39, 34 N. E. 82 (1893).

43. *Cable Co. v. Parantha*, 118 Ga. 913, 45 S. E. 787 (1903); *Pickert v. Hair*, 146 Mass. 1, 15 N. E. 79 (1888). Statements in ordinary social intercourse, casual conversations, are not the admissions of the client.

Saunders v. McCarthy, 8 Allen (Mass.) 42 (1864); *Lake Erie, etc., R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470 (1895); 2 Chamb., Ev., § 1277, n. 2, and cases cited.

44. *Anderson v. McAleeman*, 8 N. Y. Supp. 483, 15 Daly 444 (1890).

45. *Supra*, §§ 503 *et seq.*; 2 Chamb., Ev., §§ 1244 *et seq.*

46. *Ryan v. Beard*, 74 Ala. 306 (1883); *Virginia Carolina Chemical Co. v. Kirven*, 130 N. C. 161, 41 S. E. 1 (1902).

47. *Chicago City R. Co. v. McMeen*, 70 Ill. App. 220 (1899); *Lacoste v. Robert*, 11 La. Ann. 33 (1856).

48. *Treadway v. Sioux City, etc., R. Co.*, 40 Iowa 526 (1875); *Ferson v. Wilcox*, 19 Minn. 449 (1873); 2 Chamb., Ev., § 1278, n. 5, and cases cited.

49. *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313 (1873); *Voisin v. Commercial Mut. Ins. Co.*, 22 N. Y. Supp. 348, 67 Hun 335 (1893); 2 Chamb., Ev., § 1278, n. 6, and cases cited.

50. *Urquhart v. Butterfield*, 37 Ch. D. 397, 57 L. J. Ch. 521 (1887).

Responsibility for Claims.— In exercising these discretionary powers claims are continually made by counsel engaged at the trial and concessions allowed for reasons far removed from belief in or actual knowledge as to the facts covered by the statement itself. Uncertain as to the final form which the facts disclosed at the trial may eventually take, he may regard it as wise policy to make such a variety and breadth of claim as will meet any situation which the facts are likely to create.⁵¹ To hold the client personally responsible for all these assertions as propositions of fact, would clearly be unjustifiable.

Responsibility for Concessions.— Concessions, on the other hand, may be made, under the advice of counsel, not because the truth is stated but for the purpose of attaining some ulterior end. These facts may be taken for granted provisionally, in order to obtain the opinion of the court upon their legal effect, as upon a demurrer,⁵² request for rulings⁵³ or some similar expedient.⁵⁴ It may even, in order to economize time,⁵⁵ to avoid an adjournment, or continuance⁵⁶ seem advisable to counsel, formally to admit *in judicio*, for the purposes of the case, that a fact may be taken as true which both client and counsel believe not to be so. An admission by conduct may possess practically the effect of a judicial admission.⁵⁷

Substratum of Fact.— So far as the substratum, underlying basis, of ultimate fact on which the cause rests furnished by the party appears to be blended with the formal judicial admissions of counsel, or those made under legal advice, or so far as these formal judicial admissions are shown to have been made with the personal assent of the client⁵⁸ or otherwise based on the belief of the party himself, they have probative force as admissions, in any relevant connection in which they may be afterwards offered.

§ 523. [Judicial Admissions]; Probative Force: Same Case.⁵⁹— The weight of the extra-judicial admission is determined by logic, that is, it is not predetermined.⁶⁰ On the contrary, the force and effect of a judicial admission, whether formal⁶¹ or informal⁶² is practically predetermined by procedure. The effect of the formal judicial admission is final and conclusive, that of the informal judicial admission is *prima facie*.

51. *Baldwin v. Gregg*, 13 Metc. (Mass.) 253 (1847); 2 Chamb., Ev., § 1279.

52. *Kankakee, etc., R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621 (1890); *Belden v. Parker*, 124 Mich. 667, 83 N. W. 616 (1900).

53. *Keane v. Fisher*, 7 La. Ann. 334 (1852)

54. *Reeler v. Young*, 8 Bibb (Ky.) 520 (1814); *Page v. Brewster*, 58 N. H. 126 (1877); 2 Chamb., Ev., § 1280, n. 3, and cases cited.

55. *Hays v. Hinds*, 28 Ind. 531 (1867); *Shipman v. Haynes*, 15 La. 363 (1840).

56. *Ryan v. Beard*, *supra*; *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209 (1902).

57. *Asiatic Steam Navigation Co. v. Bengal Coal Co.*, 35 Indian L. Rep. Calc. (pt. 2) 751 (1908).

58. *Lord v. Bigelow*, 124 Mass. 185 (1877); 2 Chamb., Ev., § 1281.

59. 2 Chamberlayne, Evidence, §§ 1282, 1283.

60. *Supra*, § 500; 2 Chamb., Ev., § 1236; 2 Chamb., Ev., § 1282.

61. *Supra*, §§ 502 et seq.; 2 Chamb., Ev., §§ 1243 et seq.

62. *Supra*, §§ 515 et seq.; 2 Chamb., Ev., §§ 1263 et seq.

Other Cases.— In cases other than that in which they were made, judicial admissions, whether formal as pleadings, in civil and criminal cases;⁶³ or informal, as the testimony of a party as a witness,⁶⁴ or by affidavit,⁶⁵ or deposition,⁶⁶ all, indifferently, drop into the class of extra-judicial admissions⁶⁷ and have merely the logical force and effect appropriate to this class of statements.⁶⁸

§ 524. [Judicial Admissions]; Formal Judicial Admissions Conclusive.⁶⁹— As a matter of procedure, the orderly conduct of a trial necessarily requires that, in the absence of mistake,⁷⁰ misunderstanding,⁷¹ or other good cause shown, the formal statements contained in pleadings,⁷² stipulations,⁷³ specific admissions by counsel at the trial⁷⁴ or before a magistrate,⁷⁵ and the like,⁷⁶ should be once for all settled and determined as the ground work on which the rights of the parties are to be contested.⁷⁷ They are therefore, not to be withdrawn at the mere volition of the party, even in an appellate court⁷⁸ or even on a subsequent trial of the same case,⁷⁹ unless the formal judicial admission shall have been made for a temporary purpose.⁸⁰ The judge has, however, administrative power to allow the formal judicial admission to be withdrawn or modified, upon satisfactory cause shown.⁸¹

§ 525. [Judicial Admissions]; Informal Judicial Admissions Constitute Prima Facie Case.⁸²— In case of the informal judicial admission the rules of procedure attach a *prima facie* force.⁸³ The party is, however, by no means con-

63. *Parks v. Mother*, 71 Me. 304 (1880); *In re Duncan*, 64 S. C. 461, 42 S. E. 433 (1902).

64. *Supra*, §§ 516 et seq.; 2 Chamb., Ev., §§ 1268 et seq.; § 1283.

65. *Supra*, § 518; 2 Chamb., Ev., 1272.

66. *Supra*, § 520; 2 Chamb., Ev., § 1274.

67. *Tabb v. Cabell*, 17 Gratt. (Va.) 160 (1867).

68. *Infra*, §§ 558 et seq.; 2 Chamb., Ev., §§ 1383 et seq.

69. 2 Chamberlayne. Evidence, §§ 1284, 1285.

70. *Montgomery v. Givhan*, 24 Ala. 567 (1854); *Hughey v. Barrow*, 4 La. Ann. 248 (1849).

71. *State v. Paxton*, 65 Neb. 110, 90 N. W. 983 (1902).

72. *Raridan v. Central Iowa R. Co.*, 69 Iowa 527, 29 N. W. 599 (1886); *Cook v. Barr*, 44 N. Y. 156 (1870); *Goldwater v. Burnside*, 22 Wash. 215, 60 Pac. 409 (1900); 2 Chamb., Ev., § 1284, n. 3, and cases cited.

73. *Illinois Cent. R. Co. v. Fishell*, 32 Ill. Ann. 41 (1889); *Burbank v. Rockingham Mut. F. Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300 (1852).

74. *Hearne v. De Young*, 111 Cal. 373, 43

Pac. 1108 (1896); *Leroy Payne Co. v. Van Eyra*, 94 Ill. App. 356 (1901); *Moling v. Barnard*, 65 Mo. App. 600 (1896); 2 Chamb., Ev., § 1284, n. 5, and cases cited.

75. *Marsh v. Mitchell*, 26 N. J. Eq. 497 (1875).

76. *In re Henschel*, 114 Fed. 968; *McLughan v. Bovard*, 4 Watts (Pa.) 308 (1835).

77. *Supra*, § 392; 2 Chamb., Ev., § 932.

78. *Montgomery v. Givhan*, *supra*. The admission, however, is not conclusive where, on an appeal, the trial is *de novo*. *Morrison v. Riker*, 26 Mich. 385 (1873). If it may reasonably be inferred, that the intention of the parties was to confine the scope of the stipulation to a particular case, the rule is otherwise. *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313 (1873).

79. *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40 (1878); *Owen v. Cawley*, 36 N. Y. 60 (1867).

80. *Mullin v. Vermont Mut. F. Ins. Co.*, 56 Vt. 39 (1884).

81. 2 Chamb., Ev., § 1285.

82. 2 Chamberlayne. Evidence, §§ 1286, 1287.

83. *Stone v. Cook*, 79 Ill. 424 (1875); *Auer v. Hoffmann*, 132 Wis. 620, 112 N. W. 1090

cluded by his statement. A fact stated by a party in his testimony dispenses with further proof.⁸⁴ His estimate or opinion may be controlled by other evidence⁸⁵ and even where his testimony is against the interest of the party giving it, he is not, as a matter of law, concluded.⁸⁶ A statement, however, may be so relied on by the opposite party as to ground an estoppel.⁸⁷

§ 525a. Effect of Plea of Guilty Withdrawn. — Where the defendant pleads guilty in open court to the charge made against him and afterwards withdraws the plea it might seem having in view the rule of reason that this is good evidence of his guilt and should be received against him at a later trial. There are however many practical considerations against it. Most criminal defendants are ignorant and rely entirely on their counsel in such matters and such pleas are commonly made by attorneys in the nature of an offer of settlement in the hope of obtaining for the accused a light sentence without intending to admit guilt where the state of the evidence or the difficulty of obtaining witnesses renders the case a precarious one to defend. The attorney may be afraid of prejudice of the jury against his client. For these reasons the weight of authority is properly against the reception of the evidence.⁸⁸

(1907); 2 Chamb., Ev., § 1286, n. 1, and cases cited.

84. *Roach v. Burgess* (Tex. Civ. App. 1901), 62 S. W. 803.

85. *Culberson v. Chicago, etc., R. Co.*, 50 Mo. App. 556 (1892).

86. *Ephland v. Missouri Pac. R. Co.*, 71 Mo. App. 597 (1897); 2 Chamb., Ev., § 1286, n. 4, and cases cited. *Positive Stronger than Negative Statement.*—Plaintiff's declarations against interest on cross-examination

have been regarded as more strongly probative than the denials contained in his direct testimony. *Cohen v. Barry*, 111 N. Y. Supp. 668 (1908).

87. 2 Chamb., Ev., § 1287.

88. *People v. Ryan*, 82 Cal. 617, 23 Pac. 121; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *Heim v. United States* (1918), 46 Wash. L. Rep. 242. Contra: *State v. Carta*, 90 Conn. 79, 96 Atl. 411; *Comm. v. Irvine*, 8 Dana (Ky.), 30. See ante, s. 508.

CHAPTER XVIII.

ADMISSIONS: EXTRA-JUDICIAL

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§ 526. **Extra-Judicial Admissions; Definition.**¹— Extra-judicial admissions are, speaking generally, declarations of a party or his legal representatives regarding

¹ 2 Chamberlayne, Evidence, §§ 1288, 1289.

the existence of a probative or *res gestae fact*,² and made *in pais*, i.e., not in the course of judicial proceedings. They include, as has elsewhere been noted,³ the use in a subsequent legal proceeding of what were originally, i.e., when made, judicial admissions.

§ 527. [Extra-Judicial Admissions]; Use a General One.⁴—The extra-judicial admission differs from the judicial in that the latter must be employed where it arose, i.e., in a particular case, for a special purpose. The extra-judicial admission goes into every legal relation or connection in which litigation is pending where the person who made the statement is a party and wherever the opposing interest is able to persuade the court that it states a fact which is of a probative or *res gestae* order in the case where it is offered.⁵ An extra-judicial admission made by a person in a civil suit is equally available against him on a criminal prosecution.⁶ The reverse is equally true.⁷ In like manner admissions made in actions at law are competent in proceedings in equity, and the reverse.⁸ This species of statement is received in evidence regardless of whether the action be real or personal.⁹ The rule is the same in any form of civil proceeding, for example, those of a probate court,¹⁰ or for divorce,¹¹ which are not governed by common law procedure.

Criminal Cases.—Reserving the general subject of *confessions* for separate treatment,¹² it may be stated that an admission in a criminal cause differs in no essential particular from one in a civil action. The extra-judicial admission by one accused of crime is equally competent in either case and for the same reasons.¹³

Time of Making.—It is not material whether these statements were made

2. *Supra*, §§ 31, 34; 1 Chamb., Ev., §§ 47, 51.

3. *Supra*, §§ 524 et seq.; 2 Chamb., Ev., §§ 1248 et seq., 1283; 2 Chamb., Ev., §§ 1288, 1289.

4. 2 Chamberlayne, Evidence, §§ 1290–1292

5. Reed v. McCord, 160 N. Y. 330, 341, 54 N. E. 737 (1899).

6. Reg. v. McLean, 17 N. Brunsw. 377 (1877).

7. Notara v. De Kamalaris, 49 N. Y. Supp. 216, 22 Misc. 337 (1898); Meyers v. Dillon, 39 Or. 581, 65 Pac. 867, 66 Pac. 814 (1901); Shumaker v. Reed, 3 Pa. Dist. 45, 13 Pa. Co. Ct. 547 (1893); 2 Chamb., Ev., 1290, n. 3, and cases cited.

8. Spann v. Torbet, 130 Ala. 541, 30 So. 389 (1900); Earl v. Shoulder, 6 Ohio 409 (1834); Holland v. Spell, 144 Ind. 561, 42 N. E. 1014 (1905); 2 Chamb., Ev., § 1290, n. 4, and cases cited.

9. Munnerlyn v. Augusta Sav. Bank, 94 Ga.

forth, 95 Mo. App. 441, 69 S. W. 39 (1902); Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590 (1833); 2 Chamb., Ev., § 1290, n. 5, and cases cited.

10. *In re Bramberry*, 156 Pa. 628, 27 Atl. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594 (1893).

11. Gardner v. Gardner, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. Rep. 924 (1900).

12. *Infra*, §§ 582 et seq.; 2 Chamb., Ev., §§ 1472 et seq.

13. People v. Chrisman, 135 Cal. 282, 67 Pac. 136 (1901); Shaw v. State, 102 Ga. 660, 29 S. E. 477 (1897); Com. v. Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306 (1899); State v. Daly, 210 Mo. 664, 109 S. W. 53, (1908); People v. Smith, 172 N. Y. 210, 64 N. E. 814 (1902); Neifield v. State, 23 Ohio Cir. Ct. 246 (1901); State v. Shepard, 49 W. Va. 582, 39 S. E. 976 (1901); 2 Chamb., Ev., § 1290a, n. 5, and cases cited. 356, 21 S. E. 575 (1894); Lowrey v. Dan-

before or after the date claimed as that of the commission of the offense.¹⁴ Even when the specific admission¹⁵ is part of an "involuntary" confession, it may still be received.¹⁶

Minor Details.— Apart from questions of privilege¹⁷ an oral admission may be testified to by any one who heard it.¹⁸ A competent admission may be made to any person.¹⁹ That it was made in confidence that it would not be divulged is no ground for rejecting it.²⁰ Extra-judicial admissions may be offered by either party,²¹ and are competent though the declarant is present in court and available as a witness.²² It is not material that the same statement is also in written form.²³

§ 528. Conditions of Admissibility; Statement Must Be One of Fact.²⁴— It is first of all essential that the statement offered as an extra-judicial admission should be one of fact,²⁵ i.e., affirm some present existence.

Matter of Law.— Parties cannot by their admissions of law arising out of an undisputed state of facts, bind the court to adopt their view.²⁶ Conclusions of law²⁷ unless inseparably blended with and necessary to the understanding of a statement of fact²⁸ or statements as to declarant's conclusions from certain

14. *Fowler v. People*, 18 How. Pr. (N. Y.) 493 (1860); *Brooks v. U. S.*, 146 Fed. 223, 76 C. C. A. 581 (1906).

15. *Infra.* §§ 613 *et seq.*; 2 Chamb., Ev., §§ 1609 *et seq.*

16. *State v. Brinkley*, 55 Or. 134, 105 Pac. 708 (1909).

17. See 2 Chamb., Ev., § 1291, n. 1. *Presence of third person.*— Where a third person is present at a conversation otherwise privileged, the statements are not confidential and may be stated by the third party present. *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31 (1897); *Com. v. Griffin*, 110 Mass. 181 (1872); *People v. Lewis*, 16 N. Y. Supp. 881 (1891).

18. *Allen v. Hall*, 64 Neb. 256, 89 N. W. 803 (1902); *Egyptian Flag Cigarette Co. v. Comisky*, 81 N. Y. Supp. 613, 40 Misc. 236 (1903); 2 Chamb., Ev., § 1291, n. 2, and cases cited.

19. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 (1902); *Douglass v. Lonard*, 17 N. Y. Supp. 591 (1892); 2 Chamb., Ev., § 1291, n. 3, and cases cited.

20. *Crain v. Jacksonville First Nat. Bank*, 114 Ill. 516, 2 N. E. 486 (1885).

21. *Brown v. Brown*, 4 Fed. Cas. No. 1,994, 1 Woodh. & M. 325 (1846).

22. *Stevenson v. Ebervale Coal Co.*, 201 Pa. 112, 50 Atl. 818, 88 Am. St. Rep. 1805 (1902).

23. *Burch v. Harrell*, 93 Ga. 719, 20 S. E. 212 (1894).

Extra-judicial admissions are not so much an exception to the rule excluding hearsay as based upon a quasi-estoppel which controls the right of a party to disclaim responsibility for any of his statements. 2 Chamb., Ev., § 1292.

Calling attention to admissions.— Admissions made by the plaintiff may be put in evidence without first calling his attention to them. *Adams v. Chicago Great Western R. Co.*, 156 Iowa 31, 135 N. W. 21, 42 L. R. A. (N. S.) 373 (1912).

24. 2 Chamberlayne, Evidence, § 1293.

25. *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269 (1899); *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51 (1832); 2 Chamb., Ev., § 1298, n. 1, and cases cited.

26. *People v. Pittsburg, etc., Ry. Co.*, 244 Ill. 166, 91 N. E. 48 (1910); *City Club of Auburn v. McGeer*, 198 N. Y. 160, 91 N. E. 539 (1910). They may, however, estop themselves from afterwards denying such an admission, where it was made through fraud or when it induced the opposite party to assume a position he would not have assumed had the admission not been made. *Id.*

27. *Infra.* §§ 803 *et seq.*; 3 Chamb., Ev., §§ 2325 *et seq.*

28. *Lewis v. Harris*, 31 Ala. 689 (1858).

facts,²⁹ his "opinion" as it is frequently called³⁰ are not proper subjects for an admission, except in cases where the declarant might, if present as a witness, have testified to the same inference or conclusion.

Psychological Facts.—The fact covered by an admission may be a psychological one, e.g., belief.³¹

§ 529. [Extra-Judicial Admissions]; Statement Must Be Voluntary.³²—It is further required that the statement should have been voluntarily made by the declarant.³³ Threats of personal violence affect only the weight of the evidence,³⁴ and the bare custody of an officer is not sufficient to exclude a statement otherwise voluntary.³⁵ Nor is it ground for rejecting a statement as not voluntary that it was given by declarant as a witness in response to compulsory process, whether in court³⁶ before arbitrators,³⁷ commissioners in bankruptcy³⁸ or in other judicial proceedings.³⁹ It is not important that the proceedings themselves are irregular⁴⁰ or that the declarant was tricked or trapped into making the admission.⁴¹ His admission is equally received though obtained by an officer by means of a representation which may be misleading, to say the least.⁴² It has been held that no preliminary proof need be given that the admission was voluntarily made.⁴³

Criminal Cases.—As in case of the confession itself, any specific admission must if it is to be received in evidence be voluntary.⁴⁴ Should it appear that the admission constitutes or is equivalent to a confession and that it was induced by threats or promises extended to the declarant by persons in authority over the proceedings, the statement will be rejected as involuntary,⁴⁵ although

29. *Infra*, §§ 792 et seq.; 3 Chamb., Ev., §§ 2291 et seq.; 2 Chamb., Ev., § 1293, n. 6, and cases cited.

30. *Hobart v. Plymouth County*, 100 Mass. 159 (1868); 2 Chamb., Ev., 1293, n. 7, and cases cited.

31. *Bradenkamp v. Rouge*, 143 Ill. App. 492 (1908); *State v. Kelley*, 191 Mo. 680, 90 S. W. 834 (1905); 2 Chamb., Ev., § 1293, n. 8, and cases cited.

32. 2 Chamberlayne, Evidence, § 1294.

33. *Truby v. Seybert*, 12 Pa. 101 (1849); *Scott v. Home Ins. Co.*, 1 Dill. (U. S.) 105 (1870); 2 Chamb., Ev., § 1294, n. 1, and cases cited. Compare *People v. Furlong*, 187 N. Y. 199, 79 N. E. 978 (1907).

34. *Fidler v. McKinley*, 21 Ill. 308 (1859).

35. *Notara v. De Kamalaria*, *supra*; *Daniels v. State*, 57 Fla. 1, 48 So. 747 (1909); *Fouse v. State*, 83 Neb. 258, 119 N. W. 478 (1909); *State v. Smith*, 138 N. C. 700, 50 S. E. 859 (1905); 2 Chamb., Ev., § 1294, n. 3, and cases cited.

36. *Newhall v. Jenkins*, 2 Gray (Mass.) 562

(1854); *McGahan v. Crawford*, 47 S. C. 566, 25 S. E. 123 (1896).

37. *Calvert v. Friehua*, 48 Md. 41 (1877).

38. *Lilley v. Mutual Ben. L. Ins. Co.*, 92 Mich. 153, 52 N. W. 631 (1902).

39. *McGahan v. Crawford*, *supra*; *Seaborn v. Com.*, 25 Ky. L. Rep. 2203, 80 S. W. 223 (1904).

40. *Carr v. Griffin*, 44 N. H. 510 (1863).

41. *Higgins v. Dellinger*, 22 Mo. 397 (1856); *State v. Barrington*, 198 Mo. 23, 95 S. W. 235 (1906).

42. *Collins v. State*, 115 Wis. 596, 92 N. W. 266 (1902). See, however, *Tines v. Com.*, 25 Ky. L. Rep. 1233, 77 S. W. 363 (1903).

43. *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997 (1907).

44. *Com v. Williams*, 171 Mass. 461, 50 N. E. 1035 (1898); *State v. Schmidt*, 137 Mo. 266, 38 S. W. 939 (1896); *Munroe v. People*, 13 N. Y. 590 (1876); 2 Chamb., Ev., § 1294a, n. 2, and cases cited.

45. *Infra*, §§ 584 et seq.; 2 Chamb., Ev., §§ 1483 et seq. See *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035 (1905).

it is obvious that the will of the declarant has fully co-operated with his act. In several jurisdictions, the logical rule is observed that a threat or promise by an officer to an accused person which does not amount to duress leaves his declaration voluntary,⁴⁶ and its weight for the jury.

§ 530. [Extra-Judicial Admissions]; Statement Must Be Certain.⁴⁷—An admission must be certain,⁴⁸ and consistent,⁴⁹ definite⁵⁰ and clearly proved. It must, in addition, be couched in language reasonably capable,⁵¹ without forced or strained construction,⁵² to bear the interpretation placed on it. While conjectural⁵³ and supposititious⁵⁴ statements are excluded, absolute precision is not demanded in case of a declaration offered as an admission.⁵⁵ *Total failure to identify the declarant* will suffice to exclude the admission.⁵⁶

§ 531. [Extra-Judicial Admissions]; Statement Must Be Complete.⁵⁷—As a rule, with modifications more fully stated elsewhere,⁵⁸ a party is at liberty to offer merely such portions of an entire statement as he chooses, leaving his opponent to supplement it should he desire.⁵⁹ This the latter may do either by further examination of the same witness,⁶⁰ or by testimony from another person,⁶¹ so far as the additional statements shall appear to the court⁶² to be fairly necessary to qualify and explain the admissions already offered in evidence.⁶³ Where a statement is certain, complete in itself, it is not material

46. *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141 (1898); *State v. Red*, 53 Iowa 69, 4 N. W. 831 (1880); *McLain v. State*, 18 Neb. 154, 24 N. W. 720 (1885).

47. 2 Chamberlayne, Evidence, § 1295.

48. *State v. Eisenmeyer*, 94 Ill. 96 (1879); *Petzolt v. Thiess*, 35 N. Y. Supp. 740, 25 Misc. 707 (1899).

49. *Ayers v. Metcalf*, 39 Ill. 307 (1866).

50. *Douglass v. Davie*, 2 McCord (S. C.) 218 (1822).

51. *Donovan v. Driscoll*, 116 Iowa 339, 90 N. W. 60 (1902).

52. *Mack v. Cole*, 130 Mich. 84, 89 N. W. 564 (1902); *Hamilton v. Patrick*, 16 N. Y. Supp. 578, 62 Hun 74 (1891); *Middleton v. Westenev*, 7 Ohio Cir. Ct. 393, 4 Ohio Cir. Dec. 650 (1892); 2 Chamb., Ev., § 1295, n. 5, and cases cited.

53. *Driscoll v. Taunton*, 160 Mass. 486, 36 N. E. 495 (1894); *Fred Oppermann, Jr., Brewing Co. v. Pearson*, 74 N. Y. Supp. 187, 68 App. Div. 637 (1902); 2 Chamb., Ev., § 1295, n. 6, and cases cited.

54. *Mitnacht v. Bache*, 45 N. Y. Supp. 81, 16 App. Div. 426 (1897); *Rudd v. Dewey*, 121 Iowa 434, 96 N. W. 973 (1903).

55. *Nichols v. Allen*, 112 Mass. 23 (1873). Possibility of ambiguity, see *Lincoln v. Hem-*

enway, 80 Vt. 530, 69 Atl. 153 (1908); *Southern Loan & Trust Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435 (1904).

56. *Clark v. Com.*, 32 Ky. L. Rep. 63, 836, 105 S. W. 393, 106 S. W. 1191 (1908).

57. 2 Chamberlayne, Evidence, §§ 1296-1303.

58. *Supra*, §§ 246, 248, 260; 1 Chamb., Ev., §§ 490, 492, 505.

59. *Cramers v. Gregg*, 40 Ill. App. 442 (1899); *Lewis Pub. Co. v. Lenz*, 83 N. Y. Supp. 841, 86 App. Div. 451 (1903); 2 Chamb., Ev., § 1296, n. 2, and cases cited.

60. *Adam v. Eames*, 107 Mass. 275 (1871); *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337 (1862); *Wolf Creek Diamond Coal Co. v. Schultz*, 71 Pa. 180 (1872); 2 Chamb., Ev., § 1296, n. 3, and cases cited.

61. *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748 (1889); *Morris v. Jamieson*, 205 Ill. 87, 68 N. E. 742 (1903); *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372 (1883); 2 Chamb., Ev., § 1296, n. 4, and cases cited.

62. *Robinson v. Ferry*, 11 Conn. 460 (1834).

63. *Morris v. Jamieson*, *supra*; *Straw v. Greene*, 14 Allen (Mass.) 206 (1867); *Ather-ton v. Defreeze*, 129 Mich. 864, 88 N. W. 886 (1902); *People v. Bingham*, 190 N. Y. 566, 83

that it covers merely a portion of an entire transaction,⁶⁴ or that it constituted, when made, part of a conversation, the balance of which is not heard.⁶⁵

Criminal Cases.—An admission offered in evidence in a criminal case should be complete. Should the statement be oral, everything said at the same time necessary to the full and accurate understanding of the part offered should be produced in the first instance.⁶⁶ For example, a conversation said to contain an admission by the accused must be given to the court in its entirety,⁶⁷ though there be included much which is distinctly self-serving and to the interest of the accused.⁶⁸ All rights of the accused have been held, however, to be fully protected by permitting him to introduce such additional portions of the conversation as he thinks best.⁶⁹ Should the incriminating declaration be in writing, the same rule is applied, the entire document being introduced in evidence at the outset.⁷⁰ The jury may follow certain portions and disregard the balance.⁷¹ Irrelevant matter likely to mislead the jury may be omitted, upon the original reading of the document to the jury.⁷²

Self-serving Statements.—Except so far as above authorized the self-serving statements of the defendant will not be received in evidence when tendered by him,⁷³ unless they are part of the *res gestae*, either in their independently relevant⁷⁴ or assertive capacity.⁷⁵ In like manner, an accused person cannot insist upon giving a self-serving explanation offered at a conversation other than that relied upon by the prosecution.⁷⁶

N. E. 1129 (1908), aff'g 106 N. Y. Supp. 330, 121 App. Div. 593 (1907); 2 Chamb., Ev., § 1296, n. 6, and cases cited.

64. *Stansell v. Leavitt*, 51 Mich. 536, 16 N. W. 892 (1883).

65. *Voorheis v. Bovell*, 20 Ill. App. 538 (1886); *Scott v. Young*, 4 Paige (N. Y.) 542, 547 (1834); 2 Chamb., Ev., § 1296, n. 8, and cases cited.

66. *Hanrahan v. People*, 91 Ill. 142 (1878); 66 N. E. 32, 93 Am. Rep. 208 (1903); *Com. Shotwell v. Com.*, 24 Ky. L. Rep. 255, 68 S. W. 403 (1902); *State v. Kennade*, 121 Mo. 405, 26 S. W. 347 (1894); 2 Chamb., Ev., § 1297, n. 1, and cases cited.

67. *Campbell v. State*, 23 Ala. 44 (1853); *State v. Curtis*, 70 Mo. 594 (1879); *State v. Swink*, 19 N. C. 9 (1836).

68. *Walker v. State*, 28 Ga. 254 (1859); *Morrow v. State*, 48 Ind. 432 (1874); *State v. Napier*, 65 Mo. 462 (1877); 2 Chamb., Ev., § 1297, n. 3, and cases cited.

69. *People v. Murphy*, 39 Cal. 52 (1870); *Round v. State*, 57 Wis. 45, 14 N. W. 865 (1883); 2 Chamb., Ev., § 1297, n. 4, and cases cited.

70. *Supra*, §§ 256 et seq.; 1 Chamb., Ev., §§ 500 et seq.

71. *State v. Carlisle*, 57 Mo. 102 (1874); *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676 (1901).

72. *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72 (1887).

73. *Dixon v. State*, 116 Ga. 186, 42 S. E. 357 (1902); *Carle v. People*, 200 Ill. 494, 66 N. E. 32, 93 Am. Rep. 208 (1903); *Com. v. Cooseboom*, 155 Mass. 298, 29 N. E. 463 (1891); *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027 (1903); *McKee v. People*, 36 N. Y. 113 (1867); 2 Chamb., Ev., § 1297a, n. 1, and cases cited.

74. *Infra*, §§ 837 et seq.; 4 Chamb., Ev., §§ 2574 et seq.

75. *People v. Estrado*, 49 Cal. 171 (1875); *State v. Young*, 119 Mo. 495, 24 S. W. 1038 (1893); *People v. De Graff*, 4 Hun 622, 6 N. Y. St. Rep. 412 (1887); 2 Chamb., Ev., § 1297a, n. 3, and cases cited. The rule excluding self-serving statements is based upon the generally worthless character of such assertions. *State v. Howard*, 82 N. C. 623 (1880).

76. *State v. Rutledge*, 37 La. Ann. 378 (1885); *People v. Green*, 1 Park Cr. (N. Y.) 11 (1845); 2 Chamb., Ev., § 1297a, n. 5, and cases cited.

Self-serving Acts, Appearances, Etc.—One accused of crime cannot show that he acted ⁷⁷ and, indeed appeared shortly after the crime as he would have done if innocent.⁷⁸ For like reasons, it cannot be shown that the accused surrendered himself as a prisoner, or voluntarily offered to submit to arrest.⁷⁹

Irrelevancy.—A further reason for rejecting the self-serving statement frequently consists in the fact that such evidence is irrelevant.⁸⁰

A More Liberal Rule.—A rule has been adopted in several jurisdictions, to the effect that a statement, though not in strictness explanatory or qualifying, is nevertheless competent, at the instance of the declarant, if made at the same time as his admission previously offered in evidence in relation to the same subject-matter.⁸¹

Statements On Other Occasions.—The general rule is to the effect that even qualifying or contradictory statements made on another occasion by a party ⁸² or a person to whom he stands in a relation of privity,⁸³ or other representative capacity, are incompetent, even where they relate to the same subject-matter,⁸⁴ for the purpose of explaining or qualifying a declaration relied upon as an admission.

Written Declarations.—The rule requiring that statements used as admissions should be complete applies to written declarations, as those contained in letters ⁸⁵ or other documents.⁸⁶

Weight and Credibility.—When the entire statement has been received due weight should be given to it as a unit.⁸⁷ Not that all parts of the statement are

77. *Williams v. State*, 52 Ala. 411 (1875).

78. *State v. Strong*, 153 Mo. 548, 55 S. W. 78 (1890); *People v. Rathbun*, 21 Wend. (N. Y.) 509 (1839); 2 Chamb., Ev., § 1298, n. 3, and cases cited.

79. *Vaughn v. State*, 130 Ala. 18, 30 So. 669 (1901); *State v. Taylor*, 134 Mo. 109, 35 S. W. 92 (1895); 2 Chamb., Ev., § 1298, n. 4, and cases cited. So. of refusing to avail himself of a chance to escape from confinement. *People v. Montgomery*, 53 Cal. 576 (1878); *Com. v. Hersey*, 2 Allen (Mass.) 173 (1861); *People v. Rathbun*, *supra*.

80. *State v. Moore*, 156 Mo. 204, 56 S. W. 883 (1899); *Meyers v. U. S.*, 5 Okl. 173, 48 Pac. 186 (1897); 2 Chamb., Ev., § 1299, and cases cited.

81. *Robinson v. Ferry*, 11 Conn. 460 (1836); *Morris v. Jamieson*, *supra*; *Farley v. Rodocanachi*, 100 Mass. 427 (1868); 2 Chamb., Ev., § 1300, n. 1, and cases cited.

82. *Beebe v. Smith*, 194 Ill. 634, 62 N. E. 856 (1902); *Adam v. Eames*, 107 Mass. 275 (1871); *Smith v. Dodge*, 3 N. Y. Supp. 866 (1888); 2 Chamb., Ev., § 1301, n. 1, and cases cited.

83. *Royal v. Chandler*, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305 (1887); *Miller's Appeal*, 100 Pa. 568, 45 Am. Rep. 304 (1882); *Ellen v. Ellen*, 18 S. C. 489 (1882); 2 Chamb., Ev., § 1301, n. 2, and cases cited.

84. *Stewart v. Sherman*, 5 Conn. 244 (1824). In certain jurisdictions, however, the use by a party affected, of other parts of a continuous conversation, or an extended and uninterrupted correspondence, regarding the same subject, is permitted. *Swift Electric Light Co. v. Grant*, 90 Mich. 469, 51 N. W. 539 (1892); *Lewis Pub. Co. v. Lenz*, 83 N. Y. Supp. 841, 86 App. Div. 451 (1903).

85. *Morris v. Jamieson*, *supra*; *Lombard v. Chaplin*, 98 Me. 309, 56 Atl. 903 (1903).

86. *Lombard v. Chaplin*, *supra*; *Graftan v. New York Metropolitan L. Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372 (1883); 2 Chamb., Ev., § 1302, n. 2, and cases cited.

87. *Arnold v. Johnson*, 2 Ill. 196 (1835); *O'Brien v. Cheney*, 5 Cush. (Mass.) 148 (1849); *Shrady v. Shrady*, 58 N. Y. Supp. 546, 42 App. Div. 9 (1899); 2 Chamb., Ev., § 1303, n. 1, and cases cited.

equally entitled to belief.⁸⁸ The jury may give probative weight only to such parts of the whole, as they may deem worthy of confidence, and reject the balance.⁸⁹ They cannot do so capriciously or without reason.⁹⁰

§ 532. [Extra-Judicial Admissions]; Statement Must Be Relevant.⁹¹—An extra-judicial admission must be the statement of a probative or *res gestae* fact,⁹² for example, the existence of a particular state of consciousness.⁹³ The fact which is stated must, therefore, tend to establish or constitute the truth (or falsity) of a proposition in issue,⁹⁴ either directly as a *res gestae* or indirectly, as a probative fact, circumstantially as is commonly said.⁹⁵ It must be thus relevant at the time when it is offered in evidence.⁹⁶

Criminal Cases.—In criminal, as in civil actions, the admission must be that of a relevant fact.⁹⁷ The scope of criminal admissions, however, extends so far as to cover any probative or deliberative fact,⁹⁸ as well as one in the *res gestae*, e.g., the *corpus delicti*.⁹⁹

Conditions of Probative Relevancy; Adequate Knowledge.—That any statement should be relevant it is necessary, *inter alia*, that it be made by a person possessed of adequate knowledge.¹ The knowledge, however, need not be the result of his own observation, if the declarant regards the information upon which it is based as accurate and is willing to make the assertion as of his own knowledge.²

88. *Sadler v. Sadler*, 16 Ark. 628 (1856); *Thrall v. Smiley*, 9 Cal. 529 (1858); *Pierce v. Delamater*, 3 How. Pr. (N. Y.) 162 (1847); 2 Chamb., Ev., § 1303, n. 2, and cases cited.

89. *Field v. Hitchcock*, 17 Pick (Mass.) 182, 28 Am. Dec. 288 (1835); *Detroit Electric Light, etc., Co. v. Applebaum*, 132 Mich. 555, 94 N. W. 12 (1903); *Barnes v. Allen*, 1 Abb. Dec. (N. Y.) 111, 1 Keyes 390 (1864); 2 Chamb., Ev., § 1303, n. 3, and cases cited.

90. *Harris v. Woodard*, 40 Mich. 408 (1879); *Barnes v. Allen*, *supra*; 2 Chamb., Ev., § 1303, n. 4, and cases cited.

91. 2 Chamberlayne, Evidence, §§ 1304–1309.

92. *Morgan v. Patrick*, 7 Ala. 185 (1844); *Meyers v. San Pedro, etc., R. Co.*, 36 Utah 307, 104 Pac. 736 (1909).

93. *Canton v. McGraw*, 67 Md. 583, 11 Atl. 287 (1887); *Ford v. Savage*, 111 Mich. 144, 69 N. W. 240 (1896).

94. *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892); *Hooper v. Browning*, 19 Neb. 420, 27 N. W. 419 (1886); *Reed v. McCourt*, 41 N. Y. 435 (1869); 2 Chamb., Ev., § 1304, n. 3, and cases cited.

95. *Beattyville Coal Co. v. Hoskins*, 19 Ky. L. Rep. 1759, 44 S. W. 363 (1898); *Croom v. Sugg*, 110 N. C. 259, 14 S. E. 748 (1892);

2 Chamb., Ev., § 1304, n. 4, and cases cited.

96. *Keesling v. Doyle*, 8 Ind. App. 43, 33 N. E. 126 (1893); *Willard v. Horsey*, 22 Md. 89 (1864). A statement of a relevant fact competent as an admission is not within the rule under discussion and is competent though not made in connection with the matter directly involved in the suit. *Polykranas v. Krausz*, 77 N. Y. Supp. 46 (1902). As to effect of remoteness, see *Mandlebaum v. New York City Ry. Co.*, 90 N. Y. Supp. 377 (1904).

97. *People v. Williams*, 159 Mich. 518, 16 Detroit Leg. N. 1008, 124 N. W. 555 (1910).

98. *Walker v. State*, 136 Ind. 663, 36 N. E. 356 (1893); *Com. v. Waterman*, 122 Mass. 43 (1877); *Murphy v. People*, 63 N. Y. 590 (1876); 2 Chamb., Ev., § 1304a, n. 3, and cases cited.

99. *U. S. v. Jones*, 10 Fed. 469, 20 Blatchf. (U. S.) 235 (1882).

1. *Mittnache v. Bache*, 45 N. Y. Supp. 81, 16 App. Div. 426 (1897); *Folk v. Schaeffer*, 180 Pa. 613, 37 Atl. 104 (1897). This rule warrants the acceptance in evidence of a party's admission as to his age. *Koester v. Rochester Candy Works*, 194 N. Y. 92, 19 L. R. A. (N. S.) 783, 87 N. E. 77.

2. *Wasey v. Ins. Co.*, 126 Mich. 119, 85

Infants, Feeble-minded, Etc.—If the requisite degree of intelligence for adequate comprehension appears to be present, it is not important whether the declarant is or is not of full age. The declarations of an infant party will be received,³ even where he would not be deemed competent to testify under oath.⁴

Remoteness.—For probative relevancy, it is essential that the evidence should not be, in the judgment of the court, too remote in point of time.⁵ Subject to the qualification of relevancy, it is not material whether the declaration in question preceded⁶ or followed⁷ the transaction to which it relates, or was, on the other hand, concurrent with it.⁸

Deliberative Facts; Contradictory Statements.—A litigant may use as extra-judicial admissions by his opponent, statements made by the latter which tend to establish the existence of facts deliberative in their nature,⁹ i.e., those used to test the accuracy and general credibility of the evidence furnished by the witness; such as statements by a party inconsistent on some material point¹⁰ with his present testimony. The administrative requirement¹¹ which insists that before a witness can be shown to have contradicted his present testimony on a former occasion, the facts as to the alleged prior statements must be specifically and fully called to his attention and his denial or explanation taken, is not, as a rule, applied in case of the former inconsistent statements of a party.¹²

§ 533. Extra-Judicial Admissions; By Whom Made; Parties.¹³—An extra-judicial admission may, as is said elsewhere,¹⁴ be made by a party to the record or by any one who, under the rules of substantive or procedural law is able to affect the party by a statement.¹⁵ The designation of "parties" includes not

N. W. 459 (1901); *Redd v. McCord*, 160 N. Y. 330, 54 N. E. 737 (1899); *Chapman v. R. Co.*, 26 Wis. 294 (1870); 2 Chamb., Ev., § 1305, n. 2, and cases cited.

3. *Chicago C. R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997 (1902); *Atchison, etc., R. Co. v. Potter*, 60 Kan. 808, 58 Pac. 471 (1899).

4. *Mather v. Clark*, 2 Aikens (Vt.) 209 (1827); 2 Chamb., Ev., § 1306. Intoxication may be shown to have been such as to make it irrational for the jury to act upon a statement as an admission. *Bruner v. Seelbach Hotel Co.*, 133 Ky. 41, 117 S. W. 373 (1909).

5. *Bryant v. Crosby*, 40 Me. 9 (1855); *Smith v. Emerson*, 43 Pa. 456 (1862); 2 Chamb., Ev., § 1307, n. 1, and cases cited.

6. *Hall v. Bishop*, 78 Ind. 370 (1881); *Passavant v. Cantor*, 17 N. Y. Supp. 37 (1891); 2 Chamb., Ev., § 1307, n. 2, and cases cited.

7. *Rounds v. Alee*, 116 Iowa 345, 89 N. W. 1098 (1902); *Gordon v. Stubbs*, 36 La. Ann.

625 (1884); 2 Chamb., Ev., § 1307, n. 4. and cases cited.

8. *Crowley v. Pendleton*, 46 Conn. 62 (1878).

9. *Supra*, § 34; 1 Chamb., Ev., § 52.

10. *Gould v. John Hancock Mut. L. Ins. Co.*, 99 N. Y. Supp. 833, 114 App. Div. 312 (1906); *Zonker v. Cowan*, 84 Ind. 395 (1882).

11. *Supra*, §§ 226 *et seq.*; 1 Chamb., Ev., §§ 463 *et seq.*

12. *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208 (1897); *Bullard v. Bullard*, 112 Iowa 423, 84 N. W. 513 (1900); *Root v. Brown*, 4 Hun (N. Y.) 797 (1875); *Drury v. Terr.*, 9 Okla. 398, 60 Pac. 101 (1900); 2 Chamb., Ev., § 1309, n. 6, and cases cited.

13. 2 Chamberlayne, Evidence, §§ 1310, 1311.

14. *Supra*, § 499; 2 Chamb., Ev., § 1233.

15. *Green v. Gould*, 3 Allen (Mass.) 465 (1862); *Marx v. Hart*, 166 Mo. 503, 66 S. W.

only those who appear upon the record in that capacity, but persons who are actually parties without so appearing. Substance of interest rather than form of record is regarded as the determining factor.¹⁶

§ 534. [Extra-Judicial Admissions]; Parties to the Record.¹⁷—The typical admission, which the law receives, is an assertion in words, a statement or declaration made by one who is the opposing party of record in the case in which it is offered.¹⁸ Where the declarant is a defendant, it is necessary that he should have been duly served with process.¹⁹ But it is not essential that the declarant should be *sui juris*. That the person himself is an infant,²⁰ under guardianship as an insane person²¹ or as a spendthrift,²² or is under some disability, as that of coverture,²³ is deemed to be immaterial in this connection. The declarant's statement is equally competent whether made before²⁴ or after²⁵ the suit in which it is offered was brought. A discontinuance of the suit against him renders his declaration incompetent;²⁶ but that he has been defaulted has no effect.²⁷ Where a party's statements are admissible only while he is possessed of a particular interest, his declarations before he acquired the interest,²⁸ or after he ceased to have it,²⁹ are excluded. While the extra-judicial admissions of one on trial for crime will be received in evidence as in civil cases.³⁰

Criminal Cases.—The inculpatory statements of third persons, alleging their commission of the offense which is the subject of the pending inquiry cannot be proved by the accused in his own favor as the extra-judicial admissions of such a declarant.³¹ The death of the declarant³² or the fact that the state-

260, 89 Am. St. Rep. 715 (1901); *Laidlaw v. Sage*, 37 N. Y. Supp. 770, 2 App. Div. 374 (1896); 2 Chamb., Ev., § 1310, n. 2, and cases cited.

16. *Enloe v. Sherrill*, 28 N. C. 212 (1845); *Dotts v. Fetzer*, 9 Pa. 88 (1848); 2 Chamb., Ev., § 1311, n. 1, and cases cited.

17. 2 Chamberlayne, Evidence, §§ 1312, 1313.

18. *Fagan v. Lentz*, 156 Cal. 681, 105 Pac. 951 (1909); *Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 58 N. E. 183 (1900); *Williams v. Sargeant*, 46 N. Y. 481 (1871); 2 Chamb., Ev., § 1312, n. 1, and cases cited.

19. *Griswold v. Burroughs*, 15 N. Y. Supp. 314, 60 Hun 558 (1891).

20. *Chicago City R. Co. v. Tuohy*, *supra*; *Haile v. Lillie*, 3 Hill (N. Y.) 149 (1842).

21. *Hart v. Miller*, 29 Ind. App. 222, 64 N. E. 239 (1902).

22. *Hoit v. Underhill*, 10 N. H. 220, 34 Am. Dec. 148 (1839).

23. *Ernest v. Merritt*, 107 Ga. 61, 32 S. E.

898 (1899); *Morrell v. Cawley*, 17 Abb. Pr. (N. Y.) 76 (1863).

24. *Bartlett v. Falk*, 110 Iowa 346, 81 N. W. 602 (1900).

25. *Clark v. Smith*, 87 Ill. App. 409 (1899); *Dole v. Young*, 24 Pick. (Mass.) 250 (1837); 2 Chamb., Ev., § 1312, n. 7, and cases cited.

26. *Bensley v. Brockway*, 27 Ill. App. 410 (1888).

27. *Ensminger v. Marvin*, 5 Blackford (Ind.) 210 (1839).

28. *Wallace v. Miner*, 7 Ohio 249 (1835); *McIntyre v. Union College*, 6 Paige (N. Y.) 239 (1837); 2 Chamb., Ev., § 1312, n. 11, and cases cited.

29. *Boshear v. Lay*, 6 Heisk. (Tenn.) 163 (1871).

30. *Supra*, § 527; 2 Chamb., Ev., § 1290a.

31. *State v. Hack*, 118 Mo. 92, 23 S. W. 1089 (1893); *People v. Schooley*, 149 N. Y. 99, 43 N. E. 536 (1896); 2 Chamb., Ev., § 1313, n. 2, and cases cited.

32. *State v. West*, 45 La. Ann. 14, 12 So. 7 (1893).

ment is part of a death-bed confession,³³ does not affect the rule. The rule applies to the statements of the officers and other agents of a corporate defendant.³⁴

§ 535. [Extra-Judicial Admissions]; Coparties; Declarant Affected as if Sole Party.³⁵— So far as other considerations do not intervene, the declarations of one of several parties affect himself,³⁶ to the same extent as if he were the sole litigant on that side of the record, except where at the time such declarations were made a rule of substantive law operated as a bar to the use of the declaration.³⁷

Necessary Prejudice.— But where a statement of one of the co-parties cannot be received as an admission without essentially injuring the substantial rights of the others, as where the declaration in question involves the existence of some specific fact, as the validity of a will,³⁸ or other basic document,³⁹ upon which the rights of all the coparties are equally dependent, the declaration, though otherwise competent, will be excluded.

§ 536. [Extra-Judicial Admissions]; Coparty Not Affected.⁴⁰— The statements made by a party do not affect his coparties in civil cases,⁴¹ whether of common law,⁴² divorce⁴³ or equity proceedings.⁴⁴ The rule is the same in criminal proceedings.⁴⁵ *Admissions by conduct*, as where a statement made in the presence of all the parties may be deemed to have been adopted⁴⁶ or assented to⁴⁷ by them are not within the purview of the rule.

Rights of Coparty.— The rights of the coparty will be safe-guarded by the court, if requested.⁴⁸ That the statement offered must, to a certain extent necessarily affect the interests of the coparty, is not sufficient to warrant excluding it, if otherwise competent.⁴⁹ A coparty cannot, as a rule, use the

33. *West v. State*, 26 Ala. 98 (1884).

34. *People v. American Ice Co.*, 120 N. Y. Supp. 443 (1909).

35. 2 Chamberlayne, Evidence, § 1314.

36. *Williams v. Taunton*, 125 Mass. 34 (1878); *Petrie v. Williams*, 23 N. Y. Supp. 237, 68 Hun 589 (1898); *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184 (1910); 2 Chamb., Ev., § 1314, n. 1, and cases cited. Declarations of conspirator. See note, *Bender Ed.*, 106 N. Y. 104.

37. *Whittaker v. Thayer* (Tex. Civ. App. 1909), 123 S. W. 1187.

38. *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436 (1908); *In re Myer's Will*, 184 N. Y. 54, 76 N. E. 920 (1906); *Moore v. Caldwell*, 27 Ohio Cir. Ct. R. 449 (1904); 2 Chamb., Ev., § 1314, n. 3, and cases cited.

39. *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 410 (1893); *Britton v. Worcester County*,

123 Mass. 300 (1877); 2 Chamb., Ev., § 1314, n. 4, and cases cited.

40. 2 Chamberlayne, Evidence, §§ 1315-1318b.

41. *Dean v. Ross*, 105 Cal. 227, 38 Pac. 912 (1894); *Dowie v. Driacoll*, 203 Ill. 480, 68 N. E. 56 (1903); *Finelite v. Sonberg*, 78 N. Y. Supp. 338, 75 App. Div. 455 (1902); 2 Chamb., Ev., § 1315, n. 1, and cases cited.

42. *Reed v. Noxon*, 48 Ill. 323 (1868).

43. *Allen v. Allen*, L. R. 1804 Prob. Div. 248.

44. *Leeds v. Ins. Co.*, 2 Wheat. (U. S.) 380 (1817).

45. 2 Chamb., Ev., § 1315.

46. *Bradley v. Briggs*, 22 Vt. 95 (1849).

47. *Caldwell v. Auger*, 4 Minn. 217, 77 Am. Dec. 515 (1860); *Crippen v. Morse*, 49 N. Y. 63 (1872).

48. *Williams v. Taunton*, *supra*; 2 Chamb., Ev., § 1316.

statements of his associate on the record as against the opposing interest.⁵⁰ He may, however, employ them in his own favor as against the declarant.⁵¹

Joint Offenses.— It thus appears that the rule admits the declaration of a coparty as against himself, but refuses it as against the other even in cases like adultery⁵² or other joint offenses, civil⁵³ or criminal where both participants are equally guilty or equally innocent.

Exceptions to Rule.— Where by a provision of substantive law the declarant stands in some relation of agency or privity, he may, as a matter of law, make a statement which will affect his copartner as an admission.⁵⁴ Where persons are co-operating in a joint enterprise the admissions of one of them, within the scope of the common undertaking, are binding upon all.⁵⁵

Joint Ownership.— Whether the relation established by substantive law be that of agency,⁵⁶ privity⁵⁷ or under an independent rule, it is well settled that the statements of a joint owner of real or personal property⁵⁸ affect the other owners, when parties to the record, provided that the other conditions of admissibility are present. Among these is a requirement that the identity in legal interest shall be clearly shown⁵⁹ and that the joint ownership must have existed at the time the statement was made.⁶⁰ The rule applies equally to cases at law or suits in equity. No relation of joint ownership exists between owners as tenants in common,⁶¹ or between those holding present estates and persons interested in reversion or remainder, e.g., between a tenant for life and a remainderman when made parties to the same action,⁶² and the statements of a co-owner affect only himself.

Joint Liability.— The declaration of one jointly liable, on some legal obligation,⁶³ with the party against whom it is offered, is admissible as the admission of the other, when both are parties to the record. Thus, the statements of one jointly liable on a contract, written or oral, are admissible against

49. *Rogers v. Suttle*, 19 Ill. App. 163 (1885). Where prejudice is necessary, the rule is otherwise. See § 535; 2 Chamb., Ev., § 1314, ns. 2, 3.

50. *Quinlan v. Davis*, 6 Whart. (Pa.) 169 (1840).

51. *Cude v. Hatcher*, 72 Ga. 359 (1884).

52. 2 Chamb., Ev., § 1317, n. 1, and cases cited.

53. *Edgerton v. Wolf*, 6 Gray (Mass.) 453 (1856); *Roberts v. Kendall*, 3 Ind. App. 389, 29 N. E. 487 (1891).

54. *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056 (1892); 2 Chamb., Ev., § 1318, n. 1.

55. *Summerville v. Penn Drilling Co.*, 119 Ill. App. 152 (1905).

56. *Infra*, §§ 540 et seq.; 2 Chamb., Ev., §§ 1337 et seq.

57. *Infra*, § 539 et seq.; 2 Chamb., Ev., §§ 1329 et seq.

58. *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. 275 (1889); *Hollenbeck v. Todd*, 119 Ill. 543, 8 N. E. 829 (1887); *Jackson v. McVey*, 18 Johns. (N. Y.) 320 (1820); 2 Chamb., Ev., § 1318a, n. 3, and cases cited.

59. *Blenkinsopp v. Blenkinsopp*, 17 L. J. Ch. 343, 2 Phill. 807 (1848).

60. *Bakeney v. Ferguson*, 14 Ark. 640 (1854).

61. *Naul v. Naul*, 78 N. Y. Supp. 101, 75 App. Div. 292 (1902).

62. *McGregor v. Wait*, 10 Gray (Mass.) 72, 60 Am. Dec. 305 (1857); *Gallagher v. Rogers*, 1 Yeates (Pa.) 390 (1893).

63. *Thomas v. Mosher*, 128 Ill. App. 479 (1906). An obligation to contribute or indemnify is not a joint obligation. *Rapier v. Louisiana Equitable L. Ins. Co.*, 57 Ala. 100 (1876); *Edwards v. Bricker*, 66 Kan. 244, 71 Pac. 587 (1903).

his co-obligors; when sued on the common obligation.⁶⁴ They must, however, concern the subject-matter of the joint liability.⁶⁵ No new obligation can be created in this way;⁶⁶ nor can the original obligation be enlarged by such a declaration,⁶⁷ revived after it has *prima facie* been paid,⁶⁸ a condition limiting liability be removed, or the performance of it waived.⁶⁹

The Declarant Must Be a Party.—It is essential that the declarant should have been joined as a party on the record⁷⁰ and, as such, properly served with process.⁷¹

Negotiable Instruments.—The joint obligation may, with equal effect, be either a simple contract or a promissory note⁷² or other negotiable instrument.

Covenants.—It may be one by way of covenant. For example, the declaration of one joint lessee may be admissible against the other.⁷³

Self-serving Statements.—One jointly liable with another cannot use in his own favor statements of his co-obligor.⁷⁴

§ 537. [Extra-Judicial Admissions]; Nominal Parties.⁷⁵—The statements of a nominal plaintiff⁷⁶ or defendant⁷⁷ are not received as against the person beneficially entitled. But one who takes upon the litigation by virtue of ownership of the *res* takes its benefits *cum onere*, i.e., subject to the effect of all statements made by his predecessor in title while he was still beneficially interested.⁷⁸ If the fact stated is one in which the declarant alone has an interest⁷⁹ or where, for any reason, his admission would not affect the interest of the person beneficially entitled,⁸⁰ it continues to be competent. *Familiar instances of the rules* under consideration are afforded by the extra-judicial statements of a *guardian ad litem*⁸¹ or “next friend,”⁸² or general guardian.⁸³

64. *Olson v. O'Malia*, 75 Ill. App. 387 (1898); *Martin v. Root*, 17 Mass. 222 (1821); *Shirk v. Brookfield*, 79 N. Y. Supp. 225, 77 App. Div. 295 (1902); 2 *Chamb., Ev.*, § 1318b, n. 2, and cases cited. The share in the joint obligation for which the speaker is liable is not material. *Walling v. Roosevelt*, 16 N. J. L. 41 (1837).

65. *Fenn v. Dugdale*, 40 Mo. 63 (1867); *Wallis v. Randall*, 81 N. Y. 164 (1880); 2 *Chamb., Ev.*, § 1318b, n. 4, and cases cited.

66. *Thompson v. Richards*, 14 Mich. 172 (1866).

67. *U. S. Bank v. Lyman*, 1 Blatobf. (U. S.) 297, 20 Vt. 666 (1848).

68. *Rogers v. Clements*, 92 N. C. 81 (1885).

69. *Thompson v. Richards*, *supra*.

70. *Dickinson v. Clarke*, 5 W. Va. 280 (1872).

71. *Derby v. Rounds*, 53 Cal. 659 (1876).

72. *Roenagle v. Armstrong*, 17 Ida. 246, 105 Pac. 216 (1909).

73. *Miller v. Mathias*, 145 Ill. App. 465 (1908).

74. *Morgan v. Hubbard*, 66 N. C. 394 (1872).

75. 2 *Chamberlayne*, Evidence, §§ 1319, 1320.

76. *Shailer v. Bumstead*, 99 Mass. 112 (1868); *Eberhardt v. Schuster*, 10 Abb. N. Cas. (N. Y.) 374 (1879); *Strither v. Aberdeen, etc., Co.*, 123 N. C. 197, 31 S. E. 386 (1901); 2 *Chamb., Ev.*, § 1319, n. 1, and cases cited.

77. *Day v. Baldwin*, 34 Iowa 380 (1872).

78. *Sally v. Gooden*, 5 Ala. 78 (1843).

79. *Hogan v. Sherman*, 5 Mich. 60 (1858).

80. *Nix v. Winter*, 35 Ala. 309 (1859).

81. *Cooper v. Mayhew*, 40 Mich. 528 (1879); *Chipman v. R. Co.*, 12 Utah 68, 41 Pac. 562 (1895).

82. *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208 (1897); *Mertz v. Detweiler*, 8 Watts & S. (Pa.) 376 (1845).

83. *Knights' Templar, etc., Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066 (1904); 2 *Chamb., Ev.*, § 1319, n. 10, and cases cited.

Principal and Agent.—An agent may be sued, instead of his principal. He is then not a nominal party, but is identified in legal interest with his principal and his relevant statements are thus competent admissions in the suit against him.⁸⁴

Persons Acting in a Fiduciary Capacity.—Trustees and other persons acting in fiduciary capacity, at law, are not nominal parties. The statements of such a party before being duly qualified to discharge the duties of his office⁸⁵ do not affect the estate prior to that time. If such statements are made while the declarant is holding the legal title to the trust property they do affect it.⁸⁶ In certain jurisdictions, the equitable view is adopted⁸⁷ and fiduciary legal owners are deemed to be nominal parties⁸⁸ within the rule, and admissions binding upon the trust fund can alone be made by those beneficially interested in it.

§ 538. [Extra-Judicial Admissions]; Persons Beneficially Interested.⁸⁹—The declarations of the person beneficially interested are competent against the nominal party representing his interest,⁹⁰ provided they are made while the declarant's interest continues⁹¹ and a sufficient interest shall have been established to the satisfaction of the court, by evidence outside the statements of the declarant.⁹²

Injured Person in a Criminal Proceeding.—The prosecutor in a criminal proceeding, the person alleged to have been injured by the offense is in no proper sense a party to the proceeding or beneficially interested in the result. His statements, therefore, do not affect the government in the trial, nor are they admissible because of his death. Subject to other rules of admissibility, e.g., that receiving dying declarations,⁹³ admissions of accused by non-denial

84. *Johnson v. Kerr*, 1 Serg. & R. (Pa.) 25 (1814).

85. *Niskern v. Haydock*, 48 N. Y. Supp. 895, 23 App. Div. 175 (1897); 2 Chamb., Ev., § 1320, n. 1, and cases cited.

86. *Dennis v. Weeks*, 46 Ga. 514 (1872); *McRaney v. Clark*, 4 N. C. 698 (1878).

87. *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691 (1867).

88. *Bragg v. Geddes*, 93 Ill. 39 (1879); *Calvert v. Alvey*, 152 N. C. 610, 68 S. E. 153 (1910).

Executor.—Evidence of admissions made by an executor that he had unduly influenced the making of a will is not competent against the beneficiaries. Their interests are not joint and to permit him to prejudice the rights of others would open the door to fraud. *Re Fowler*, 156 N. C. 340, 72 S. E. 357, 38 L. R. A. (N. S.) 745 (1911).

The insured cannot prejudice the rights of the beneficiary in the policy by denying the

statements made in the application as to his health and making contradictory statements but where the beneficiary has no vested interest but is liable to be changed by the insured such statements are admissible in evidence. *Knights of Maccabees v. Shields*, 156 Ky. 270, 160 S. W. 1043, 49 L. R. A. (N. S.) 853 (1913).

89. 2 Chamberlayne. Evidence, §§ 1321–1328.

90. *Brown v. Brown*, 62 Kan. 666, 64 Pac. 599 (1901); *Shields v. Whitaker*, 82 N. C. 516 (1880); *Fay v. Feeley*, 18 R. I. 715, 30 Atl. 342 (1894); 2 Chamb., Ev., § 1321, n. 1, and cases cited.

91. *Shepherd v. Hayes*, 16 Vt. 486 (1844).

92. *Smith v. Aldrich*, 12 Allen (Mass.) 553 (1866); *Kinnane v. Conroy*, 52 Wash. 651, 101 Pac. 223 (1909).

93. Such dying declarations are only received in case of homicide, under a very restricted rule. *Com. v. Horner*, 153 Mass.

of statements made in his presence,⁹⁴ that the declaration is part of the *res gestae*,⁹⁵ or the like,⁹⁶ the assertions of the prosecutor are not receivable for⁹⁷ or against⁹⁸ the accused. His or her declarations viewed as admission of a private prosecutor, would be mere hearsay.⁹⁹

Corroboration and Impeachment.—Naturally such declarations of the injured person may, upon ordinary principles, be received to corroborate¹ or impeach² the evidence of the injured person should he appear to testify. Thus, where a question arises as to whether a person alleged to have been injured by a given act *consented* to its perpetration, statements at other times, not too remote from the time of the occurrence to be relevant in a probative sense,³ may be shown to establish or negative the fact of *consent*.⁴

Mental States.—There is a marked disagreement in opinion between the courts in different jurisdictions as to whether the declarations of an injured person are admissible as to his purpose or intent in visiting the scene of a given *res gestae*. Naturally, adopting the view-point of independent relevancy, judges have held that where the mental state is probative or constituent the declarations of the injured party logically tending circumstantially to establish it are to be received.⁵ On the other hand, adopting the attitude of scrutinizing the statement declaring the existence of a given mental state as an assertive one, the conclusion that it should be rejected as hearsay has impressed certain tribunals as inevitable.⁶

343, 26 N. E. 872 (1891); *People v. Davis*, 56 N. Y. 95 (1874); *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 96 (1878); 2 Chamb., Ev., § 1322, n. 1, and cases cited.

94. *State v. Dillon*, 74 Iowa 653, 38 N. W. 525 (1888); *People v. Meyers*, 7 N. Y. St. Rep. 217 (1887); *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046 (1896); 2 Chamb., Ev., § 1322, n. 2, and cases cited.

95. *Bow v. People*, 160 Ill. 438, 43 N. E. 593 (1896); *Com. v. Hackett*, 2 Allen (Mass.) 136 (1861); *Dickson v. State*, 39 Ohio St. 73 (1883); 2 Chamb., Ev., § 1322, n. 3, and cases cited. As to probative facts, see the same note and cases cited.

96. Disqualifications by reason of infancy or imbecility. *People v. Quong Kun*, 34 N. Y. Supp. 260 (1895); *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608 (1879).

97. *Green v. State*, 112 Ga. 638, 37 S. E. 885 (1900); *Com. v. Nott*, 133 Mass. 260 (1883); 2 Chamb., Ev., § 1322, n. 5, and cases cited. But see *People v. Doyle*, 12 N. Y. Supp. 836, 58 Hun 535 (1890); *State v. Shorter*, 85 S. C. 170, 67 S. E. 131 (1901).

98. *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315 (1895); *Com. v. Sanders*, 14 Gray (Mass.) 394, 77 Am. Dec. 335 (1860); *Davis v. People*, 2 Thomps. & C. (N. Y.) 212

(1873); *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125 (1887); 2 Chamb., Ev., § 1322, n. 6, and cases cited.

99. *Graves v. People*, 18 Colo. 170, 32 Pac. 63 (1893); *Com. v. Chance*, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306 (1899); *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901); 2 Chamb., Ev., § 1322, n. 7, and cases cited.

1. *Dunn v. State*, 45 Ohio St. 249, 12 N. E. 826 (1887).

2. *Austine v. People*, 110 Ill. 248 (1884); *Com. v. Densmore*, 12 Allen (Mass.) 535 (1866); 2 Chamb., Ev., § 1323, n. 2, and cases cited.

3. *Infra*, §§ 640 *et seq.*; 3 Chamb., Ev., §§ 1709 *et seq.*

4. *State v. Perigo*, 80 Iowa 37, 45 N. W. 390 (1890). For example, on an issue of rape, if the prosecutrix denies, as a witness, that she made a given statement, the accused should reasonably be permitted to show that she made it. *Carroll v. State*, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539 (1897).

5. *Hunter v. State*, 40 N. J. L. 495 (1878); *State v. Goodrich*, 19 Vt. 116, 47 Am. Dec. 676 (1847).

6. *Adams v. State* (Tex. Cr. App. 1901), 64 S. W. 1055; *State v. Power*, 24 Wash. 34,

Claim.— For example, that a former possessor of real³⁴ or personal³⁵ property has declared during the time of his possession³⁶ that he owned it, is not, indeed, under the rule against hearsay, any evidence that he, as a matter of law and fact, did own it. But such declarations are evidence that the possessor *claimed* to do so. They characterize his possession as adverse, and so are available to a subsequent holder. In general, such statements are competent as to the nature,³⁷ extent,³⁸ and other essential features of the possession.

Disclaimer.— The rule is the same as to disclaimer of ownership regarding real³⁹ or personal⁴⁰ property.

Mental Condition.— The mental condition of the declarant, standing in relation of privity to the party as to his mental capacity to do certain acts⁴¹ may be material. If so declarations of the predecessor in title tending substantially to establish the existence of a relevant mental condition are competent. They are not, however, exceptions to the rule excluding hearsay, nor are they admissions.⁴²

Mental State.— It may be necessary to establish the existence of other probatively relevant⁴³ facts in connection with a predecessor in title. Among the constituent, or *res gestae*⁴⁴ facts to be established in a given case with regard to a predecessor in title may be the existence, on his part, of a mental state relevant to the issue.⁴⁵ This may happen when it is necessary to establish intent in connection with domicile,⁴⁶ the existence of fraud or its absence, or in making proof of other facts.⁴⁷ Assent⁴⁸ or knowledge whether acquired by notice⁴⁹ or otherwise⁵⁰ stand in the same position.

See Independent Relevancy, in general, 2 Chamb., Ev., § 1331.

34. *Peck, etc., Co. v. Atwater Mfg. Co.*, 61 Conn. 31, 23 Atl. 699 (1891); *Herscher v. Brazier*, 38 Ill. App. 654 (1890); *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482 (1891); 2 Chamb., Ev., § 1333, n. 1, and cases cited.

35. *Guy v. Lee*, 81 Ala. 163, 2 So. 273 (1886); *Wilson v. Albert*, 89 Mo. 537, 1 S. W. 209 (1886); 2 Chamb., Ev., § 1333, n. 2, and cases cited.

36. *Tierney v. Corbett*, 2 Mackey (D. C.) 264 (1883).

37. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13 (1895).

38. *Austin v. Andrews*, 71 Cal. 98, 16 Pac. 546 (1886); *Gratz v. Beates*, 45 Pa. 495 (1863); 2 Chamb., Ev., § 1333, n. 5, and cases cited.

39. *New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896); 2 Chamb., Ev., § 1334, n. 1, and cases cited.

40. *Smith v. Page*, 72 Ga. 539 (1884);

Fellows v. Smith, 130 Mass. 378 (1881); 2 Chamb., Ev., § 1334, n. 2, and cases cited.

41. *Howell v. Howell*, 59 Ga. 145 (1877); *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 56 (1903).

42. 2 Chamb., Ev., § 1335.

43. *Brice v. Lide*, 30 Ala. 647, 68 Am. Dec. 148 (1857); *Roeber v. Bowe*, 30 Hun (N. Y.) 379 (1883).

44. *Cook v. Knowles*, 38 Mich. 316 (1878).

45. *Gibbs v. Estey*, 15 Gray (Mass.) 587 (1860); *Norfolk City Nat. Bank v. Bridgers*, 128 N. C. 322, 38 S. E. 888 (1901); 2 Chamb., Ev., § 1336, n. 3, and cases cited.

46. *Wilson v. Terry*, 9 Allen (Mass.) 214 (1864).

47. *Whitney v. Wheeler*, 116 Mass. 490 (1875); *Hopkins v. Clark*, 35 N. Y. Supp. 360, 90 Hun 4 (1895); 2 Chamb., Ev., § 1336, n. 5, and cases cited.

48. *Beecher v. Parmele*, 9 Vt. 352, 31 Am. Dec. 633 (1837); *Gibbs v. Estey*, *supra*.

49. *Fisher v. Ireland*, 4 Cush. (Mass.) 456, 50 Am. Dec. 805 (1849).

50. *Bicknell v. Mellett*, 100 Mass. 328, 35

§ 540. [Extra-Judicial Admissions]; Admissions by Agents.⁵¹—As related to procedure in connection with admissions, the substantive law of agency contents itself with declaring that the declarations of an agent, whenever such statements would, under the laws of agency, affect the principal,⁵² are competent against the latter, as his admissions whenever he appears as party to an action to the issues of which the fact stated by the agent is relevant.

Agency Must be Affirmatively Shown.—Unless the fact be admitted,⁵³ that the relation of agency itself exists between the declarant and the party against whom the declaration is offered it must be affirmatively shown,⁵⁴ by the proponent of the statement, to the reasonable satisfaction of the judge. This may be done by direct testimony including that of the agent himself,⁵⁵ or by a resort to circumstantial evidence.⁵⁶

Proof of Agency by Declarations of Agent.—While the testimony of an agent to the existence of the agency is unquestionably competent,⁵⁷ the agent's assertions are rejected,⁵⁸ except where ratification⁵⁹ or other corroborative or confirmatory evidence⁶⁰ is submitted or promised. The evidence as a whole must be sufficient to warrant the jury, as reasonable men, in finding the existence of an agency.⁶¹ The court may accept the statement of the agent,

N. E. 1130 (1894); *Adams v. Bowerman*, 109 N. Y. 23, 15 N. E. 874 (1888); 2 Chamb., Ev., § 1336, n. 8, and cases cited.

51. 2 Chamberlayne, Evidence, §§ 1337-1342.

52. *Brickell v. Camp Mfg. Co.*, 147 N. C. 118, 60 S. E. 905 (1908); *Tenhet v. Atlantic Coast Line R. Co.*, 82 S. C. 465, 64 S. E. 232 (1909); 2 Chamb., Ev., § 1337, n. 1, and cases cited. Admissions of servant against master. see note, Bender ed., 54 N. Y. 335. Admissibility of declarations showing negligence from breach of duty by servant or agent as against principal, see note, Bender ed., 106 N. Y. 172.

53. *Bibby v. Thomas*, 131 Ala. 350, 31 So. 432 (1901).

54. *Howell v. W. F. Maine & Co.*, 127 Ga. 574, 56 S. E. 771 (1907); *Pease v. Trench*, 197 Ill. 101, 64 N. E. 388 (1902); *Walkeen Lewis Millinery Co. v. Johnston*, 131 Mo. App. 693, 111 S. W. 639 (1908); *Arnold v. Rockland Lake, etc., Co.*, 108 N. Y. Supp. 296, 123 App. Div. 650 (1908); *Schwalbach v. Chicago, etc., R. Co.*, 73 Wis. 137, 40 N. W. 579 (1888); 2 Chamb., Ev., § 1338, n. 2, and cases cited.

55. *Davis v. Anderson*, 163 Ala. 385, 50 So. 1002 (1909); *Connor v. Johnson*, 59 S. C. 115, 37 S. E. 240 (1900).

Physician.—The plaintiff is not bound by statements made by his physician where the

defendant asks for a statement from the attending physician and the plaintiff asks him to make one where the plaintiff never saw the statement and did not know what it contained. The physician cannot be put in the same class with a referee to whom the plaintiff has referred a question. *Aldridge v. Aetna Life Ins. Co.*, 204 N. Y. 83, 97 N. E. 399, 38 L. R. A. (N. S.) 343 (1912).

56. *Porter v. Robertson*, 34 Ill. App. 74 (1889); *Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888 (1899); 2 Chamb., Ev., § 1338, ns. 4, 5, 6.

57. See last preceding section; *McRae v. Preston*, 54 Fla. 190, 44 So. 946 (1907).

58. *Castner v. Rinne*, 31 Colo. 256, 72 Pac. 1052 (1903); *State v. Oder*, 92 Iowa 767, 61 N. W. 190 (1894); *Richmond Iron Works v. Hayden*, 132 Mass. 190 (1882); *Bank of N. Y. Banking Assoc. v. American Dock, etc., Co.*, 143 N. Y. 559, 38 N. E. 713 (1894); 2 Chamb., Ev., § 1339, n. 2, and cases cited.

59. *Toledo, etc., R. Co. v. Fisher*, 13 Ind. 258 (1859); *Marsh v. Hammond*, 11 Allen (Mass.) 483 (1866).

60. *Louisville, etc., R. Co. v. Tift*, 100 Ga. 86, 27 S. E. 765 (1896); *Shepler v. Patton*, 100 N. Y. Supp. 286, 114 App. Div. 846 (1906).

61. *Peters v. Davenport*, 104 Iowa 625, 74 N. W. 6 (1898); *Wendell v. Abbott*, 45 N. H. 349 (1864).

de bene, contingent upon the introduction of evidence showing the agency.⁶²

Statement Must be Within Scope of Agency.—Under the general rules of agency, the statement must be made within the scope of the agency, actual or constructive. The declaration must be made while the agent is engaged on the business of the principal, and in course of *bona fide*⁶³ effort to advance his interests by the statement which the agent has made.⁶⁴

Specific Authority Must Be Shown.—It is necessary not only that the declarant be an agent to do the business on which he is engaged at the time of making the declaration, but also that he should be authorized to make the declaration itself.⁶⁵ Statements prior to the delegation of power to act as agent made by one who afterwards was given such power are incompetent to affect one who subsequently became the principal.⁶⁶ This rule holds even where, as in case of the future officers of a proposed corporation,⁶⁷ the formation of the relationship has been definitely prearranged. Equally incompetent to bind the principal are statements which are made by the agent after the relation of agency has ended.⁶⁸ Nor is it material whether the agency has been revoked,⁶⁹ or has expired by limitation. In the absence of some proof of special agency,⁷⁰ the near relatives⁷¹ or intimate personal friends of a party in a civil

62. *Buist v. Guice*, 96 Ala. 255, 11 So. 280 (1892); *Smith v. Dodge*, 3 N. Y. Supp. 866, 49 Hun 611 (1888); 2 Chamb., Ev., § 1339, n. 7, and cases cited.

63. *Sopeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 218 (1908).

64. *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57, 73 Pac. 740 (1903); *Matzenbaugh v. People*, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134 (1902); *Bergeman v. Indianapolis, etc., R. Co.*, 104 Mo. 77, 15 S. W. 992 (1890); *Keeler v. Salisbury*, 33 N. Y. 648 (1865); *Patterson v. United Artozans*, 43 Or. 333, 72 Pac. 1095 (1903); 2 Chamb., Ev., § 1340, n. 2, and cases cited.

After agency has terminated.—The statement of an agent may be admissible against the surety even after his agency has ceased where it is made in pursuance to a duty he owes his employer. The court sees no reason why such a statement should not be admissible as part of the *res gestae* when made as part of his duty though his principal duty as agent has ceased. *United American Fire Ins. Co. v. American Bonding Co.*, 146 Wis. 573, 131 N. W. 994, 40 L. R. A. (N. S.) 661 (1911).

65. *Pacific Mut. L. Ins. Co. v. Walker*, 67 Ark. 137, 53 S. W. 675 (1899); *Sweeney v. Sweeney*, 119 Ga. 76, 46 S. E. 76 (1903); *Crowley v. Boston Elevated Ry. Co.*, 204 Mass. 241, 90 N. E. 532 (1910); *Diehl v.*

Watson, 85 N. Y. Supp. 851, 89 App. Div. 445 (1903); 2 Chamb., Ev., § 1341, ns. 1, 2, and cases cited.

66. *Portland First Nat. Bank v. Linn County Nat. Bank*, 30 Or. 296, 47 Pac. 614 (1897); 2 Chamb., Ev., § 1341, n. 3, and cases cited.

67. *Fogg v. Pew*, 10 Gray (Mass.) 409, 71 Am. Dec. 662 (1858); *Matter of Kip*, 1 Paige (N. Y.) 601 (1829).

68. *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629, 33 S. E. 878 (1899); *Pomeroy v. Fullerton*, 131 Mo. 581, 33 S. W. 173 (1895); *Ditmars v. Sackett*, 30 N. Y. Supp. 721, 81 Hun 317 (1894); 2 Chamb., Ev., § 1341, n. 5, and cases cited.

69. *Loving Co. v. Hesperian Cattle Co.*, 176 Mo. 330, 75 S. W. 1095 (1903); *Small v. McGovern*, 117 Wis. 608, 94 N. W. 651 (1903).

70. A statement made within the scope of an agency for accused may be received against him, if otherwise relevant. *Pierce v. State*, 109 Ind. 535, 10 N. E. 302 (1886); *Wait v. Com.*, 24 Ky. L. Rep. 604, 69 S. W. 697 (1903); 2 Chamb., Ev., § 1341, n. 7, and cases cited. *Admissions by counsel.*—An admission by the defendant's counsel in a criminal case not made with the client's consent does not bind him. *State v. Beatty*, 45 Kan. 402, 25 Pac. 899 (1891); 2 Chamb., Ev., § 1341, n. 7, and cases cited.

case or of the accused in a criminal one are not entitled to make admissions which will affect him.

General and Special Agency.—Much with regard to the actual or ostensible authority of one acting for his principal under a contract of agency⁷² will be found to depend, under the substantive law, upon whether the agency itself is general⁷³ or special.⁷⁴

In case of a general agency the powers necessary for or usually incident to an agency of the type disclosed will be assumed, in the absence of evidence to the contrary, to have been conferred upon the agent in any particular case. For example, the statements of a general agent which may be used against his principal are not rendered less efficacious, nor is the use of such admissions impaired because of the fact that the principal is ignorant of his acts, or because of any undisclosed instructions or other limitations upon the agency which may exist unknown to the person with whom the agent is dealing.⁷⁵

The statements of a special agent which may be used against his principal are governed more strictly by the exact extent of the scope of the agency. Thus declarations of a special agent must, to be competent, be within the precise scope of the particular authority delegated and must be made while the agent is discharging the duties of the particular work which has been committed to him.⁷⁶

The statements of both general and special agents are subject to the application of the rules in reference to the exclusion of declarations which do not form part of the *res gestae*⁷⁷ or which are merely narrative.⁷⁸ The general rule of substantive law that an agent cannot delegate his authority without the assent of the principal does not apply to *ministerial* acts to be performed by the agent.⁷⁹

Opinion Excluded.—In order that the statement of an agent should bind his principal, it is essential that his declarations should be one of fact; his expressions of opinion, inference, conclusion, or judgment are to be rejected.⁸⁰

71. *People v. Dixon*, 94 Cal. 255, 29 Pac. 504 (1892); *People v. McLaughlin*, 35 N. Y. Supp. 73, 13 Misc. 287 (1895); *Com. v. Robbins*, 3 Pick. (Mass.) 63 (1825); 2 Chamb., Ev., § 1341, n. 8, and cases cited.

72. See Definitions of agency, 2 Chamb., Ev., § 1341a, n. 1.

73. *Rutland v. Southern Ry. Co.*, 81 S. C. 448, 62 S. E. 865 (1908). A general agent is one employed in his capacity as a professional man or master of an art or trade, or one to whom the principal confides his whole business or all transactions or functions of a designated class. Black's Law Dict.

74. A special agent is one employed to conduct a particular transaction or authorized to perform a special act. Black's Law Dict.

75. *Carney v. Hennessey*, 74 Conn. 107, 49

Atl. 910, 92 Am. St. Rep. 199, 53 L. R. A. 699 (1901). *Principal in foreign country.*—Scope of general agent conducting business in his absence enlarged. *Rothschild v. Schuberth*, 8 Bosw. (N. Y.) 289 (1861).

76. *Krohn v. Anderson*, 20 Ind. App. 379, 64 N. E. 621 (1902); *Rowe v. Canney*, 139 Mass. 41, 29 N. E. 219 (1885); *Berdan v. J. M. Bour Co.*, 10 Ohio Cir. Ct. 127, 6 Ohio Cir. Dec. 154 (1899); 2 Chamb., Ev., § 1341a, n. 5, and cases cited.

77. *Butters Salt, etc., Co. v. Vogel*, 135 Mich. 381, 97 N. W. 757 (1904); *infra*, § 542, 2 Chamb., Ev., § 1344.

78. *Infra*, § 542; 2 Chamb., Ev., § 1346.

79. *Bowman v. Lickey*, 86 Mo. App. 47 (1900).

80. *School Trustees v. Mitchell*, 73 Ill. App.

It is even more essential than in cases of direct statements by a party⁸¹ that the declaration of the agent should be made upon the personal knowledge⁸² of the declarant, rather than based upon his information, inferences, or conjectures.⁸³

§ 541. [Extra-Judicial Admissions]; Admissions by Agents; Evidence is Primary.⁸⁴—Admissions by an agent have the same quality of *primary* proof which characterizes other admissions.⁸⁵ The declaration is equally competent though the declarant be in court and available as a witness.⁸⁶ The evidence furnished by the fact of an admission is primary.⁸⁷ So, also, the statement continues competent after the death of the principal, if made by the agent before that event.⁸⁸ It is entirely unaffected by the death of the agent.⁸⁹

§ 542. [Extra-Judicial Admissions]; Admissions by Agents; “*Res Gestae*” in this Connection.⁹⁰—Among the many uses of the term “*res gestae*” is one in connection with the law of agency.⁹¹ In stating the rule that the agent must, in order to affect his principal by his declaration, have been engaged, at the time when it was made, upon the business of his agency, the word “business” is Latinized into the familiar *res gestae*. The proposition is then announced that for the declaration of an agent to affect the principal, it must be made as “part of the *res gestae*.”⁹² By the courts of certain jurisdictions it is said that his declaration must be part of some *res gestae* fact which it assists to characterize and explain.⁹³

Spontaneity Required.—Under this “*res gestae* rule,” there is another qualification. It is said that the declaration of an agent is competent as part of the *res gestae* when the transaction to which it relates is continuing at the time of the statement or so recently past as to continue to exercise a controlling in-

543 (1897); Boston, etc., R. Co. v. Ordway, 140 Mass. 510, 5 N. E. 627 (1886); Rhode v. Metropolitan L. Ins. Co., 129 Mich. 112, 88 N. W. 400 (1901); 2 Chamb., Ev., § 1342, n. 1, and cases cited.

81. *Supra*, § 528; 2 Chamb., Ev., § 1293.

82. McCormick Harvester Mach. Co. v. Ripley, 6 Ky. L. Rep. 638 (1885).

83. Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106 (1893).

84. 2 Chamberlayne, Evidence, § 1343.

85. *Supra*, § 527; 2 Chamb., Ev., § 1291, n. 6.

86. Phenix Mut. L. Ins. Co. v. Clark, 58 N. H. 164 (1877); 2 Chamb., Ev., § 1343, n. 2, and cases cited.

87. Smith v. Wallace, 25 Wis. 55 (1860).

88. Hines v. Poole, 56 Ga. 638 (1876).

89. Van Rensselaer v. Morris, 1 Paige (N. Y.) 13 (1828); Howerton v. Lattimer, 68 N. C. 370 (1873).

90. 2 Chamberlayne, Evidence, §§ 1344–1346.

91. *Supra*, § 31; 1 Chamb., Ev., § 47. *Res gestae* as used in the present treatise is confined to denoting that portion of the actual world-happenings out of which the right or liability asserted in the action arises, if at all.

92. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307 (1903); U. S. Express Co. v. Rawson, 106 Ind. 215, 6 N. E. 337 (1885); Allin v. Whittemore, 171 Mass. 239, 50 N. E. 618 (1898); Baker v. Temple, 160 Mich. 318, 16 Detroit Leg. N. 1092, 125 N. W. 63 (1910); Truesdell v. Chumar, 27 N. Y. Supp. 87, 75 Hun 416 (1894); 2 Chamb., Ev., § 1344, n. 2, and cases cited.

93. *Infra*, §§ 951 et seq.; 4 Chamb., Ev., §§ 2985 et seq. Waters v. West Chicago St. R. Co., 101 Ill. App. 265 (1902); Fogg v. Child, 13 Barb. (N. Y.) 246 (1852); 2 Chamb., Ev., § 1344, n. 3, and cases cited.

fluence on the mind of the declarant, thus excluding the probability of invention.⁹⁴ In other words, merely narrative statements regarding past events made by an agent in the full exercise of his inventive or reflective faculties are excluded.⁹⁵ They are deemed "mere hearsay."

Narrative Excluded.—Under the rule admitting statements as part of the *res gestae* a declaration narrating past events is, as a rule, inadmissible because it is lacking in the all important element of spontaneity. Narrative statements of an agent are rejected under the substantive law because it is no part of his agency to talk about his principal's affairs. It has proved easy to say, in either case or aspect, that the agent's statement is no part of the *res gestae*. In other words, the narrative statement of an agent⁹⁶ as to past transactions,⁹⁷ even those not long past,⁹⁸ is excluded, in the two cases;—although by a different rule and for a different reason.

As a matter in the law of agency, it may be said that an agent is not in general required or authorized by the terms of his agency to discuss, *post factum*,⁹⁹ his principal's conduct¹ or affairs, especially his legal rights or liabilities.² Only *dum fervet opus*, while the business is going forward, is it that the agent has any mandate from his principal which could empower the agent to affect the principal by his statements.³ Even where the authority continues until the work entrusted has been completed,⁴ the declaration of the agent is competent against the principal only when the statement itself is an authorized act of agency. The same rule refuses to give any effect, as against the principal, to the admission of the agent made after a transaction has been completed.⁵ The agent is not at liberty to talk *in pais* about a past transaction

94. Stecher Lithographic Co. v. Inman, 175 N. Y. 124, 67 N. E. 213 (1903); Shafer v. Lacock, 168 Pa. 497, 32 Atl. 44, 29 L. R. A. 254 (1895); 2 Chamb., Ev., § 1346, n. 1, and cases cited.

95. See next section. For an illustrative instance of the rule, see 2 Chamb., Ev., § 1845.

96. Cherokee, etc., Coal, etc., Co. v. Dickson, 55 Kan. 62, 39 Pac. 691 (1895); Clarke v. Anderson, 14 Daly (N. Y.) 464 (1888); 2 Chamb., Ev., § 1346, n. 2, and cases cited.

97. Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687 (1900); Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215 (1898); Geary v. Stevenson, 160 Mass. 23, 47 N. E. 508 (1897); Kay v. Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751 (1900); Root v. Monroeville, 16 Ohio Cir. Ct. 617, 4 Ohio Cir. Dec. 53 (1894); 2 Chamb., Ev., § 1346, n. 3, and cases cited.

98. Goehring v. Stryker (Pa. 1900), 174 Fed. 897; Rogers v. McCune, 19 Mo. 557 (1854).

99. Maxson v. Michigan Cent. R. Co., 117

Mich. 218, 75 N. W. 459 (1898); Walter A. Wood Mowing, etc., Mach. Co. v. Pearson, 64 Hun 638, 19 N. Y. Supp. 485 (1892); 2 Chamb., Ev., § 1346, n. 5, and cases cited.

1. Koch v. Godshaw, 12 Bush (Ky.) 318 (1876).

2. McKenna v. Gould Wire Cord Co., 197 Mass. 406, 83 N. E. 1113 (1908); Shaver v. New York, etc., Transp. Co., 31 Hun (N. Y.) 55 (1883); 2 Chamb., Ev., § 1346, n. 7, and cases cited.

3. Adams v. Humphreys, 54 Ga. 496 (1875); Chicago, etc., R. Co. v. Riddle, 60 Ill. 534 (1871); Gilmore v. Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623 (1897); Anderson v. Rome, etc., R. Co., 54 N. Y. 334 (1873); 2 Chamb., Ev., § 1346, n. 8, and cases cited.

4. Union Bank v. Wheat, 58 Mo. App. 11 (1894); Graham v. Schmidt, 1 Sandf. (N. Y.) 74 (1847).

5. Goehring v. Stryker, *supra*; Tillotson v. McCrillis, 11 Vt. 477 (1839).

to the injury of his principal, though the declarant took memoranda during the progress of the transaction and proposes to speak from them.⁶ The same result follows even where the statement is made by an agent as a witness in court.⁷

Admissions May be in Narrative Form.—As a matter of agency, the statements of the agent, where suitable authority is shown, not only may be but frequently are in narrative form. The statement of a party being rendered competent by the rules of procedure,⁸ his declaration made personally or by agent, though narrative, is competent either in a civil⁹ or criminal¹⁰ proceeding.

Admissions by Conduct.—In case of a party, or of one identified with him in legal interest under the provisions of substantive law,¹¹ not only are his statements, though narrative, received, the same rule applies to his so-called "admissions by conduct."¹² For example, where statements, though narrative, are made in the presence and hearing of the party under circumstances¹³ which require or permit his silence, partial statement, or other conduct rationally to be construed as raising an inference of acquiescence in the truth of the statements made, they may be offered in evidence.¹⁴

§ 543. [Extra-Judicial Admissions]; Admissions by Agents; Independent Relevancy Distinguished.¹⁵—As distinguished from statements, a verbal act is viewed as being complete in itself, not as constituting a vehicle for the assertion of a fact. Generally, the term "statement" is broad enough to embrace both the assertive declaration and the verbal act. There is, in essence, no real difference between the two classes of fact which the law of evidence persistently seeks to differentiate.¹⁶ While all statements are verbal acts, all verbal acts are not assertions.

Probative or Constituent Acts of an Agent.—Verbal acts of an agent may constitute or assist to constitute¹⁷ a transaction involving legal consequences,¹⁸

6. *Morris v. Brooklyn Heights R. Co.*, 47 N. Y. Supp. 242, 20 App. Div. 557 (1897).

7. *Canadian Bank of Commerce v. Coumbe*, 47 Mich. 358, 11 N. W. 196 (1882).

8. *Supra*, §§ 56 *et seq.*; 1 Chamb., Ev., §§ 123 *et seq.*

9. *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981 (1883); *Tyler v. Nelson*, 109 Mich. 37, 66 N. W. 671 (1896); *Barrett v. New York Cent., etc., R. Co.*, 157 N. Y. 663 (1899); 2 Chamb., Ev., § 1346, n. 14, and cases cited.

10. *Texas v. Davis*, 104 Tenn. 501, 58 S. W. 122 (1900); *Johnson v. State*, 8 Wyo. 494, 58 Pac. 761 (1899).

11. *Supra*, §§ 538 *et seq.*; 2 Chamb., Ev., §§ 1328 *et seq.*

12. *Infra*, §§ 559 *et seq.*; 2 Chamb., Ev., §§ 1392 *et seq.*

13. *Infra*, §§ 566 *et seq.*; 2 Chamb., Ev., §§ 1418 *et seq.*

14. *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523 (1891); *People v. Foley*, 64 Mich. 148, 31 N. W. 94 (1887); 2 Chamb., Ev., § 1346, n. 19, and cases cited.

15. 2 Chamberlayne, Evidence, §§ 1347-1350.

16. *Infra*, § 837; 4 Chamb., Ev., § 2580, 2 Chamb., Ev., § 1347.

17. The statements of an agent may constitute the basis upon which a transaction takes place. *Lewis v. Burns*, 106 Cal. 381, 39 Pac. 778 (1895); *Kelly v. Campbell*, 2 Abb. Dec. (N. Y.) 492, 1 Keyes 29 (1863); 2 Chamb., Ev., § 1348, n. 1, and cases cited.

18. *Ohio, etc., R. Co. v. Porter*, 92 Ill. 437 (1879); *Murray v. Sweasy*, 74 N. Y. Supp.

as an acceptance,¹⁹ claim,²⁰ an oral contract,²¹ disclaimer,²² fraud,²³ offer,²⁴ ouster,²⁵ ratification,²⁶ waiver,²⁷ or the like, provided such acts are done in pursuance of the authority conferred by the agency²⁸ or the acts have been ratified by the principal.²⁹

Impeachment, Inconsistency, Etc.—The statements of an agent may be used to impeach his testimony³⁰ or invalidate his claim by showing that it is inconsistent with his present conduct.³¹

Narrative Statements Independently Relevant.—It is by no means material in this connection that the statements of the agent, when used for purposes of contradiction or proof of any other deliberative fact should be in narrative form.³²

Mental State.—In accordance with the general rule of evidence that where the existence of a mental state by a given person at a certain time is probative, the fact may be proved by appropriate declarations of the person in question,³³ the statements of an agent may be independently or circumstantially relevant to establish the existence on his part of intent³⁴ or intention,³⁵ knowledge,³⁶ motive,³⁷ or other material³⁸ mental state.³⁹ As the statement is merely a

543, 69 App. Div. 45 (1902); *Tillyer v. Van Cleve Glass Co.*, 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209 (1896); 2 Chamb., Ev., § 1348, n. 2, and cases cited.

19. *Fischer Leaf Co. v. Whipple*, 51 Mo. App. 181 (1892).

20. *Barker v. Mackay*, 175 Mass. 485, 56 N. E. 614 (1900); *Smith v. Sargent*, 4 Thomps. & Co. (N. Y.) 684 (1874); 2 Chamb., Ev., § 1348, n. 4, and cases cited.

21. *Blessing v. Dodds*, 53 Ind. 95 (1876); *Steinbach v. Prudential Ins. Co.*, 70 N. Y. Supp. 809, 62 App. Div. 133 (1901); 2 Chamb., Ev., § 1348, n. 5, and cases cited.

22. *Pearson v. Adams*, 129 Ala. 157, 29 So. 977 (1900).

23. *U. S. Home Assoc. v. Kirk*, 8 Ohio Dec. (Reprint) 592, 9 Cine. L. Bul. 48 (1892); 2 Chamb., Ev., § 1348, n. 7, and cases cited.

24. *Gray v. Rollinsford*, 58 N. H. 253 (1878).

25. *Morgan v. Short*, 34 N. Y. Supp. 10, 13 Misc. 279 (1895).

26. *U. S. v. Conklin*, 1 Wall. (U. S.) 644, 17 L. ed. 714 (1863).

27. *Zielke v. London Assur. Corp.*, 64 Wis. 442, 25 N. W. 436 (1885).

28. *Capital F. Ins. Co. v. Watson*, 76 Minn. 387, 79 N. W. 601, 77 Am. St. Rep. 657 (1899).

29. *Paul v. Berry*, 78 Ill. 158 (1875); *Livingston Middleditch Co. v. New York Dentistry College*, 64 N. Y. Supp. 140, 31 Misc.

259, 7 N. Y. An. Cas. 398 (1900); 2 Chamb., Ev., § 1348, n. 13, and cases cited.

30. *Pettibone v. Lake View Town Co.*, 134 Cal. 227, 66 Pac. 218 (1901); *Stillwell v. New York Cent. R. Co.*, 34 N. Y. 29 (1865); 2 Chamb., Ev., § 1349, n. 14, and cases cited.

31. *Roth v. Continental Wire Co.*, 94 Mo. App. 236, 68 S. W. 594 (1902).

32. *Farmers' Bank of Wickliffe v. Wickliffe*, 131 Ky. 787, 116 S. W. 249; *Riggs v. Metropolitan St. Ry. Co.*, 216 Mo. 304, 115 S. W. 968 (1909).

33. *Infra*, §§ 847: *et seq.*; 4 Chamb., Ev., §§ 2643 *et seq.*

34. *Consolidated Ice Mach. Co. v. Keifer*, 164 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696 (1890); *Jones v. Jones*, 120 N. Y. 589, 24 N. E. 1016 (1890); 2 Chamb., Ev., § 1349, n. 2, and cases cited.

35. *Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356 (1863).

36. *Denver v. Cochran*, 17 Colo. App. 72, 67 Pac. 23 (1902); *Chapman v. Erie R. Co.*, 55 N. Y. 579 (1874); *Youngstown v. Moore*, 30 Ohio St. 133 (1876); 2 Chamb., Ev., § 1349, n. 4, and cases cited.

37. *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268 (1887).

38. *Evans v. Boyle*, 94 Iowa 753, 64 N. W. 619 (1895).

39. *Georgia R. Co. v. Smith*, 76 Ga. 634 (1886); *Jones v. Jones*, *supra*; 2 Chamb., Ev., § 1349, n. 7, and cases cited.

fact tending to prove the existence of a state of mind from which it would naturally arise, it may properly precede⁴⁰ or follow⁴¹ the time at which the existence of the mental state is of importance.

Statements Through Interpreter.—The foregoing rules with relation to the statements of agents in general, both as affecting the principal by way of admission or as independently relevant, apply equally, *mutatis mutandis*, to cases where the agent is an interpreter.⁴²

§ 544. **Form of Extra-Judicial Admissions; Adoption.**⁴³—It is not essential that the statement should have originally been made by a party. It may have been the declaration of another person and adopted by the party as his own. This may be done indirectly;—as where an inference of acquiescence arises from silence under circumstances naturally calling for a reply.⁴⁴ The adopted statement may be oral, or, in writing;—as where an insured person or beneficiary adopts the findings of a coroner's inquest⁴⁵ or other written statement⁴⁶ as part of his proofs of loss.

Oral.—The oral declaration of a party is competent against him under all circumstances,⁴⁷ even though a written admission⁴⁸ contained in an instrument of a formal character⁴⁹ upon books of account⁵⁰ or in a written contract⁵¹ exists to the same effect.

Completeness will be required.—Where, therefore, the admission is contained in an answer in response to a question, the latter, so far as reasonably necessary to the complete understanding of the admission, will be received in evidence.⁵²

Evidence is Primary.—Though the declarant is present in court and available as a witness, evidence of his oral statement will be received. The "best evidence rule"⁵³ so called, does not apply to admissions, even where the statement

40. *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45 (1887).

41. *Keough v. Scott County*, 28 Iowa 337 (1869); *Paper Works v. Willett*, 1 Rob. (N. Y.) 131 (1863).

42. *Miller v. Lathrop*, 50 Minn. 91, 52 N. W. 274 (1892); *Wright v. Maseras*, 56 Barb. (N. Y.) 521 (1869); 2 Chamb., Ev., § 1350, n. 1, and cases cited.

43. 2 Chamberlayne, *Evidence*, §§ 1351-1353.

44. *Infra*, §§ 566 *et seq.*; 2 Chamb., Ev., §§ 1418 *et seq.* As to direct acquiescence, see *State v. Wooley*, 215 Mo. 620, 115 S. W. 417 (1908); *State v. Peterson*, 149 N. C. 533, 63 S. E. 87 (1908).

45. *Walther v. Ins. Co.*, 65 Cal. 417, 4 Pac. 413 (1884); *U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567 (1887); 2 Chamb., Ev., § 1351, n. 2, and cases cited.

46. *Wasey v. Ins. Co.*, 126 Mich. 119, 85 N. W. 459 (1901); *Modern Woodmen v. Kozak*, 63 Neb. 146, 88 N. W. 248 (1901); 2 Chamb., Ev., § 1351, n. 3, and cases cited.

47. *Leyner v. Leyner*, 123 Iowa 185, 98 N. W. 628 (1904); *Stewart v. Gleason*, 23 Pa. Super. Ct. 325 (1903); 2 Chamb., Ev., § 1352, n. 1, and cases cited.

48. *Bayliss v. Cockcroft*, 81 N. Y. 363 (1880); *Cross v. Kistler*, 14 Colo. 571, 23 Pac. 903 (1890).

49. *Dimon v. Keery*, 66 N. Y. Supp. 817, 54 App. Div. 318 (1900).

50. 2 Chamb., Ev., § 1352, n. 4, and cases cited.

51. *Newhall v. Holt*, 4 Jur. 610, 9 L. J. Exch. 298 (1840).

52. *State v. Price*, 121 La. Ann. 53, 46 So. 99 (1908).

53. *Supra*, §§ 227 *et seq.*; 1 Chamb., Ev., §§ 464 *et seq.* See also, *Southern Bank of*

is in writing. The copy of a letter, if shown to be correct, is as admissible in this connection as the letter itself would be if produced.⁵⁴

Criminal Cases.—As in civil cases, the criminal admission is primary evidence. It is not, therefore, material that the fact covered by the admission could have been proved by the testimony of a witness who is not produced.⁵⁵

§ 545. [Extra-Judicial Admissions]; References to Another.⁵⁶—A rather anomalous rule is that which admits, by virtue of an agency thereby created,⁵⁷ statements of a person to whom a party has referred another for information which shall be final⁵⁸ regarding a given matter which is uncertain or in dispute.⁵⁹ These statements by the referee are admissible, in favor of the person referred,⁶⁰ as against the party referring, as the admission⁶¹ of the latter. If the reference is to a number of persons, they must be definitely ascertained⁶² or readily ascertainable. The intention, moreover, to refer must be clearly shown.⁶³ The statement of the referee must be one of fact⁶⁴ and appear to have been made by one who possesses adequate information on the subject.⁶⁵

§ 546. [Extra-Judicial Admissions]; Writing.⁶⁶—An admission may be in any written form capable of conveying thought regardless of its formality and of whether the writing is valid for the purpose which it seeks to accomplish.⁶⁷ The declaration may be received as an admission although the document which contains it may have been void *ab initio* because contrary to law⁶⁸ or as it was not executed with the necessary formalities⁶⁹ or has been avoided by act of an individual entitled to do so.⁷⁰ The only important consideration

Fulton v. Nichols, 202 Mo. 309, 100 S. W. 613 (1907).

54. Kelly v. McKenna, 18 Mich. 381 (1869).

55. Com. v. Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672 (1847).

56. 2 Chamberlayne, Evidence, §§ 1354, 1355.

57. Duval v. Covenhoven, 4 Wend. (N. Y.) 561 (1830); Jennings v. Haynes, 1 Ohio Cir. Ct. 22, 1 Ohio Cir. Dec. 13 (1885); 2 Chamb., Ev., § 1354, n. 1, and cases cited.

58. Over v. Schiffing, 102 Ind. 191, 26 N. E. 91 (1885); Wehle v. Spelman, 1 Hun (N. Y.) 634, 4 Thomps. & C. 649 (1874); 2 Chamb., Ev., § 1354, n. 2, and cases cited.

59. Robertson v. Hamilton, 16 Ind. App. 328, 45 N. E. 46, 59 Am. St. Rep. 319 (1896).

60. Cohn v. Goldman, 76 N. Y. 248 (1879).

61. Craig v. Craig, 3 Rawle (Pa.) 472, 24 Am. Dec. 390 (1832); McElwee Mfg. Co. v. Trowbridge, 22 N. Y. Supp. 674, 68 Hun 28 (1893).

62. Rosenbury v. Angell, 6 Mich. 508 (1859).

63. Robertson v. Hamilton, *supra*;

64. Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293 (1879); 2 Chamb., Ev., § 1354, n. 9, and cases cited.

65. Hood v. Reeve, 3 C. & P. 532, 14 E. C. L. 700 (1828). As to action conditioned on that of others, see 2 Chamb., Ev., § 1355, and cases cited.

66. 2 Chamberlayne, Evidence, § 1356.

67. Hickey v. Hinsdale, 12 Mich. 99 (1863); Morrell v. Cawley, 17 Abb. Pr. (N. Y.) 76 (1863); Reis v. Hellman, 25 Ohio St. 180 (1874); 2 Chamb., Ev., § 1356, n. 1, and cases cited.

68. Ayres v. Bane, 39 Iowa 518 (1874).

69. Lusk v. Throop, 89 Ill. App. 509, *aff'd* 189 Ill. 127, 59 N. E. 529 (1900). Lack of delivery seems to preclude a statement contained in the document so retained from having effect as an admission. United Press v. A. S. Abell Co., 80 N. Y. Supp. 454, 70 App. Div. 550 (1903).

70. Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429 (1877).

is that the party has made it.⁷¹ The responsibility of the party for the document in question, his having written, authorized or ratified it, must be clearly shown. Surmise or conjecture is not sufficient.⁷²

§ 547. [Extra-Judicial Admissions]; Book Entries.⁷³—Written admissions are frequently contained in *book entries*.⁷⁴ In fact, entries in books of account which the party himself has made,⁷⁵ or which are made by others under his supervision or control,⁷⁶ are among the most commonly employed vehicles for written admissions. As the only fact of importance is that the party made the entry or is responsible for it, the form in which the book containing it is kept,⁷⁷ or the nature of the book itself is of but little consequence, in relation to admissibility. The book may be only a "blotter,"⁷⁸ or it may be torn or otherwise mutilated.⁷⁹ The proponent, however, cannot select such of a series of connected items as serve his purpose and exclude the rest. The entries that help his adversary are equally competent so long as they are connected with those introduced as admissions.⁸⁰ But the opponent cannot produce in evidence another book, in no way related to the first,⁸¹ and use it for his own purpose.

Banks.—Books kept by a bank in its business may be received in evidence and the relevant statements therein contained pointed out to the court as admissions made by the bank.⁸² The depositor's bank book—which the bank keeps for the depositor, showing amounts placed in the bank's custody by the depositor is admissible against the institution.⁸³ If the bank keeps its accounts with its customer on an envelope, the piece of paper would be equally

71. Facts essential to the validity or operation of a document may be established by parol evidence. *Saunders v. Dunn*, 175 Mass. 164, 55 N. E. 893 (1900); 2 *Chamb., Ev.*, § 1356, n. 5, and cases cited.

72. *Rex v. Lawrence*, 25 N. Zealand L. Rep. 129 (1905). *Adoption by Party.*—A litigant may give the force and effect of an admission to any document statements of which he sees fit to adopt as his own. *Weidner v. Olivit*, 96 N. Y. Supp. 37, 108 App. Div. 122 (1905).

73. 2 *Chamberlayne, Evidence*, §§ 1357-1363.

74. *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107 (1894); *infra*, §§ 977 *et seq.*; 4 *Chamb., Ev.*, §§ 3051 *et seq.*

75. *Com. v. Clark*, 145 Mass. 251, 13 N. E. 888 (1887); *Doolittle v. Stone*, 136 N. Y. 613, 32 N. E. 639 (1892); *Halleck v. State*, 11 Ohio 400 (1842); 2 *Chamb., Ev.*, § 1357, n. 2, and cases cited.

76. *San Pedro Lumber Co., v. Reynolds*, 121 Cal. 74, 53 Pac. 410 (1898); *Williams-*

burg City F. Ins. Co. v. Frothingham, 122 Mass. 391 (1877); *Nelson v. New York*, 131 N. Y. 4, 29 N. E. 814 (1892); 2 *Chamb., Ev.*, § 1357, n. 3, and cases cited.

77. *Loewenthal v. McCormick*, 101 Ill. 143 (1881).

78. *Beyle v. Reid*, 31 Kan. 113, 1 Pac. 264 (1883).

79. *McLellan v. Crofton*, 6 Me. 307 (1830).

80. *Dewey v. Hotchkiss*, 30 N. Y. 497 (1864); *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544 (1901).

81. *Bently v. Ward*, 116 Mass. 333 (1874); *Doolittle v. Stone*, *supra*.

82. *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129 (1888); *Com. v. Ensign*, 40 Pa. Super. Ct. 157 (1909).

83. *Nicholson v. Randall Banking Co.*, 130 Cal. 533, 62 Pac. 930 (1900); *Atlanta Trust, etc., Co. v. Close*, 115 Ga. 939, 42 S. E. 265 (1902); *Jermain v. Denniston*, 6 N. Y. 276 (1852); 2 *Chamb., Ev.*, § 1358, n. 2, and cases cited.

admissible.⁸⁴ It is not necessary to produce the clerk who actually made the entry.⁸⁵

Loan Agencies, Railroads.—The admission may be contained on the books of a loan agency.⁸⁶ Books kept by railroad agents are within the rule.⁸⁷ The report of a railroad company to the tax assessors may be competent against the company in proceedings for the abatement of taxes assessed on the basis of that particular report.⁸⁸

Admissions of Non-owner of Books.—The entry set forth on a book of account may be used as containing the admission of a person other than the owner or keeper of the book or of some principal, for whom he is lawfully acting. This may happen where the other party to the transaction makes the entry himself upon the book of his associate in the agreement, sale or the like,⁸⁹ or he sees or is informed, without objection on his part, as to the fact and nature of the entry.⁹⁰ The rule is the same where the entry is made by mutual consent of the parties, as the settlement of their accounts.⁹¹ Where a clerk makes an entry, relating to himself, and his employer has occasion to sue him, the entry then becomes the admission of him who made it.⁹² In other words, an entry by A. upon his own books, made against B. is the admission of B. if B. has in any way consented to its correctness.⁹³ Should a merchant, tradesman or the like write upon the pass book held by the customer an entry concerning the delivery of goods, etc., the entry is the admission of the seller.⁹⁴ The effect of the pass book has, however, been limited to the matter of receipt of goods,⁹⁵ the question of fairness of price being proved in some other way. Where a clerk makes upon his employer's books an entry favorable to himself, he is entitled to show the fact and the silence of his principal or employer as constituting an admission by the latter.⁹⁶

When Original Entries Need Not be Produced.—Where the object of the

84. *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354 (1894).

85. *Watson v. Phoenix Bank*, 8 Metc. (Mass.) 217, 41 Am. Dec. 500 (1844).

86. *Dexter v. Berge*, 78 Minn. 216, 78 N. W. 1111 (1899).

87. *Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395 (1885); *Root v. Great Western R. Co.*, 55 N. Y. 636, aff'g 65 Barb. 610 (1873).

88. *Atchison, etc., Ry. Co. v. Sullivan* (Colo. 1909), 173 Fed. 456, 97 C. C. A. 1: 2 (Chamb., Ev., § 1359).

89. *Rembert v. Brown*, 14 Ala. 360 (1848).

90. *Reviere v. Powell*, 61 Ga. 30, 34 Am. Rep. 94 (1878); *Tucker v. Stephens*, 4 Thomp. & C. (N. Y.) 593 (1874); 2 Chamb., Ev., § 1360, n. 2, and cases cited.

91. *McDavid v. Ellis*, 78 Ill. App. 381

(1898); *Earle v. Reed*, 10 Metc. (Mass.) 387 (1845).

92. *Williamsburg City F. Ins. Co. v. Frothingham*, *supra*; *Lucas v. Thompson*, 27 N. Y. Supp. 659, 75 Hun. 584 (1894); *Stetson v. New Orleans City Bank*, 12 Ohio St. 577 (1861); 2 (Chamb., Ev., § 1360, n. 4, and cases cited).

93. *Bartlett v. Tarbox*, 1 Abb. Dec. (N. Y.) 120, 1 Keyes 405 (1864); *Halleck v. State*, 11 Ohio 400 (1842).

94. *Folsom v. Grant*, 136 Mass. 493 (1884); *Ruck v. Fricke*, 28 Pa. 241 (1857).

95. *Hovey v. Thompson*, 37 Ill. 538 (1865).

96. *Wiggins v. Graham*, 51 Mo. 17 (1872); *Rockwell v. Merwin*, 1 Sweeney (N. Y.) 484, 8 Abb. Pr. (N. Y.) 330, aff'd 45 N. Y. 166 (1869).

evidence, is to prove that the opposite party admitted or assented to the correctness of an account, the book of original entries need not be produced.⁹⁷ Nor, on the other hand, where the party has admitted the correctness of a particular account, is it necessary to produce the ledger, though it appear that the items have been posted.⁹⁸

Effect of Agency.— Upon familiar principles, an entry not made, adopted or authorized by the party, does not in general, affect him as his admission.⁹⁹

Banks.— Where the parties to the transaction have each deposited in the same bank and the institution is the common agent for both in keeping their accounts, its books are admissible against either of the parties in favor of the other as being authorized admissions.¹

Partnership Books.— The entries upon partnership books, made by the partners, or one of them or by their authorized clerks and employes, are the admissions of all partners who had access to the books.²

Real Estate.— The books of a real estate agent do not affect the principal where the latter had no right to make entries upon the books or, in any way, exercise supervision and control over them.³

Independent Relevancy.— Where the relevant fact is that certain entries are on the books, and that therefore a party *knew* of them, rather than that they are correct, the fact that the books are incorrectly kept, in that other items also should have been entered, is not material.⁴

§ 548. [Extra-Judicial Admissions]; Business Documents.⁵— Business documents other than book entries such as contracts,⁶ reports,⁷ settlements,⁸ and the like,⁹ which are commonly used in the ordinary transaction of business,¹⁰ may well constitute the vehicle for an admission. A favorite form of written admission is the account stated, or account rendered.¹¹ *Applications for insurance policies* may stand in the same position.¹²

97. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 So. 834 (1890); *Darlington v. Taylor*, 3 Grant (Pa.) 195 (1855).

98. *Stetson v. Godfrey*, 20 N. H. 227 (1830); 2 Chamb., Ev., § 1361.

99. *Davison v. West Oxford Land Co.*, 126 N. C. 704, 36 S. E. 162 (1900); 2 Chamb., Ev., § 1362, n. 1, and cases cited.

1. *Oliver v. Phelps*, 21 N. J. L. 597 (1845). CONTRA: *Perrine v. Hotchkiss*, 58 Barb (N. Y.) 77 (1870).

2. *Eden v. Lingenfelter*, 39 Ind. 19 (1872); *Tucker v. Peaslee*, 36 N. H. 167 (1858); *Fairchild v. Fairchild*, 64 N. Y. 471, aff'g 5 Hun 407 (1878); 2 Chamb., Ev., § 1363, n. 1, and cases cited.

3. *McKeen v. Providence County Sav. Bank*, 24 R. I. 342, 54 Atl. 49 (1902).

4. *Foster v. Fifield*, 29 Me. 136 (1848).

5. 2 Chamberlayne, Evidence, § 1364.

6. *Springer v. Chicago*, 37 Ill. App. 206 (1890); *Lynch v. Troxell*, 207 Pa. 162, 56 Atl. 413 (1903).

7. *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 74 Pac. 147 (1903); *Merrill Nat. Bank v. Illinois, etc., Lumber Co.*, 101 Wis. 247, 77 N. W. 185 (1898); 2 Chamb., Ev., § 1364, n. 2, and cases cited.

8. *Miller v. Campbell Commission Co.*, 13 Okl. 75, 74 Pac. 507 (1903).

9. *Putnam v. Gunning*, 162 Mass. 552, 39 N. E. 347 (1895); *Weidner v. Olivit*, 188 N. Y. 611, 81 N. E. 1178 (1907); 2 Chamb., Ev., § 1364, n. 4, and cases cited.

10. *Ackerman v. Berriman*, 113 N. Y. Supp. 1015 (1909).

11. *Wotherspoon v. Wotherspoon*, 49 N. Y. Super. Ct. 152 (1883); *Thorn v. Smith*, 71 Wis. 18, 36 N. W. 707.

12. *Trudden v. Metropolitan Life Ins. Co.*

§ 549. [Extra-Judicial Admissions]; Commercial Paper.¹³—Promissory notes,¹⁴ specialties under seal,¹⁵ and other negotiable instruments or other specimens of commercial paper may be used in evidence as containing admissions.

§ 550. [Extra-Judicial Admissions]; Letters.¹⁶—Official business or social letters are equally available for the proof of admissions. It must, however, be shown by the proponent that the party against whom the admission is offered is responsible for the letter. This may be done (1) by affirmative evidence that he has written it,¹⁷ (2) that the actual writer had been previously authorized to make the statement by the party against whom it is now offered, or (3) that the latter, upon adequate information, has ratified the deed of one who without previous authority has acted as his agent.¹⁸ Under any of these circumstances, the statements are competent against the writer,¹⁹ although the person offering the evidence is not the one to whom the letter was originally sent.²⁰ The writing, if written by or for the party to be affected by it as his admission, may well have been written to any third person, the writer's attorney²¹ or even to a newspaper.²²

Completeness Required.—Where an admission is said to be stated in a letter, the admitting party is entitled to have the whole letter or even the entire correspondence of which it forms a part so far as relevant placed before the tribunal.²³ This he may himself do at a subsequent stage of the trial,²⁴ unless the proponent puts in the entire correspondence, as tending to explain the crucial statements on which, in reality, he is relying.²⁵ Where a part of a letter has gone in evidence anything in it which tends to explain

64 N. Y. Supp. 183, 50 App. Div. 473 (1900); Taylor v. Grand Lodge A. O. U. W. of Minnesota, 101 Minn. 72, 111 N. W. 919 (1907).

13. 2 Chamberlayne, Evidence, § 1365.

14. Travis v. Barger, 24 Barb. (N. Y.) 614 (1857); Hennessy's Estate, 4 L. T. (N. S.) (Pa.) 9 (1882); 2 Chamb. Ev., § 1365, n. 2, and cases cited. It is not necessary that the document itself should actually have been shown to a party to make his admission of its genuineness competent. It is sufficient that it has been read to him and has received his assent. Stewart v. Gleason, 23 Pa. Super Ct. 323 (1903).

15. Jobe v. Weaver, 77 Mo. App. 665 (1898); Lefevre v. Silo, 98 N. Y. Supp. 321, 112 App. Div. 464 (1906); 2 Chamb. Ev., § 1365, n. 1, and cases cited.

16. 2 Chamberlayne, Evidence, §§ 1366-1370.

17. Quarles v. Littlepage, 2 Hen. & M. (Va.) 401, 3 Am. Dec. 637 (1808); McDermott v. Mahoney, 139 Iowa 292, 115 N. W. 32, 116 N. W. 788 (1908); 2 Chamb. Ev., § 1366, n. 1, and cases cited.

18. Neely v. Naglee, 23 Cal. 152 (1863).

19. Conant v. Evans, 202 Mass. 34, 88 N. E. 438 (1900); Rapp v. Platt, 117 N. Y. Supp. 987 (1909); Russell v. Weiler, 28 Ohio Cir. Ct. 176 (1905); Griffin, etc., Co. v. Joannes, 80 Wis. 601, 50 N. W. 785 (1891); 2 Chamb. Ev., § 1366, n. 3, and cases cited.

20. Downey v. Taylor (Tex. Civ. App. 1898), 48 S. W. 541; Little v. Keyes, 24 Vt. 118 (1851); 2 Chamb. Ev., § 1366, n. 4, and cases cited.

21. Lyle v. Higginbotham, 10 Leigh (Va.) 63 (1839).

22. Beecher v. Pettee, 40 Mich. 181 (1879).

23. Stringer v. Breen, 7 Ind. App. 557, 34 N. E. 1015 (1893); Trischet v. Hamilton Ins. Co., 14 Gray (Mass.) 456 (1860); Raymond v. Howland, 17 Wend. (N. Y.) 389 (1837); 2 Chamb. Ev., § 1367, n. 1, and cases cited.

24. *Supra*, §§ 272 et seq.; 1 Chamb. Ev., §§ 518 et seq.

25. Buffum v. York Mfg. Co., 175 Mass. 471, 58 N. E. 599 (1900).

or qualify the portion of the document which is used is also admissible.²⁶ A litigant cannot produce a letter which evidently is an answer to a previous part of the correspondence without submitting the latter²⁷ or accounting for its absence by showing that it has been lost,²⁸ or is, for some other reason, beyond his power to produce. If it is beyond his power to produce the letter, he must prove its contents, or leave the other party to do so, if the latter's knowledge is more complete on the subject than his own.²⁹ A party cannot, however, put in evidence his own self-serving letter merely because it was written in reply to a letter from his opponent.³⁰

The general rule as to completeness does not apply to cases where a party seeks to put in evidence a letter received by him from a third person in reply to a letter of his own. He is not required to prove the contents of his own letter, or produce it, as a preliminary to introducing the letter received by him when the sender is dead or is, for some other reason, beyond his power to exhibit as a witness, e. g., where the sender is out of the jurisdiction.³¹ Where it is intended to offer only a special and particular admission, not affected by the rest of the correspondence, the proponent of the admission need not produce the entire series of letters.³² This is especially reasonable as a rule where the letter offered in evidence explains itself.³³ The sender of the letter is not entitled to insist that the entire writing shall be received in evidence, in such a way as to give him the benefit of his own self-serving statements.³⁴ The letter to which the one containing the competent statement is itself in reply, need not be produced³⁵ nor its absence explained.³⁶ Nor is it material that, on account of the death of the declarant, the person producing his letter could not testify against his estate to the same facts as are admitted in the document itself.³⁷

Criminal Cases.—The rules regulating the operation of the canon of completeness in this connection are equally applicable in criminal³⁸ as in civil cases.

Self-serving Statements Not Competent.—Letters and the like, not sent

26. *Walker v. Griggs*, 28 Ga. 552 (1859); *Glover v. Stevenson*, 126 Ind. 532, 26 N. E. 486 (1890); 2 Chamb., Ev., § 1367, n. 4, and cases cited.

27. *Belmont Coal Co. v. Richter*, 31 W. Va. 858, 8 S. E. 609 (1888).

28. Failure to make such a submission and even the voluntary destruction of the connected documents by the producing party have been held merely to affect the probative weight of the admission shown. *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238 (1870).

29. *Newton v. Price*, 41 Ga. 186 (1870).

30. *Houde v. Tolman*, 42 Minn. 522, 44 N. W. 879 (1890).

31. *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29 (1856).

32. *Stone v. Sanborn*, *supra*; *Dainese v. Allen*, 45 How. Pr. (N. Y.) 430 (1873); 2 Chamb., Ev., § 1367, n. 10, and cases cited.

33. *Brayley v. Ross*, 33 Iowa 505 (1871).

34. *Leslie v. Morrison*, 16 U. C. Q. B. 130 (1858).

35. *Wiggin v. Boston, etc., Co.*, 120 Mass. 201 (1876).

36. *Mortimer v. Wright*, 4 Jur. 465, 9 L. J. Exch. 158 (1840).

37. *Harriman v. Jones*, 58 N. H. 328 (1878).

to the opposite party or some one whose acts affect him are not, as a rule, receivable in the writer's favor.³⁹

Minor Details.—It has been considered better practice, where the proponent desires to use only a portion of a letter as a written admission that he should produce in evidence the entire document;—reading to the jury such parts as he relies upon and leaving his opponent to do the same.⁴⁰ Where a portion of the letter is missing, the document itself is competent unless it appear that the portion which is absent is material and cannot be supplied. The opponent is not at liberty to refuse to assist in solving the question of materiality and simply insist upon the rejection of an uncompleted letter.⁴¹

§ 551. [Extra-Judicial Admissions]; Obituary Notices.⁴²—Obituary notices stand in much the same position as that occupied by tax-lists.⁴³ Assuming that the declarant is possessed of adequate knowledge the feelings deemed appropriate to the writing of such a composition excuse, if they do not justify, such lack of precision in statement as to remove all evidentiary quality.⁴⁴

§ 552. [Extra-Judicial Admissions]; Official Papers.⁴⁵—Public records, such as accounts, inventories,⁴⁶ schedules⁴⁷ and other probate or bankruptcy proceedings may contain relevant admissions of a party. It is deemed essential, however, that the statements should be properly connected with the party himself, e. g., where he has personally made, revised⁴⁸ or otherwise adopted them.⁴⁹ Statements in records of various kinds may be used in this way.⁵⁰ The returns of officers upon writs, executions, and the like may constitute admissions of the official whose acts they purport to record.⁵¹

§ 553. [Extra-Judicial Admissions]; Professional Memoranda.⁵²—Abstracts of title,⁵³ books of claims,⁵⁴ and other legal documents or writings used in pro-

38. *Rumph v. State*, 91 Ga. 20, 16 S. E. 104 (1892); *Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846 (1895); 2 Chamb., Ev., § 1368, n. 1, and cases cited.

39. *Snow v. Warner*, 10 Metc. (Mass.) 132, 43 Am. Dec. 417 (1845); *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299 (1890); 2 Chamb., Ev., § 1369, n. 1, and cases cited.

40. *Lester v. Piedmont, etc., Ins. Co.*, 55 Ga. 475 (1875); *Raphael v. Hartman*, 87 Ill. App. 634 (1899).

41. *Van Vechten*, 20 N. Y. Supp. 140, 65 Hun 215 (1892); 2 Chamb., Ev., § 1370.

42. 2 Chamberlayne, Evidence, § 1371.

43. *Infra*, § 554; 2 Chamb., Ev., § 1374.

44. *Hull's Will*, 117 Iowa 738, 89 N. W. 979 (1902); 2 Chamb., Ev., § 1371.

45. 2 Chamberlayne, Evidence, § 1372.

46. *Dupuy v. Harris*, 6 B. Mon. (Ky.) 534 (1846); *Morrill v. Foster*, 33 N. H. 379

(1856); 2 Chamb., Ev., § 1372, n. 1, and cases cited.

47. *Rankin v. Busby* (Tex. Civ. App. 1894), 25 S. W. 678.

48. *Henkle v. Smith*, 21 Ill. 238 (1859); *Downs v. New York Cent. R. Co.*, 47 N. Y. 83 (1871).

49. *Rich v. Flanders*, 39 N. H. 304 (1859); *Klatt v. N. C. Foster Lumber Co.*, 92 Wis. 622, 66 N. W. 791 (1896).

50. *Lyon v. Phillips*, 106 Pa. St. 57 (1884); 2 Chamb., Ev., § 1372, n. 5, and cases cited.

51. *Woodward v. Larking*, 3 Esp. 286 (1901).

52. 2 Chamberlayne, Evidence, § 1373.

53. *Ege v. Medlar*, 82 Pa. 86 (1876); 2 Chamb., Ev., § 1373.

54. *Webster Mfg. Co. v. Schmidt*, 77 Ill. App. 49 (1897).

fessional work in law or conveyancing may be introduced into evidence as containing admissions.

§ 554. [Extra-Judicial Admissions]; Tax Lists.⁵⁵— So far as the written return required or permitted by law, of property subject to assessment made by the owner for purposes of taxation, contains an enumeration of the property of the taxpayer, it has been held by certain courts that, in view of the motives which may be assumed to have actuated the declarant, no quality of an evidentiary value should attach to a statement so made.⁵⁶ On the other hand, it has been strenuously insisted that good faith to the cause of justice forbids that a man should not be held to the truth of a solemn declaration under oath, and the party is accordingly affected by the declaration not alone as an admission operating directly as to the fact of ownership, or lack of it;⁵⁷ but as a circumstance tending to establish the fact as to whether the declarant claimed⁵⁸ or did not claim⁵⁹ to own it. The declarant may not when acting in entire good faith be possessed of competent knowledge regarding the value of his property.⁶⁰ He may be more or less warped, consciously or unconsciously, by the financial penalty attached to placing a high valuation. A statement made under these circumstances is not available as an admission on the question of value.⁶¹

§ 555. [Extra-Judicial Admissions]; Temporal or Ephemeral Forms of Writing.⁶²— The writing containing the admission need not be of a permanent nature. A newspaper article,⁶³ and even more fugitive publications, are equally admissible with the most solemn instrument. It is not even essential that the admission should have been committed, as a whole, to the writing.⁶⁴ The computation of interest on a note,⁶⁵ mathematical calculations,⁶⁶ the footings of bookkeepers⁶⁷ and the like, will be received.

§ 556. [Extra-Judicial Admissions]; Transmission by Telephone.⁶⁸— Oral admissions may be communicated by any means usually employed, as through

55. 2 Chamberlayne, Evidence, § 1374.

56. Tuckwood v. Hanthorn, 67 Wis. 326, 30 N. W. 705 (1886).

57. Comstock v. Grindle, 121 Ind. 459, 23 N. E. 494 (1889); Miffin Bridge Co. v. Juniata County, 144 Pa. 365, 22 Atl. 896, 13 L. R. A. 431 (1891); 2 Chamb., Ev., § 1374, n. 2, and cases cited.

58. Washburn v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97 (1903); Lefever v. Johnson, 79 Ind. 554 (1881).

59. Lefever v. Johnson, *supra*; Whitfield v. Whitfield, 40 Miss. 352 (1861).

60. This is still more clear where the declarant is not the owner. San Jose, etc., R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522 (1900).

61. Swaim v. Swaim, 134 Ind. 596, 33 N. E.

792 (1893); Randidge v. Lyman, 124 Mass. 361 (1878); 2 Chamb., Ev., § 1374, n. 7, and cases cited.

62. 2 Chamberlayne, Evidence, § 1375.

63. Edwards v. Watertown, 13 N. Y. Supp. 309, 59 Hun 620 (1891). Southern Pac. Co. v. Godfrey (Tex. Civ. App. 1908). 107 S. W. 1135, railroad folder or time-table.

64. Manning v. City of Lowell, 173 Mass. 100, 53 N. E. 160 (1899).

65. Harris v. Burley, 10 N. H. 171 (1839).

66. Pendexter v. Carleton, 16 N. H. 482 (1845).

67. Butler v. Cornell, 148 Ill. 276, 35 N. E. 767 (1903); 2 Chamb., Ev., § 1375, ns. 6, 7, and cases cited.

68. 2 Chamberlayne, Evidence, § 1376.

a telephone operator,⁶⁹ or by the direct use of the telephone itself.⁷⁰ The rule is the same even in criminal cases,⁷¹ *provided* the speaker be properly identified.⁷²

§ 557. **Scope of Extra-Judicial Admissions.**⁷³—In general, such a statement carries all fair inferences with it.⁷⁴ There are, however, obvious limits as to how far an inference should reasonably extend. It is not, for example, a reasonable inference to presume the existence of a fact from its express denial.⁷⁵

Contents of a Writing.—The rule laid down by the English courts⁷⁶ that the contents of a written instrument, even the most formal, may be established by an oral admission as to what they are, has been followed in certain American jurisdictions.⁷⁷ The English rule has not been adopted by other tribunals either as proof of contents⁷⁸ or of the execution⁷⁹ of the document.

Criminal Cases; Facts of Conduct.—Admissions in criminal cases may cover any probative fact in the conduct of the accused. It may be shown, for example, by the admissions of the accused that he has fled from justice,⁸⁰ attempted to break jail⁸¹ or aided the escape of others.⁸² The fact that such statements by an accused may show the commission of other crimes furnishes no ground for excluding them.⁸³ The doing of other criminal acts, however, cannot be shown by the prisoner's admissions for the mere purpose of discrediting him or showing bad character.⁸⁴

Physical Facts.—Any physical or bodily facts affecting the prisoner in a probative way may be established by his admissions. Thus, he may prove his own age⁸⁵ or race⁸⁶ or the fact that he has been married⁸⁷ by an ad-

69. *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901 (1885).

70. *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407 (1907); *Star Bottling Co. v. Cleveland Faucet Co.*, 128 Mo. App. 517, 109 S. W. 902 (1908); 2 Chamb., Ev., § 1376, n. 2, and cases cited. See *Rimes v. Carpenter*, 114 N. Y. Supp. 96, 61 Misc. 614 (1909).

71. *People v. Ward*, 3 N. Y. Cr. 483 (1885).

72. *Stepp v. State*, 31 Tex. Cr. 349, 20 S. W. 753 (1892).

73. 2 Chamberlayne. Evidence, §§ 1377-1382.

74. *Sloan v. Diggins*, 49 Cal. 38 (1874); *Rendlemann v. Willard*, 15 Mo. App. 375 (1884); *New York Ice Co. v. Parker*, 8 Bosw. (N. Y.) 688 (1861); 2 Chamb., Ev., § 1377, n. 1, and cases cited.

75. *Clarendon v. Weston*, 16 Vt. 332 (1844).

76. See *Slatterie v. Pooley*, 6 M. & W. 664 (1860); 2 Chamb., Ev., § 1378, n. 1, and cases cited.

77. *Denver, etc., R. R. v. Wilson*, 4 Colo.

App. 355 (1894); *Cooley v. Collins*, 186 Mass. 507, 71 N. E. 979 (1904); 2 Chamb., Ev., § 1378, n. 2, and cases cited.

78. *Jameson v. Conway*, 10 Ill. 227 (1848); *Hasbrouck v. Baker*, 10 Johns. (N. Y.) 248 (813).

79. *Palmer v. Manning*, 4 Den. (N. Y.) 131 (1847).

80. *Thomas v. State*, 100 Ala. 53, 14 So. 621 (1892).

81. *State v. Jackson*, 95 Mo. 623, 8 S. W. 749 (1888).

82. *Campbell v. State*, 23 Ala. 44 (1853).

83. *Gore v. People*, 162 Ill. 259, 44 N. E. 500 (1896).

84. *Henderson v. Com.*, 16 Ky. L. Rep. 289, 27 S. W. 808 (1894); 2 Chamb., Ev., § 1379, n. 5.

85. *People v. Tripp*, 4 N. Y. Leg. Obs. 344 (1846).

86. *Bell v. State*, 33 Tex. Cr. 163, 25 S. W. 769 (1894).

87. *Tucker v. People*, 117 Ill. 68, 7 N. E.

mission. The identity of one accused of crime may be admitted by him.⁸⁸

Mental Conditions.—Declarations of accused are receivable as admissions to establish mental conditions, as the mental capacity necessary for the commission of crime.⁸⁹ Even the conclusion or inference on the part of the accused is competent against him regarding this matter.⁹⁰ The declaration of the prisoner that he was feigning insanity at a given time will be received against him as an admission.⁹¹

Mental State.—Declarations of accused are admissible to show the existence of mental states. Thus the government may show that the prisoner has admitted having guilty knowledge.⁹² Such an admission may either directly allege the existence of the mental state or, on the other hand, it may assert the existence of probative facts from which the mental state may be inferred, for example, where the accused says he committed other crimes the effect of which is to show guilty knowledge on the occasion in question.⁹³ Criminal intent⁹⁴ may be established in the same way.

§ 558. *Probative Force of Extra-Judicial Admissions.*⁹⁵—Extra-judicial admissions range in probative force from the faintest trace of probability up to statements which carry an overwhelming weight of conviction.⁹⁶ So great is the effect of variations in deliberateness,⁹⁷ lack of motive to misrepresent, means and extent of knowledge, and the like, that it would be impossible with any approach to logical accuracy to speak of the probative value of admissions as a class. It is possible, however, to make certain deductions with confidence. In the absence of an estoppel, extra-judicial admissions are not conclusive.⁹⁸ It may fairly be said, further, that in so far as any particular admission is one in the popular sense, its probative force is increased.⁹⁹ Likewise, where a declarant makes a statement obviously contrary to that which he knows to be his pecuniary or proprietary interest, or

51 (1886); *Stanglein v. State*, 17 Ohio St. 453 (1867); 2 Chamb., Ev., § 1380, n. 4, and cases cited.

88. *Com. v. Gay*, 162 Mass. 458, 38 N. E. 112 (1894); *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782 (1893).

89. *State v. Kring*, 74 Mo. 612 (1884); *People v. Tripp*, *supra*.

90. *State v. Kring*, *supra*.

91. *Cogswell v. Com.*, 17 Ky. L. Rep. 822, 32 S. W. 935 (1895); 2 Chamb., Ev., § 1381, n. 5, and cases cited.

92. *Com. v. Crowe*, 165 Mass. 139, 42 N. E. 563 (1895); *State v. Hogard*, 12 Minn. 293 (1867); 2 Chamb. Ev., § 1382, n. 1, and cases cited.

93. *Com. v. Edgerly*, 10 Allen (Mass.) 464 (1865); *infra*, §§ 1012 *et seq.*; 4 Chamb., Ev., §§ 3228 *et seq.*

94. *State v. Long*, 103 Ind. 481, 3 N. E. 169 (1885). Compare *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 427 (1874).

95. 2 Chamberlayne, Evidence, §§ 1383-1391.

96. *Pence v. Makepeace*, 65 Ind. 345, 365 (1879); *Lipsev v. People*, 227 Ill. 364, 81 N. E. 348 (1907).

97. *Holmes v. Connable*, 111 Iowa 298, 82 N. W. 780 (1900); *State v. Mickle*, 25 Utah 179, 70 Pac. 856 (1902); 2 Chamb., Ev., § 1383, n. 2, and cases cited.

98. *Cooper v. Central R. Co.*, 44 Iowa 134 (1876); *State v. Shorter*, 85 S. C. 170, 67 S. E. 131 (1910).

99. *Simeone v. Lindsay* (Del. 1907), 65 Atl. 778.

which charges himself with the doing of acts which clearly carry criminal liability.¹

Criminal Cases.—The prosecution in a criminal case, is not by offering the admission of an accused person, concluded by it, in any sense which could estop it from denying the truth, in point of fact, of any portion of the prisoner's statement.²

Judicial Estimates; Unfavorable.—To the judicial observer whose attention is attracted to the weaknesses by which admissions are occasionally characterized and the ease by which they may be fabricated, they have appeared as presenting but little probative value;³ and, indeed, have seemed dangerous evidence on which to rely at all.⁴ This is felt to be especially true where a considerable interval has elapsed since the statement was made.⁵

Judicial Estimates; Favorable.—To those who have been impressed with the powerful sense of conviction which admissions are capable of creating they have seemed judicial instruments of proof of great value.⁶ In reality, for the reasons indicated, generalization is impossible.⁷

Not Conclusive in the Absence of Estoppel.—It may be regarded as settled that, in the absence of proof of facts which would properly ground an estoppel and a claim by the adverse party that to allow the proof offered would improperly prejudice his rights,⁸ a litigant is entitled to introduce evidence tending to control the probative effect of his admissions. To exclude the evidence on this ground it is sufficient that it should be made to appear that some definite prejudicial substantive legal change would take place in the rights and relations of the party against whom the evidence is tendered,⁹ the testimony which is offered to control the effect of the prior statement by the party admitted in evidence for the purpose. The "admission" may be deemed conclusive also when such is the direct result of a rule of substantive law, as where an indorser of a negotiable instrument is said to "admit" (warrant) the genuineness of prior indorsements.¹⁰

1. *General Tire Repair Co. v. Price*, 115 N. Y. Supp. 171 (1909).

2. *State v. Wisdom*, 119 Mo. 539, 24 S. W. 1037 (1893); *Lowenberg v. People*, 5 Park. Cr. (N. Y.) 414 (1863); 2 *Chamb., Ev.*, § 1384, and cases cited.

3. *Freeman v. Peterson*, 45 Colo. 102, 100 Pac. 600 (1909). See, however, *Burk v. Hill*, 119 Ga. 38, 45 S. E. 732 (1903).

4. *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124 (1892); *Kinney v. Murray*, 170 Mo. 674, 71 S. W. 917 (1902); *Garrison v. Akin*, 2 Barb. (N. Y.) 25 (1847); *Crowell v. Western Reserve Bank*, 3 Ohio St. 406 (1854); 2 *Chamb., Ev.*, § 1385, n. 2, and cases cited.

5. *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182 (1886); *Kinney v. Murray*, *supra*; *Ro-*

berge v. Bonner, 88 N. Y. Supp. 91, 94 App. Div. 342 (1904); *Thompson v. Thompson*, 18 Ohio St. 73 (1868); *McClellan v. Sanford*, 26 Wis. 595 (1870); 2 *Chamb., Ev.*, § 1385, n. 3, and cases cited.

6. *Ector v. Welsh*, 29 Ga. 443 (1859); *Robinson v. Stewart*, 68 Me. 61 (1878).

7. *Pence v. Makepeace*, *supra*.

8. *Cafferatta v. Cafferatta*, 23 Mo. 235 (1856); *Bogert v. Turner*, 120 N. Y. Supp. 420, 135 App. Div. 530 (1909); 2 *Chamb., Ev.*, § 1387, n. 2, and cases cited.

9. *Batture v. Sellers*, 5 Har. & J. (Md.) 117, 9 Am. Dec. 492 (1820); *Chicago, etc., Ry. Co. v. Mashore*, 21 Okl. 275, 96 Pac. 630 (1908); 2 *Chamb., Ev.*, § 1387, n. 3, and cases cited.

10. *Critchlow v. Parry*, 2 Camp. 182 (1809).

Declarant May Explain, Supplement.—It thus appears that in cases where no estoppel is shown the declaring party is not concluded by his statement,¹¹ but may control its effect by other evidence.¹² He may, in any event, deny¹³ the truth of the statement, whether oral¹⁴ or written.¹⁵ He may explain¹⁶ or supplement it.¹⁷ He may show that the statement originated through mistake,¹⁸ either of law,¹⁹ or of fact.²⁰ He may offer evidence tending to show that his statement was based upon ignorance of important facts,²¹ or was made only by way of jest.²²

Deceased Persons.—Where, as in case of admissions by persons since deceased, no explanation of a statement is available, its probative force is naturally decreased.²³ Still, such evidence is frequently regarded as competent,²⁴ although a judicial warning regarding unreliability may well be warranted.²⁵

Criminal Cases.—In a criminal case, the party against whom an admission is offered is at all times at liberty to explain the meaning of what he has said and the intent with which he said it.²⁶ The circumstance that an ac-

11. See last preceding section. See also, *People v. Ouderkirk*, 105 N. Y. Supp. 134, 120 App. Div. 650 (1907); *Bruger v. Princeton & St. M. Mut. F. Ins. Co.*, 129 Wis. 281, 109 N. W. 95 (1906); 2 Chamb., Ev., § 1388, n. 1, and cases cited.

12. *Boyd v. L. H. Quinn Co.*, 41 N. Y. Supp. 391, 18 Misc. 169 (1896); *Campbell v. Sech*, 155 Mich. 634, 119 N. W. 922, 15 Detroit Leg. N. 1105 (1909).

13. *Robinson v. Smith*, 7 N. Y. Supp. 38, 3 Silv. (N. Y.) 490 (1889).

14. *Home Ins. Co. v. Atchison, etc., R. Co.*, 4 Kan. App. 60, 46 Pac. 179 (1896); *King v. Ford River Lumber Co.*, 93 Mich. 172, 53 N. W. 10 (1892); *Wall v. New York Cent., etc., R. Co.*, 67 N. Y. Supp. 519, 56 App. Div. 599 (1900); *Bennet v. Kesarty, Wright (Ohio)* 696 (1834); 2 Chamb., Ev., § 1388, n. 4, and cases cited.

15. *Illinois Cent. R. Co. v. Cowles*, 32 Ill. 116 (1863); *Knight v. New England Worsted Co.*, 2 Cush. (Mass.) 271 (1848); *Newcomb v. Jones*, 37 Mo. App. 475 (1889); 2 Chamb., Ev., § 1388, n. 5, and cases cited.

16. *Risdon v. Yates*, 145 Cal. 210, 78 Pac. 641 (1904); *Phoenix Ins. Co. v. Gray*, 113 Ga. 424, 38 S. E. 992 (1901); *Thon v. Rochester R. Co.*, 29 N. Y. Supp. 675, 30 id. 620, 83 Hun 443 (1894); *Eddy v. Church*, 118 N. Y. Supp. 795, 64 Misc. 7 (1909) (words and phrases); 2 Chamb., Ev., § 1388, n. 6, and cases cited.

17. *Johnson v. Opfer*, 58 Neb. 631, 79 N.

W. 547 (1899); *New York Fidelity, etc., Co. v. Dorrough*, 107 Fed. 389, 46 C. C. A. 364 (1901); 2 Chamb., Ev., § 1388, n. 7, and cases cited. Parol evidence is admissible. *Sperry v. Wilcox*, 1 Metc. (Mass.) 267 (1840); *Bingham v. Bernard*, 36 Minn. 114, 30 N. W. 404 (1886). Privies, agents, coparties, etc., occupy the same position. *Lang v. Metzger*, 206 Ill. 475, 69 N. E. 493 (1904); *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379 (1831); *Davidson v. Rightmyer*, 77 N. Y. Supp. 977, 38 Misc. 493 (1902); 2 Chamb., Ev., § 1388, n. 7, and cases cited.

18. *Chicago, etc., R. Co. v. Bartlett*, 20 Ill. App. 96 (1886); *Moore v. Hitchcock*, 4 Wend (N. Y.) 292 (1830); *Cullen v. Bimm*, 37 Ohio St. 236 (1881); 2 Chamb., Ev., § 1388, n. 8, and cases cited.

19. *Solomon v. Solomon*, 2 Ga. 18 (1847).

20. *Newton v. Liddiard*, 12 Q. B. 925 (1848).

21. *Pennsylvania Ins. Co. v. Telfair*, 61 N. Y. Supp. 322, 45 App. Div. 564 (1899); *Rowen v. King*, 25 Pa. 409 (1855).

22. *Beebe v. De Raun*, 8 Ark. 510 (1848).

23. *Succession of Gabisso*, 122 La. 824, 48 So. 277 (1909).

24. *Powers v. Johnson*, 107 Minn. 476, 120 N. W. 1021 (1903).

25. *Hoffman v. Condon*, 118 N. Y. Supp. 899, 134 App. Div. 205 (1909).

26. *State v. Kirby*, 62 Kan. 436, 63 Pac. 752 (1900).

cused is *drunk* at the time of making a statement, while its effect is not to render the evidence inadmissible, may seriously impair its weight.²⁷

Prima Facie Quality.—A *prima facie* effect has been accorded to extra-judicial admissions in general,²⁸ in the absence of statutory regulation on the subject.²⁹

Question for the Jury.—The substantive or procedural law prescribes no predetermined weight for extra-judicial admissions, whether oral³⁰ or in writing.³¹ It leaves the question of weight³² and construction of an admission, verbal³³ or written,³⁴ to the jury, entirely unaffected as to specific rules as to weight.

Criminal Cases.—Decisions in criminal cases to the effect that admissions alone are not sufficient to convict without proof of the *corpus delicti* are not applicable to civil cases.³⁵

Impeachment.—The probative force of admissions is not impeached by proof of inconsistent statements.³⁶

27. *People v. Farrington*, 140 Cal. 656, 74 Pac. 288 (1903); *Com. v. Howe*, 9 Gray (Mass.) 110 (1857); 2 Chamb., Ev., § 1388a, n. 2, and cases cited.

28. *Joralmon v. McPhee*, 31 Colo. 26, 71 Pac. 419 (1903); *Vinal v. Burrill*, 16 Pick. (Mass.) 401 (1833); *Martin v. Farrell*, 72 N. Y. Supp. 934, 66 App. Div. 177 (1901); *Lane Implement Co. v. Lowder*, 11 Okl. 61, 65 Pac. 926 (1901); 2 Chamb., Ev., § 1389, n. 1, and cases cited.

29. *Hickman v. Thompson*, 28 La. Ann. 265 (1876).

30. *Betts v. Betts*, 113 Iowa 111, 84 N. W. 975 (1901); *Stephens v. Vroman*, 18 Barb. (N. Y.) 250 (1854); 2 Chamb., Ev., § 1390, n. 1, and cases cited.

31. *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381 (1877); *Miner v. Baron*, 131 N. Y. 677, 30 N. E. 481, aff'g 15 N. Y. Supp. 401 (1892); *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599 (1902); 2 Chamb., Ev., § 1390, n. 2, and cases cited.

32. *Stephens v. Vroman*, *supra*; *Saveland v. Green*, 40 Wis. 431 (1876); *Gibson v. Rowland*, 35 Pa. Super. Ct. 158 (1908); 2 Chamb., Ev., § 1390, n. 3, and cases cited.

33. *Stewart v. De Loach*, 86 Ga. 729, 12 S. E. 1067 (1890); *Stacy v. Graham*, 3 Duer (N. Y.) 444 (1854); 2 Chamb., Ev., § 1390, n. 4, and cases cited.

34. *Dampf v. Greener*, 46 Hun 675, 11 N. Y. St. Rep. 90 (1887); *Chadwick v. United States* (U. S. Ohio 1905), 72 C. C. A. 343, 141 Fed. 225.

35. *North v. Zerwick*, 97 Ill. App. 306 (1901).

36. A criminal defendant is not at liberty to show, in disproof of having made a statement at one time inconsistent with his present position, that on another occasion he made a statement quite in accordance with his present view. *U. S. v. Gleason*, 25 Fed. Cas. No. 15,216, Woolw. (U. S.) 128 (1867); 2 Chamb., Ev., § 1391.

CHAPTER XIX.

ADMISSIONS: BY CONDUCT.

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§ 559. **Admissions by Conduct; Inconsistent Conduct.**¹— Any act of a party from which an inference can legitimately be drawn, unfavorable to his present interest or contention, as to the existence of a probative or *res gestae* fact.² is thought to be available to his opponent as an admission.³ Acts done by a party suggesting an inference that his present contention is false or an exaggeration⁴ or is an after-thought may be shown by the adverse interest.⁵ Either party may, in like manner, prove that the other has failed to assert a claim which he now makes,⁶ has recognized the validity of a demand which he at present disputes,⁷ or, in other particulars occupied in the past a position inconsistent with his present one.⁸

1. 2 Chamberlayne, Evidence, §§ 1392–1400.

2. *Supra*, §§ 31, 34; 1 Chamb., Ev., §§ 47, 51.

3. 2 Chamberlayne, Evidence, § 1392.

4. *Berger v. Abel & Bach Co.*, 141 Wis 321, 124 N. W. 410 (1910).

5. *Tripp v. Metallic Packing Co.*, 137 Mass. 499 (1884); *Terwilliger v. Industrial Ben. Assoc.*, 31 N. Y. Supp. 938, 83 Hun 320 (1894); 2 Chamb., Ev., § 1393, n. 2.

6. *Millard v. Adams*, 21 N. Y. Supp. 424.

1 Misc. 431 (1892); *East Brandywine, etc., R. R. v. Ranck*, 78 Pa. 454 (1875); 2 Chamb., Ev., § 1393, n. 3.

7. *Lusk v. Throop*, 89 Ill. App. 509, aff'd 189 Ill. 127, 59 N. E. 529 (1900); *Jones v. Shattuck*, 175 Mass. 415, 56 N. E. 736 (1900); *Miller v. Savannah Ocean Steamship Co.*, 118 N. Y. 199, 23 N. E. 462 (1890); 2 Chamb., Ev., § 1393, n. 4.

8. *Georgia Central R. Co. v. Moseley*, 112 Ga. 914, 38 S. E. 350 (1900); *Boston v. Richardson*, 13 Allen (Mass.) 146 (1866);

Failure to Advance Present Defense.—A plaintiff may well attempt to show that one who now denies facts essential to liability on his part, failed, on a previous occasion and under circumstances which would have made a denial natural, could it have been truthfully done,⁹ to set up the denial on which he now relies. If he, with a fair opportunity of doing so, omitted to advance his present claim to absence of liability,¹⁰ such a fact is significant to the effect that the present defense is an invention. In general a litigant may show, in the same way, that his adversary, up to the time of formally denying the claim against him, has acted as if it were true; has previously assigned a defense which was consistent with the existence of liability on his part;¹¹ and instead of disputing the claim itself, has tried to arrange favorable terms for adjusting it.¹² It has even been held that the proponent may show, under certain circumstances, that his opponent has settled with others whose legal position in the matter is no better than that of the plaintiff.¹³ If these acts shall apparently have been done upon the basis that the claim that he is liable is a valid one, and not by way of compromise¹⁴ or for some other reason than because the claim is felt to be a just one,¹⁵ an inference that the party has by his conduct conceded, or, as is commonly said, "admitted," the legal validity of the demand made against him naturally arises. In *criminal* cases, the inference may be similar. For example, should one accused of crime discuss the case with the prosecution lawyer and confine himself to threats of violence making no claim of innocence, this may well be considered a relevant circumstance to the effect that he is conscious of guilt, i. e., is guilty.¹⁶

Failure to Allege Present Claim.—The reverse is equally true. A defendant may very properly attempt to show that a plaintiff who now claims a

Walser v. Wear, 141 Mo. 443, 42 S. W. 928 (1897); 2 Chamb., Ev., § 1393, n. 5. Contradictory statements in evidence given on a former trial may be used to impeach a present witness. Wiseman v. St. Louis, etc., R. Co., 30 Mo. App. 516 (1888); McAndrews v. Santee, 57 Barb. (N. Y.) 193, 7 Abb. Pr. (N. S.) 408 (1869).

Transfer of Property to avoid Liability.—Evidence that a defendant transferred his property to his wife after an accident in which his motor vehicle was involved is competent as bearing on the good faith of his defense that his agent was not acting in the scope of his authority at the time of the accident. Chaufy v. De Vries, R. I. (1918) 102 Atl. 612

9. See Woolner v. Hill, 47 N. Y. Super. Ct. 470 (1881); Hayes v. Kelley, 116 Mass. 300 (1874); 2 Chamb., Ev., § 1394, n. 1.

10. Parsons v. Martin, 11 Gray (Mass.) 111 (1858); Evans v. Montgomery, 95 Mich. 497,

55 N. W. 363 (1893); Moore v. Hamilton, 48 Barb. (N. Y.) 120 (1865); 2 Chamb., Ev., § 1394, n. 2.

11. Broschart v. Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33 (1890); Day v. Gregory, 60 Ill. App. 34 (1894); 2 Chamb., Ev., § 1394, n. 3.

12. Wise v. Adair, 50 Iowa 104 (1878); Peck v. Richmond, 2 E. D. Smith (N. Y.) 380 (1854); 2 Chamb., Ev., § 1394, n. 4.

13. Campbell v. Missouri Pac. R. Co., 86 Mo. App. 67 (1900); Grimes v. Keene, 52 N. H. 330 (1872); 2 Chamb., Ev., § 1394, n. 5.

14. *Infra*, §§ 574 *et seq.*; 2 Chamb., Ev., §§ 1439 *et seq.* Slingerland v. Norton, 12 N. Y. Supp. 647, 58 Hun 578 (1891); 2 Chamb., Ev., § 1394, n. 6.

15. Missouri, etc., R. Co. v. Fulmore (Tex. Civ. App. 1895), 29 S. W. 688.

16. Com. v. Coughlin, 182 Mass. 558, 66 N. E. 207 (1903).

certain right has in the past done acts inconsistent with the actual existence of such a right as is now set up. He has failed to assert his claim on occasions when such a course would have been proper.¹⁷ It may be shown that he settled without trial litigation which involved the assertion of the same right.¹⁸ Where he claims that property possesses a certain value, it may be proved that he has offered to sell it for less.¹⁹ Where he advances a claim, at the present time, that he is entitled to receive a certain sum of money on a given account, it may be shown that on other occasions he has stated a smaller amount as being that to which he was entitled.²⁰ *On the other hand* the act of alleged inconsistency may be explained by the party against whom it is offered.²¹

Clear Relevancy Demanded.—Where the act of one against whom a demand is made may equally well have been done for other reasons than belief in legal liability;—as where it is without probative value on that issue;²² or where the conduct in question is equally explainable as a mere matter of business prudence,²³ a natural impulse of human kindness,²⁴ or as proceeding from a desire to avoid the annoyance of litigation²⁵ the act will be rejected.

Conduct Consistent With Adversary's Claim.—In general, any act of a party may be shown by his opponent which is consistent with the latter's claim. Thus, upon a question whether a certain relation exists, one party may show that the other who now denies it has, by his conduct, recognized its existence,²⁶ as by accepting benefits under it. In like manner, one who is claimed to be entitled to a given office may, as against himself, be proved to have exercised its powers.²⁷ For similar reasons where it is insisted by one party that some one else has a right to an office,²⁸ to stand in a certain position or is entitled to exercise the functions of a given calling²⁹ or profession³⁰

17. *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405 (1898); *Sears v. Kings County El. R. Co.*, 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 117 (1890); *Lloyd v. Lloyd*, 1 Redf. Surr. (N. Y.) 399 (1859); 2 Chamb., Ev., § 1395, n. 1

18. *Pym v. Pym*, 118 Wis. 662, 96 N. W. 429 (1903).

19. *Springer v. Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609 (1891); *Houston v. Western Washington R. Co.*, 204 Pa. 321, 54 Atl. 166 (1903).

20. *State v. Berning*, 74 Mo. 87 (1881); *Shiland v. Loeb*, 69 N. Y. Supp. 11, 58 App. Div. 365 (1901); 2 Chamb., Ev., § 1395, n. 4.

21. *Moore v. Dunn*, 42 N. H. 471 (1861); *Chamberlain v. Iba*, 181 N. Y. 486, 74 N. E. 481 (1905).

22. *Talcott v. Harris*, 93 N. Y. 567 (1883).

23. *Armour v. Ross*, 110 Ga. 403, 35 S. E.

787 (1900); *Anderson v. Duckworth*, 162 Mass. 251, 38 N. E. 510 (1894); 2 Chamb., Ev., § 1396, n. 2.

24. *Sias v. Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 554 (1901).

25. *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725 (1884); *Camp v. U. S.*, 113 U. S. 648, 5 S. Ct. 687, 28 L. ed. 1081 (1885).

26. *Turrentine v. Grigsby*, 118 Ala. 380, 23 So. 666 (1898); *Bertha Mineral Co. v. Morrill*, 171 Mass. 167, 50 N. E. 534 (1898); 2 Chamb., Ev., § 1397, n. 1.

27. *Trowbridge v. Baker*, 1 Cow. (N. Y.) 251 (1823).

28. *Dickinson v. Coward*, 1 B. & Ald. 677 (1818).

29. *Rex v. Borrett*, 6 C. & P. 124, 25 E. C. L. 353 (1883).

30. 2 Serg. & R. (Pa.) 440 (1816).

one may show that his antagonist has, in his own conduct, recognized and assented to the truth of the assertion. In general, the character in which the plaintiff sues, or in which the defendant is sued, may be admitted by the conduct of the opposite party.³¹

Bodily Condition.—A litigant may show that his opponent or other persons are sick by evidence that they received sick benefits.³² In general, each litigant may prove in either a civil³³ or criminal³⁴ action any conduct on the part of his adversary which corroborates the contention of him who offers the evidence.

Mental State.—Psychological facts may also be shown by acts of consistent conduct. For example, either litigant may prove that his opponent had at any given time a relevant mental state, such as intent,³⁵ intention, knowledge,³⁶ the influence of a particular motive,³⁷ or other relevant state of consciousness.³⁸ This he may do by showing that his opponent acted as one naturally would who was affected by the existence of such a mental state.

Efforts at Settlement.—Any conduct of accused in a criminal case showing his consciousness of guilt or his doubt in the merits of his defense, such as an attempt on his part to compound a felony or to arrange terms for a settlement with the injured person,³⁹ is admissible in evidence.

Suppressing Prosecution.—Any effort to suppress the prosecution, by tampering with its witnesses, and the like, will be deemed significant of consciousness of guilt.⁴⁰ So arranging the facts as to lead to false inferences,⁴¹ fabricating evidence, or in any way perverting the course of justice stand in the same position.

Flight.—Prominent among relevant acts of the accused showing a con-

31. *Stanford v. Hurlstone*, L. R. 9 Ch. 116 (1873); 2 Chamb., Ev., § 1397, n. 6.

32. *Seidenspinner v. Metropolitan L. Ins. Co.*, 175 N. Y. 95, 67 N. E. 123 (1903).

33. *Chicago, etc., R. Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161 (1902); *Manning v. Lowell*, 173 Mass. 100, 53 N. E. 160 (1899); *Swee v. Neumann*, 123 N. Y. Supp. 776, 67 Misc. 605 (1910); 2 Chamb., Ev., § 1398, n. 2.

34. *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636 (1881); *State v. Greene*, 33 Utah 497, 94 Pac. 987 (1908); 2 Chamb., Ev., § 1398, n. 3.

35. *Starks v. Sikes*, 8 Gray (Mass.) 609, 69 Am. Dec. 270 (1857); *Wohlfarth v. Chamberlain*, 14 Daly (N. Y.) 178, 6 N. Y. St. Rep. 207 (1887); *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299 (1874); 2 Chamb., Ev., § 1399, n. 1.

36. *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577 (1890); *Smith v. Duncan*, 181 Mass. 435, 63 N. E. 938 (1902); *Potter v. Mellen*, 41

Minn. 487, 43 N. W. 375 (1889); 2 Chamb., Ev., § 1399, n. 2.

37. *Sanscrainte v. Torongo*, 87 Mich. 69, 49 N. W. 497 (1891); *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L. R. A. 603 (1888); 2 Chamb., Ev., § 1399, n. 3.

38. *Hackett v. King*, 8 Allen Mass. 144, 85 Am. Dec. 695 (1864); *Sheldon v. Sheldon*, 32 N. Y. Supp. 419, 84 Hun 422 (1895); 2 Chamb., Ev., § 1399, n. 4.

39. *State v. Farr*, 29 R. I. 72, 69 Atl. 5 (1908); *Booth v. State* (Tex. Cr. App. 1908), 108 S. W. 687; 2 Chamb., Ev., § 1399, n. 6.

40. *Booth v. State*, *supra*. The act of spoliation must in some way be connected with the party. *People v. Long*, 144 Mich. 585, 108 N. W. 91 (1906); 2 Chamb., Ev., § 1399, n. 7.

41. *Barnes v. State* (Tex. Cr. App. 1908), 111 S. W. 943. See, however, *Sanders v. State*, 148 Ala. 603, 41 So. 466 (1906).

consciousness of guilt is flight.⁴² Where the prosecution can show in a criminal case⁴³ that the accused has become a fugitive from justice,⁴⁴ such a fact urgently calls for explanation from the defendant. Where one charged with crime, without good ground, departs from the jurisdiction⁴⁵ shortly after the commission of the crime with which he is charged, the circumstance may often be highly significant. The law of early times made flight conclusive evidence of guilt.⁴⁶ *Under the more rational system* of later times, the fact of flight is merely a circumstance tending to establish consciousness of guilt.⁴⁷

Explanation Received.—It is settled that the defendant may offer any relevant explanation of his act.⁴⁸ The accused may, for example, allege, in explanation of his flight, that he was apprehensive of personal violence.⁴⁹ The advice of friends may be assigned as the cause of fleeing from the jurisdiction.⁵⁰ In all cases, the accused is entitled to prove by his own testimony the actual motive which has influenced his conduct.⁵¹ An absence due to insanity obviously gives rise to no inference of guilt.⁵²

An attempt to escape stands in the same position as would an escape itself.⁵³ Not unnaturally, moreover, the possession of tools calculated to assist an attempt at escape is regarded as a probative fact in such a connection.⁵⁴ Efforts to bribe a custodian of the jail in order to facilitate flight give rise to a similar inference, i. e., consciousness of guilt.⁵⁵ None of these incriminating circumstances constitute a *prima facie* case of liability to the consequences of crime.⁵⁶ Standing alone, therefore, they will not warrant a conviction.⁵⁷

Actor Alone Affected.—Naturally, flight or an attempt to flee affects only the actor, the person so conducting himself.⁵⁸

Declining to Flee, Voluntary Return, Etc.—While flight is competent

42. 2 Chamb., Ev., § 1399a, n. 1.

43. In a civil case, flight is probably not evidence of liability. This rule is not affected by the circumstance that, as in case of seduction, a criminal remedy may exist for the offense. See *Wise v. Schlosser*, 111 Iowa 16 (1900); 2 Chamb., Ev., § 1399a, n. 2.

44. *In re Voorhees*, 32 N. J. L. 150 (1867).

45. *United States v. O'Brian*, 3 Dill. C. C. (U. S.) 381 (1874).

46. Chamb., Ev., 1399a, ns. 5, 6.

47. *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457 (1886); *Com. v. Brigham*, 147 Mass. 414, 18 N. E. 167 (1888); *State v. Howell*, 117 Mo. 307, 23 S. W. 263 (1893); *People v. McKeon*, 19 N. Y. Supp. 486, 64 Hun 504 (1892); 2 Chamb., Ev., § 1399a, n. 7.

48. *Sewell v. State*, 76 Ga. 836 (1888); *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216 (1895); 2 Chamb., Ev., § 1399a, n. 8.

49. *State v. McDevitt*, 69 Iowa 549, 29 N. W. 459 (1886); *State v. Barham*, 82 Mo. 67 (1884); 2 Chamb., Ev., § 1399a, n. 9.

50. *State v. Phillips*, 24 Mo. 475 (1857).

51. *Webb v. Com.*, 4 Ky. L. Rep. 436 (1882); *Lewallen v. State*, 33 Tex. Cr. Rep. 412, 26 S. W. 832 (1894); 2 Chamb., Ev., § 1399a, n. 11.

52. *Peacock v. State*, 50 N. J. L. 653, 14 Atl. 893 (1888).

53. *Campbell v. State*, 23 Ala. 44 (1853); *State v. Jackson*, 95 Mo. 623 (1888).

54. *Clark v. Com.* (Ky. 1895), 38 S. W. 131; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699 (1893).

55. *McKea v. State*, 71 Ga. 96 (1883); *Dean v. Com.*, 4 Gratt. (Va.) 541 (1847).

56. *Waybright v. State*, 56 Ind. 122 (1877); *State v. Ah Kung*, 17 Nev. 361, 30 Pac. 995 (1893); 2 Chamb., Ev., § 1399a, n. 16.

57. *Webb v. Com.*, *supra*.

58. *People v. Stanley*, 47 Cal. 113 (1874); *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 581 (1887); 2 Chamb., Ev., § 1399a, n. 18.

evidence, as grounding an inference that the accused knew he was guilty, declining to flee when urged is, at most, a self-serving act, without probative force.⁵⁹ Any other rule of administration, indeed, would flood the courts with fabricated testimony.⁶⁰ For the same reasons, one accused of crime cannot show that, having fled, he afterwards voluntarily returned.⁶¹

Order of Acts.—The act claimed as consistent with the proponent's claim may precede the fact to which it is relevant,⁶² or may follow in point of time the *res gestae* of the particular case, as where a master discharges a servant alleged to have been negligent,⁶³ or pays money into court.⁶⁴

§ 560. [Admissions by Conduct]; Silence.⁶⁵—Should a party to a litigation deny the truth of a statement made to him no reason exists for introducing the fact in evidence, as an admission that the statement was true.⁶⁶ On the contrary, should he fail to deny the truth of the statement made to him, or in his presence, it has been thought that under cover of the maxim that "silence gives consent"⁶⁷ some rule of evidence renders admissible as against the party all which was said in his presence and not categorically or in substance denied by him.⁶⁸ The dangers of such a rule are obvious. No rights of a party whom anyone saw fit to address concerning them would be safe under such a state of the law.⁶⁹ Silence may be probatively relevant by giving rise to other inferences than that of acquiescence. For example, failure to answer a pertinent question may be significant to the effect that the person addressed knows of no way in which it can be truthfully or even plausibly answered to his advantage.⁷⁰

§ 561. [Admissions by Conduct]; Failure to Object to Written Statements.⁷¹—Failure to object to the written statement of a party may be explained by so many causes not applicable to silence when the parties are in personal conversation that all such evidence is of a lighter character than when the same facts are orally stated to the party, even where other circumstances continue to be the same.⁷² Under many states of fact it is doubtful whether failure

59. *State v. Cicely*, 13 Smedes & M. (Miss.) 208 (1849).

60. *People v. Rathbun*, 21 Wend. (N. Y.) 509, 520 (1839).

61. *People v. Cleveland*, 107 Mich. 367 (1895).

62. *Chicago, etc., Ry. Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161 (1902).

63. *Martin v. Towle*, 59 N. H. 31 (1879).

64. *Lucy v. Walrond*, 3 Bing. N. C. 841, 6 L. J. C. P. 290 (1837).

65. 2 Chamberlayne, Evidence, § 1401.

66. *People v. Morton*, 139 Cal. 719, 73 Pac. 609 (1903); *Low v. State*, 108 Tenn. 127, 65 S. W. 401 (1901); 2 Chamb., Ev., § 1401,

n. 1. *Reiteration of Denial*.—A denial is not so far conclusive as to remove, of necessity, probative effect from a subsequent failure to deny. *Jewett v. Ranning*, 21 N. Y. 27 (1860).

67. *Bailey v. Bailey*, 139 Mo. App. 176, 122 S. W. 1099 (1909).

68. *Mattocks v. Lyman*, 16 Vt. 113 (1844).

69. *Moore v. Smith*, 14 Serg. & R. (Pa.) 388 (1826); *Mattocks v. Lyman*, *supra*.

70. *Jackson v. State*, 167 Ala. 77, 52 So 730 (1910).

71. 2 Chamberlayne, Evidence, §§ 1402-1406.

72. *Fennig v. Weston*, 31 Vt. 345 (1858); 2 Chamb., Ev., § 1402, ns. 1, 2, 3, 4.

to deny a written statement can fairly be said to have any probative value whatever.⁷³

Obligation of Good Faith.—In order that any inference should properly be drawn against a party from failure to reply to written statements brought to his notice it must affirmatively appear not only (a) that he received the writing in question,⁷⁴ and understood its meaning; but also (b) that some moral or legal obligation thereupon became imposed upon the person in question to take at once a definite attitude on the subject and not permit the writer of the statement to continue to assume it to be true, unless, in fact, it be true.⁷⁵

Effect of Denials.—One to whose attention statements in a writing are brought is not required to reiterate a previous denial.⁷⁶ Nor can one who has denied all liability reasonably be required to furnish, in addition, a specific denial of each separate item.⁷⁷

Conditions of Admissibility; Party Must Understand the Statement.—Where it is affirmatively made to appear to the court, by access to,⁷⁸ possession⁷⁹ or use of them,⁸⁰ that the party had full opportunities of becoming acquainted with papers and documents, it will be assumed, in the absence of evidence to the contrary, that he was acquainted with their contents. So far, therefore, at least, as they affect himself it will be reasonably assumed that he knew them. Such knowledge does not, in itself, imply assent to the truth of the proposition stated in the document.⁸¹ It merely makes the conduct of the party significant; for without such knowledge it can have no force in establishing acquiescence.

Party Must be Under a Definite Duty to Declare the Truth.—Where one is under no obligation, moral or legal, to declare his position in a given matter, his silence is meaningless. Still, showing that a party has read a newspaper article⁸² or accepted a bill of costs as taxed⁸³ without objection to any statement found in such documents furnishes some evidence of assent to the truth of the assertions made in them. Where, however, it is known that the party addressed has already taken a final position in the matter,⁸⁴ and there-

73. 2 Chamb., Ev., § 1402.

74. *Greenburg v. S. D. Childs & Co.*, 242 Ill. 110, 89 N. E. 679 (1909).

75. *Lucy v. Mouflet*, 5 H. & N. 229, 29 L. J. Ex. 110 (1860); 2 Chamb., Ev., § 1403, n. 2.

76. *Churchill v. Fulliam*, 8 Iowa 45 (1859); *Cheney v. Cheney*, 162 Mass. 591 (1895); 2 Chamb., Ev., § 1404, n. 1.

77. *Hinton v. Coleman*, 45 Wis. 165 (1878); *Watson v. Travelers' Ins. Co.*, 43 Wash. 396, 86 Pac. 659 (1906).

78. *Cheney v. Cheney*, *supra*.

79. *Wilshusen v. Binns*, 45 N. Y. Supp. 1085, 19 Misc. 547 (1897); *George A. Fuller Co. v. Doyle*, 87 Fed. 687 (1898). CONTRA:

People v. Colburn, 105 Cal. 648, 38 Pac. 1105 (1895).

80. *Prout v. Chisholm*, 47 N. Y. Supp. 376, 21 App. Div. 54 (1897); *Ryder v. Jacobs*, 196 Pa. 386, 46 Atl. 667 (1900); 2 Chamb., Ev., § 1405, n. 3.

81. *Com. v. Eastman*, 1 Cush. (Mass.) 189, 215 (1848); *Starkweather v. Converse*, 17 Wend. (N. Y.) 20 (1837); 2 Chamb., Ev., § 1405, n. 4.

82. *People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902).

83. *Hamilton v. Gray*, 67 Vt. 233, 31 Atl. 315 (1894).

fore, the sender of the letter cannot be misled by failure to reply, or derive advantage from further repetition of familiar statements, no obligation to speak exists. The presence of unsettled matters tends to increase the urgency for the exercise of good faith. For example, that there is a pending correspondence assists to create a duty to reply to statements deemed erroneous.⁸⁵ So, where one in receipt of a letter sees fit to answer it in part, he must answer fully, if he desires to avoid the inference that he acquiesces in any statements which he does not deny.⁸⁶ *In case of documents other than letters*, the party in order to be affected must either have been under some legal or moral obligation to speak, or should have, in part at least, undertaken to do so.⁸⁷ Otherwise, failure to give a claim any attention is without probative effect upon the situation.⁸⁸

§ 562. [Admissions by Conduct]; Probative Force.⁸⁹—The inference of assent may arise equally from other facts, e. g., long retention without objection, and then only when there is a duty which would impel to dissent in view of the nature of the statements if they were false. If the party's conduct taken in connection with these statements, either in the way of a reply,⁹⁰ failure to answer⁹¹ or other conduct,⁹² tends to show concurrence in the truth of a relevant written statement,⁹³ evidence of such conduct is competent.

Active Adoption.—The rule under consideration is limited to cases of inference from silence. It does not extend to positive acts in adoption of the statements of a letter, as where the party acquainted with the contents assists in its mailing,⁹⁴ or letter press copies of them are found in his possession.⁹⁵ Such conduct may prove a written admission or constitute one by active rather than passive adoption.

Effect of Partial Answers.—Increased weight⁹⁶ and even a *prima facie* quality,⁹⁷ attaches to failure to object to a given assertion, if the truth of

84. *Learned v. Tillotson*, 97 N. Y. 1, 40 Am. Rep. 508 (1884); *Dempsey v. Dobson*, 174 Pa. 122, 34 Atl. 459, 52 Am. St. Rep. 516, 32 L. R. A. 761 (1896); 2 Chamb., Ev., § 1406, n. 4.

85. *Fenno v. Weston*, *supra*.

86. *Com. v. Eastman*, *supra*; *Tilton v. Beecher*, 59 N. Y. 176 (1875); *Fenno v. Weston*, *supra*.

87. *Burns v. Campbell*, 71 Ala. 271 (1882).

88. *Sullivan v. Louisville, etc., R. Co.*, 128 Ala. 77, 30 So. 528 (1900); *Robinson v. Fitchburg, etc., R. Co.*, 7 Gray (Mass.) 92 (1856).

89. 2 Chamberlayne, Evidence, §§ 1407–1410.

90. *Triachet v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 456 (1860); 2 Chamb., Ev., § 1407, n. 1.

91. *Gaskill v. Skene*, 14 Q. B. 664, 68 E. C. L. 664 (1850).

92. *Keith v. Electrical Engineering Co.*, 136 Cal. 178, 68 Pac. 598 (1902); *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384 (1896); 2 Chamb., Ev., § 1407, n. 3.

93. *Reg. v. Hare*, 3 Cox C. C. 247 (1848).

94. *Hulett v. Carey*, *supra*; 2 Chamb., Ev., § 1408, n. 1.

95. *Com. v. Jeffries*, 7 Allen (Mass.) 548 (1863).

96. *Burns v. Campbell*, *supra*; *Tams v. Lewis*, 42 Pa. 402 (1862); 2 Chamb., Ev., § 1409, n. 1.

97. *Prout v. Chisolm*, *supra*; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129, 19 L. ed. 884 (1869).

other assertions in the same writing is disputed, while the declaration in question is accepted without demur. By any recognition of the correctness of the statements contained in a letter,⁹⁸ as by accepting benefits conferred on him by its terms⁹⁹ or retaining, without demur, money sent under certain conditions,¹ the litigant may furnish corroborative evidence of his acquiescence in the correctness of its statements.

Inference Rebuttable.—The inference of acquiescence from failure to deny a written statement is by no means of conclusive force. Such silence is merely one circumstance, to be weighed with others, bearing upon the truth of the statement itself.²

§ 563. [Admissions by Conduct]; Scope of Inference; Book Entries.³— Assertions of relevant facts contained in ordinary accounts current,⁴ or book entries, whether kept by clubs,⁵ corporations,⁶ firms⁷ or individuals⁸ may be shown, together with the conduct of a party to be affected by such statements. Failure to object to the truth of these may reasonably be deemed relevant on the issue of acquiescence.⁹

Commercial Writings.—The same rule applies to statements made in other mercantile papers, commonly employed in business dealings.¹⁰ Such declarations may, in connection with a party's failure, for a considerable time, to object to them,¹¹ be significant, even to the extent of suggesting the inference that the party knew them to be true.

Legal Documents.—The same observations apply to statements in any usual legal documents.¹² Notice to a tenant requiring him to quit and de-

98. *Murray v. East End Imp. Co.*, 22 Ky. L. Rep. 1477, 60 S. W. 648 (1901); 2 Chamb., Ev., § 1409, n. 3.

99. *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 165, 59 N. E. 995 (1901); *Sturtevant v. Wallack*, 141 Mass. 119, 4 N. E. 615 (1886).

1. *Id.*

2. *Waring v. U. S. Telegraph Co.*, 4 Daly (N. Y.) 233, 44 How. Pr. 69 (1872); *Hill v. Pratt*, 29 Vt. 119 (1856); 2 Chamb., Ev., § 1410, n. 1.

3. 2 Chamberlayne, Evidence, §§ 1411-1415.

4. *House v. Beak*, 43 Ill. App. 615 (1891); *Fisk Pavement, etc., Co. v. Evans*, 60 N. Y. 640 (1875); *Jones v. De Muth*, 137 Wis. 120, 118 N. W. 542 (1908); 2 Chamb., Ev., § 1411, n. 2.

5. *Raggett v. Musgrave*, 2 C. & P. 556, 12 E. C. L. 730 (1827).

6. *Anderson v. Mutual Reserve Fund L. Assoc.*, 171 Ill. 40, 49 N. E. 205 (1898); *Allen v. Coit*, 6 Hill (N. Y.) 318 (1844). Some implication of actual knowledge must

be furnished. *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046 (1891); 2 Chamb., Ev., § 1411, n. 4. See as to other views, 2 Chamb., Ev., § 1411, n. 4.

7. *Kohler v. Lindenmeyr*, 129 N. Y. 498, 29 N. E. 957 (1892); *Chick v. Robinson*, 37 C. C. A. 205, 95 Fed. 619 (1899).

8. *Cheney v. Cheney*, *supra*; *Raub v. Nisbett*, 118 Mich. 248, 76 N. W. 393 (1898); *Tanner v. Parshall*, 3 Keyes (N. Y.) 431, 4 Abb. Dec. 356, 35 How. Pr. 472 (1867); 2 Chamb., Ev., § 1411, n. 6.

9. *Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023 (1903).

10. *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, 36 L. R. A. 539 (1897); *Del Piano v. Caponigri*, 46 N. Y. Supp. 452, 20 Misc. 541 (1897); 2 Chamb., Ev., § 1412, n. 1.

11. *Weigle v. Brautigam*, 74 Ill. App. 285 (1897); *Pabst Beer Co. v. Lueders*, 107 Mich. 41, 64 N. W. 872 (1895); *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569 (1818); 2 Chamb., Ev., § 1412, n. 2.

12. *Patrick v. Crowe*, 15 Colo. 543, 25 Pac.

liver up possession of certain premises¹³ is a common instance of the employment of this rule. Even less formal writings¹⁴ stand in the same position. The rule applies, with especial stringency, to "proofs of loss" rendered under a contract of insurance.¹⁵

Letters.— Failure to object to statements in a letter does not, as a rule, admit their truth.¹⁶ No obligation exists, under ordinary circumstances, to reply to any self-serving declarations which another sees fit to send to him in this form.¹⁷ One who is injured is under no obligation to complain of the damage done to him under penalty of losing, by silence, a right to redress.¹⁸

Evidence Admitted.— There are however, important exceptions to this rule,¹⁹ circumstances under which failure to reply to written statements tends to show acquiescence in their truth.²⁰ Whenever good faith requires that the receiver of a letter should declare his position frankly in order that the person sending the original letter may not be misled,²¹ his retaining the letter without objection is a significant fact. This may happen when he is aware that the sender is about to act upon the assumption that he is correct in his own statement.²² Under such circumstances failure to deny will be deemed evidence of acquiescence in the truth of the facts asserted.

Criminal Cases.— For similar reasons, in a criminal case, the letters sent to defendant by the prosecuting witness, or other person are inadmissible as admissions by conduct of the former by mere reason of the fact that he makes no reply to the statements therein contained.²³ No inference of acquiescence by silence could possibly arise unless and until it be shown that the accused actually received the letter.²⁴ Even should he have received it, no inference

985 (1890); *Schrowang v. Sahler*, 2 N. Y. Supp. 140 (1888). *Memorandum of sale*, see *Friedman v. Enders*, 116 N. Y. Supp. 461 (1909).

13. *St. Louis Consol. Coal Co. v. Schaefer*, 31 Ill. App. 364 (1889).

14. *Grier v. Deputy*, 1 Marv. (Del.) 19, 40 Atl. 716 (1894).

15. When the insurer submits, as required by the contract, proofs of loss, any unnecessary retention of them by the insurer without objection, will be deemed an acquiescence in the truth of the statements made in them, especially if the time during which new proofs may be filed has elapsed. 2 Chamb., Ev., § 1413, n. 4.

16. *Razor v. Razor*, 149 Ill. 621, 36 N. E. 963 (1894); *Fearing v. Kimball*, 4 Allen (Mass.) 125, 81 Am. Dec. 690 (1862); *Haas, Schachter & Kass v. Bonwit, Teller & Co.*, 119 N. Y. Supp. 202 (1909); *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385 (1894); 2 Chamb., Ev., § 1414, n. 1.

17. *Chicago v. McKechney*, 205 Ill. 372,

68 N. E. 954 (1903); *Com. v. Edgerly*, 10 Allen (Mass.) 184 (1865); *Gray v. Kaufman, D. & I. C. Co.*, 162 N. Y. 388, 397, 56 N. E. 903 (1900); 2 Chamb., Ev., § 1414, n. 2.

18. *Starkweather v. Converse*, 17 Wend. (N. Y.) 20 (1837).

19. *Richards v. Gellatly*, L. R. 7 (C. P.) 127 (1872).

20. *Meach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. 867 (1900); *Murray v. East End Imp. Co.*, *supra*; *Whitaker v. White*, 23 N. Y. Supp. 487, 60 Hun 258 (1893); 2 Chamb., Ev., § 1414, n. 5.

21. *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385 (1894); *Janin v. Cheney*, 60 N. Y. Supp. 645, 44 App. Div. 110 (1899).

22. *Dutton v. Woodman*, 9 Cush. (Mass.) 257 (1852); *Hill v. Pratt*, 29 Vt. 119 (1856).

23. *People v. Colburn*, 105 Cal. 648 (1894); *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846 (1898); 2 Chamb., Ev., § 1414, n. 9.

24. *Com. v. Edgerly*, *supra*; *Payne v. Com.*, 31 Gratt. (Va.) 855 (1878).

of acquiescence from silence naturally arises.²⁵ Should the accused have replied to the letter or otherwise acted upon it the reply or other conduct may be shown in evidence and so much of the letter as tends to give probative point to the evidence so introduced.²⁶ *A fortiori*, the accused himself is not permitted to introduce as evidence in his own behalf, favorable letters sent to him by persons not connected with the *res gestae*.²⁷

§ 564. [Admissions by Conduct]; Independent Relevancy.²⁸—It is advisable that the effect of the written statement which is not denied by a party under circumstances which render his conduct significant on the issue of acquiescence should be distinguished from declarations which are received in evidence because they are independently relevant. The writing in the latter case is not offered as evidence of facts stated by it; its probative force lies rather in the results directly accomplished by it, by reason of its bare existence.²⁹ It gives notice,³⁰ constitutes a demand,³¹ affords knowledge,³² creates an identification³³ or the like.³⁴

§ 565. [Admissions by Conduct]; Falsehood.³⁵—Prominent among admissions by conduct is the making of false statements by the accused regarding important matters involved in the inquiry. The inference is the same as that which arises in other cases of fabrication or spoliation,³⁶ i. e., the accused knows that he will be shown to be guilty in a criminal proceeding or unsuccessful in a civil one were the facts fully known. The government, therefore, is at liberty to show the most self-serving explanations or other statements of the accused with a view to proving the fact that they are false³⁷ and that the accused must have known it.

§ 566. [Admissions by Conduct]; Silence as Proof of Acquiescence.³⁸—Failure to deny a statement made in one's presence under surroundings which prompt to speech if the statement were false, is some evidence of acquiescence

25. *People v. Green*, 1 Park. Cr. (N. Y.) 11 (1845).

26. *People v. Colburn*, *supra*; *State v. Stair*, 87 Mo. 268, 56 Am. Rep. 449 (1885).

27. *State v. Crowder*, 41 Kan. 101, 21 Pac. 208 (1889).

28. 2 Chamberlayne, Evidence, § 1416.

29. *Sturtevant v. Wallack*, 141 Mass. 119, 4 N. E. 615 (1886).

30. *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712 (1863); *Allen v. Peters*, 4 Phila. (Pa.) 78 (1860).

31. *Hand v. Howell*, 61 N. J. L. 142, 38 Atl. 748 (1897); *Hill v. Pratt*, 29 Vt. 119 (1856).

32. *Infra*, § 850; 4 Chamb., Ev., § 2666; *Carne v. Steer*, 5 H. & N. 628 (1860).

33. *R. v. Plumer*, R. & R. 264 (1814).

34. *Dutton v. Woodman*, *supra*; *Hullett v. Carey*, *supra*.

35. 2 Chamberlayne, Evidence, § 1417.

36. *Supra*, §§ 430 *et seq.*; 2 Chamb., Ev., §§ 1070 *et seq.*

37. *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098 (1904); *Com v. Goodwin*, 14 Gray (Mass.) 55 (1859); *People v. Wilkinson*, 14 N. Y. Supp. 827 (1891); 2 Chamb., Ev., § 1417, n. 2.

38. 2 Chamberlayne, Evidence, §§ 1418-1422. Admissions by failing to contradict. See note, Bender Ed., 162 N. Y. 399. Failure to deny statements as an admission. See note, Bender Ed., 92 N. Y. 29.

in the truth of the assertion.³⁹ Regarded, therefore, as evidence of acquiescence in ⁴⁰ or adoption of a statement made in the presence of a party ⁴¹ or even as a relevant circumstance, his total ⁴² or partial ⁴³ silence and failure to deny the truth of the statement made in his presence is probative in proportion to the strength of the impulse to speak which is thus controlled.⁴⁴ It follows that it is not the fact of silence which is probative. It is the fact of silence *under certain circumstances*. Standing alone, the statement made in the party's presence is without logical bearing as to the existence of the fact asserted; only in connection with some evidence of significant conduct ⁴⁵ on the part of the listener does the statement itself become entitled to evidentiary weight.⁴⁶

Civil Cases.—The inference of acquiescence from silence may arise in civil cases.⁴⁷ Reading a statement to a party may, in connection with his non-denial be sufficient to show acquiescence in its assertions.⁴⁸ In any case, it must be made affirmatively to appear that the party in question understood the force and effect of what was said to him, and that he was, in view of the circumstances, under the duty or probably influenced by some impulse to speak, if this well could have been done.⁴⁹ Relevant statements made in an agent's presence and not denied by him, may be competent facts.⁵⁰ But narrating a past occurrence in the presence of an agent who is not called upon to act upon the information furnished, may be entirely immaterial.⁵¹ Municipal agents stand in the same position.⁵² *Self-serving statements*, where not,

39. *State v. Quirk*, 101 Minn. 334, 112 N. 409 (1907); *Bass v. Tolbert* (Tex. Civ. App. 1908), 112 S. W. 1077; *Vail v. Strong*, 10 Vt. 457 (1838); 2 Chamb., Ev., § 1418, n. 1.

40. *Holston v. Southern R. Co.*, 116 Ga. 656, 43 S. E. 29 (1902); *Proctor v. Old Colony R. Co.*, 154 Mass. 251, 28 N. E. 13 (1891); *Lathrop v. Bramhall*, 3 Hun (N. Y.) 394 (1875); 2 Chamb., Ev., § 1418, n. 2.

41. Silence of an agent may bind the principal. *Gault v. Sickles*, 85 Iowa 266, 52 N. E. 206 (1892); *Stecher Lithographic Co. v. Iaman*, 175 N. Y. 124, 67 N. E. 213 (1903); 2 Chamb., Ev., § 1418, n. 3.

42. *Gibney v. Marchay*, 34 N. Y. 301 (1866); *Webb v. Atkinson*, 124 N. C. 447, 32 S. E. 737 (1899); 2 Chamb., Ev., § 1418, n. 4. See, however, *Merriweather v. Com.*, 26 Ky. L. Rep. 793, 82 S. W. 592 (1904).

43. *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134 (1909); *Rowe v. Bregenzer*, 161 Mich. 684, 126 N. W. 706 (1910); 2 Chamb., Ev., § 1418, n. 5.

44. *Proctor v. Old Colony R. Co.*, *supra*; *Peck v. Ryan*, 110 Ala. 336, 17 So. 733

(1895); *Gibney v. Marchay*, *supra*, 2 Chamb., Ev., § 1418, n. 6.

45. *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894); *Gibney v. Marchay*, *supra*; *Com. v. Trefethen*, 157 Mass. 180 (1892); 2 Chamb., Ev., § 1418, n. 7.

46. *People v. Mallon*, *supra*; *Senn v. Southern R. Co.*, 108 Mo. 142, 18 S. W. 1007 (1891). Functions of judge and jury, see 2 Chamb., Ev., § 1418, n. 8.

47. *Kozlowski v. City of Chicago*, 113 Ill. App. 513 (1904); *Proctor v. Old Colony R. Co.*, *supra*; *Cable v. Bowlus*, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526 (1900); 2 Chamb., Ev., § 1419, n. 1.

48. *Huggins v. Southern Ry. Co.*, 148 Ala. 153, 41 So. 856 (1906); *People v. Rollins*, 14 Cal. App. 134, 111 Pac. 123 (1910).

49. *Parulo v. Philadelphia & R. Ry. Co.* (U. S. C. C., N. Y. 1906), 145 Fed. 664.

50. *Linderberg v. Crescent Min. Co.*, 9 Utah 163, 33 Pac. 692 (1893).

51. *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134 (1887).

52. *Maher v. Chicago*, 38 Ill. 266 (1865).

as a rule, admissible in favor of the declarant,⁵³ may be received if made in the presence of the opposite party and not denied by him.⁵⁴

Criminal Prosecution.—The same inference of acquiescence from silence may be made in the case of one accused or suspected of crime.⁵⁵ It may be employed to establish the existence even of the *corpus delicti* itself,⁵⁶ the connection of the person in question with it, or regarding the existence of any other material fact.⁵⁷ Alleged admissions by accused from his failure to deny incriminating statements made in his presence are, it is said, subject to the same rules as applied to confessions.⁵⁸ It is not a consideration of any importance that the person who makes a relevant assertion in the presence of a criminal defendant would himself be incompetent to testify as a witness on the point to the same effect.⁵⁹

Self-serving Statements.—The declarant is not entitled to use his self-serving statements⁶⁰ except so far as fairly necessary to qualify the effect of the concatenated facts, the statement and his conduct in respect to it, used against him.⁶¹ A denial by the defendant of liability for an offense makes the charge in his presence irrelevant.⁶² Should the accused, however, answer in part, his reply will be considered by the jury as a whole.⁶³

Inference of Acquiescence Rebuttable.—In the absence of facts grounding an estoppel⁶⁴ the failure to deny may be controlled in its effect by other evidence.⁶⁵ Non-denial is merely one fact among others bearing on the question. It is not conclusive in its nature.⁶⁶

§ 567. [Admissions by Conduct]; Conditions of Admissibility.—There are four conditions of admissibility required: (a) The party must be shown to have understood the statement. (b) It must appear that it would have been natural to have denied the statement if it had been false. (c) The person addressed must possess at the time adequate knowledge on the subject covered by the statement. (d) He must have been physically and mentally able to

53. *Infra*, §§ 857 et seq.; 4 Chamb., Ev., §§ 2698 et seq.

54. *Wonsetler v. Wonsetler*, 23 Pa. Super. Ct. 321 (1903).

55. *People v. Swaile*, *supra*; *Conway v. State*, 118 Ind. 482, 21 N. E. 285 (1888); *Com. v. O'Brien*, 179 Mass. 533, 61 N. E. 213 (1901); *People v. McCue*, 178 N. Y. 579, 70 N. E. 1104 (1904); 2 Chamb., Ev., § 1420, n. 1.

56. The contrary view has been maintained. *People v. Rowland*, 12 Cal. App. 6, 106 Pac. 428 (1909).

57. *Com. v. Finai*, 146 Mass. 570 (1888); *State v. Burton*, 94 N. C. 947 (1886).

58. *Hauger v. U. S.* (W. Va. 1909), 173 Fed. 54, 97 C. C. A. 372.

59. *People v. McCrea*, 32 Cal. 98 (1867);

Richards v. State, 82 Wis. 172, 51 N. W. 652 (1892).

60. *Williams v. Mower*, 29 S. C. 332, 7 S. E. 505 (1888).

61. *Davidson v. State*, 135 Ind. 254, 34 N. E. 972 (1893); *Clement v. Drybread*, 108 Iowa 701, 78 N. W. 235 (1899); 2 Chamb., Ev., § 1421, n. 2.

62. *Low v. State*, 108 Tenn. 127, 65 S. W. 401 (1901).

63. *Com. v. Robinson*, 165 Mass. 426, 43 N. E. 121 (1895).

64. *Mattocks v. Lyman*, 16 Vt. 113 (1844).

65. *Hagenbaugh v. Crabtree*, 33 Ill. 225 (1864); *Cable v. Bowlus*, *supra*; 2 Chamb., Ev., § 1422, n. 2.

66. *Jones v. Morrell*, 1 C. & K. 266, 47 E. C. L. 266 (1844).

deny the statement had he seen fit.⁶⁷ The burden is upon the proponent of the evidence to show⁶⁸ to the satisfaction of the court,⁶⁹ that these conditions of admissibility exist in any particular case. There is, however, no impropriety in leaving the question⁷⁰ as well as that of weight⁷¹ to the jury.

§ 568. [Admissions by Conduct]; Statement Must Have Been Understood.⁷²—Affirmative evidence must be produced by the proponent⁷³ to the effect that the statement was a definite⁷⁴ declaration of fact;⁷⁵ and that the party actually heard⁷⁶ and understood it.⁷⁷

All Attendant Objective Facts Considered.—Thus, the loudness of tone in which a remark is made,⁷⁸ the intervention of objects calculated to deflect sound,⁷⁹ the proximity of the speaker, all are or may be material considerations determining whether it may fairly be inferred that the party heard the statement and understood it.⁸⁰

Understanding Assumed From Hearing.—If it appears that a person heard a remark, it may fairly be assumed, in the absence of evidence to the contrary, that he understood it. If made in a party's hearing, it is not necessary that it should have been made in his immediate presence.⁸¹ One may be said to be "present" if there is "proximity within a distance sufficient to permit hearing."⁸² Proof that a remark is made within hearing distance of a person is not equivalent to proof that the remark was heard,⁸³ unless the person must necessarily have heard it,⁸⁴ or it can reasonably be inferred that he did so.

All Attendant Subjective Facts Considered.—It must appear that the

67. *Com. v. Kenney*, 12 Metc. (Mass.) 235 (1847); 2 Chamb., Ev., § 1423.

68. *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894); *Drumright v. State*, 20 Ga. 430 (1859).

69. *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272 (1897); *Com. v. Kenney*, *supra*; 2 Chamb., Ev., § 1423, n. 2.

70. *State v. Perkins*, 3 Hawks (N. C.) 377 (1824).

71. *Jewett v. Banning*, 21 N. Y. 27 (1860); *Pierce v. Pierce*, 60 Vt. 369, 29 Atl. 364 (1894); 2 Chamb., Ev., § 1423, n. 4.

72. 2 Chamberlayne, Evidence, §§ 1424-1427.

73. *Joseph v. Furnish*, 27 Or. 260, 41 Pac. 424 (1895); *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287 (1906); 2 Chamb., Ev., § 1424, n. 1.

74. *Chapman v. State*, 109 Ga. 157, 34 S. E. 309 (1899).

75. *State v. Foley*, 144 Mo. 600, 46 S. W. 733 (1898).

76. *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31 (1892); *Simmons v. State*, 115 Ga.

574, 41 S. E. 983 (1902); *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783 (1894); *People v. Bissert*, 75 N. Y. Supp. 630, 72 App. Div. 620 (1902); 2 Chamb., Ev., § 1424, n. 4.

77. *Martin v. Capital Ins. Co.*, 85 Iowa 643, 52 N. W. 534 (1892); *Com. v. Kenney*, *supra*; *State v. Burton*, 94 N. C. 947 (1886); 2 Chamb., Ev., § 1424, n. 5. The silence must amount to voluntary demeanor. *State v. Blackburn* (Del. 1892), 75 Atl. 536.

78. *Vincent v. Huff*, 8 Serg. & R. (Pa.) 381 (1822).

79. *Yale v. Dart*, 17 N. Y. Supp. 179 (1891); *Joseph v. Furnish*, *supra*; 2 Chamb., Ev., § 1425, n. 2.

80. *State v. Record*, 151 N. C. 695, 65 S. E. 1010 (1909).

81. *Neile v. Jakle*, 2 C. & K. 709, 61 E. C. L. 709 (1849).

82. *People v. Philbon*, 138 Cal. 530, 71 Pac. 650 (1903); 2 Chamb., Ev., § 1426, n. 2.

83. *Jackson v. Builders' Wood Working Co.*, 36 N. Y. Supp. 227, 91 Hun 435 (1895).

84. *Moore v. Smith*, 14 Serg. & R. (Pa.) 388 (1826).

party both heard and understood⁸⁵ the declaration in question. If the person appears to have been unconscious,⁸⁶ asleep,⁸⁷ or even semi-conscious,⁸⁸ the statement is incompetent, though there is some evidence that the person may be shamming his unconsciousness.⁸⁹ The rule is the same if the person was, at the time, drunk or stupified.⁹⁰ If it shall appear that he was so deaf⁹¹ as to be unable to hear, no inference will be drawn from his silence.

Attention.—In order that an inference should arise to the effect that he understood a given statement made in his presence, it must affirmatively appear that his attention was, in point of fact, directed to the remark,⁹² i. e., that he was listening to it.⁹³ If it appears that his attention was so diverted from what was being said at the time by present suffering,⁹⁴ or occupation in distinct affairs,⁹⁵ no inference arises from failure to controvert any injurious statement made in the party's presence.

§ 569. [Admissions by Conduct]; Denial Must be Natural.⁹⁶—Affirmative evidence must also be submitted that the party would be interested to deny the statement were he able to do so, i. e., were it false.⁹⁷ All the relevant facts pertaining to the declaration should be taken into consideration.⁹⁸ The entire occurrence should, therefore, be placed before the jury, who are at liberty to draw any legitimate inferences from it as to the guilt of the accused.⁹⁹ It is good circumstantial evidence.¹

(1) *Declaration Must Invite a Reply.*—The statement in respect to which the conduct of the party is significant must be such as to call for a reply.² The fact covered by the statement and by it directly or indirectly asserted to

85. *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579 (1893); *Wright v. Maseras*, 56 Barb. (N. Y.) 521 (1869); 2 Chamb., Ev., § 1427, n. 1.

86. *Dean v. State*, 105 Ala. 21, 17 So. 28 (1894); *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730 (1897).

87. *Lanergan v. People*, 39 N. Y. 39 (1868).

88. *Gowen v. Bush*, 76 Fed. 349, 22 C. C. A. 196 (1896).

89. *People v. Koerner*, *supra*.

90. *State v. Perkins*, *supra*.

91. *Tufts v. Charlestown*, 4 Gray (Mass.) 537 (1855).

92. *Jones v. State*, 65 Ga. 147 (1880).

93. *Steer v. Little*, 44 N. H. 613 (1863); *State v. Rosa* (N. J. 1905), 62 Atl. 605.

94. *Schilling v. Union R. Co.*, 78 N. Y. Supp. 1015, 77 App. Div. 74 (1902); 2 Chamb., Ev., § 1427, n. 10.

95. *Drury v. Hervey*, 126 Mass. 519 (1879).

96. 2 Chamberlayne, *Evidence*, §§ 1428–1431.

97. *Brantley v. State*, 115 Ga. 220, 41 S. E. 695 (1902); *Slattery v. People*, 76 Ill. 217 (1875); *Drury v. Hervey*, 126 Mass. 519 (1879); *Stecher Lith. Co. v. Inman*, 175 N. Y. 124, 67 N. E. 213 (1903); 2 Chamb., Ev., § 1428, n. 1.

98. *Fearing v. Kimball*, 4 Allen (Mass.) 125, 81 Am. Dec. 690 (1862); *Davis v. Gallagher*, 124 N. Y. 487, 26 N. E. 1045 (1891); 2 Chamb., Ev., § 1428, n. 2.

99. *Ackerson v. People*, 124 Ill. 563, 16 N. E. 847 (1888); *Com. v. Funai*, 146 Mass. 570, 16 N. E. 458 (1888); *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342 (1874); *Harberty v. State*, 8 Ohio Cir. Ct. 262 (1893); 2 Chamb., Ev., § 1428, n. 3.

1. *Watt v. People*, 126 Ill. 9, 18 N. E. 340 (1888); *Musfelt v. State*, 64 Neb. 445, 90 N. W. 237 (1902); 2 Chamb., Ev., § 1428, n. 4.

2. *Whitney v. Houghton*, 127 Mass. 527 (1879); *Sira v. Wabash, etc., R. Co.*, 115 Mo. 127, 21 S. W. 905 (1893); 2 Chamb., Ev., § 1429, n. 1.

be true must be such as to injuriously affect some considerable interest of the party in his real³ or personal⁴ property, his right to liberty or some other privilege,⁵ or to expose him to the social and legal punishment of crime.⁶ Should the party addressed be falsely led to believe that he has no concern in the subject matter of the inquiry, his silence loses all probative force.⁷ In like manner where a party is led to think that he has no motive to respond to the statements made in his presence, e. g., because the remarks were sufficiently favorable to him,⁸ failure to reply possesses no evidentiary value.

Party Expected to Speak.—The person addressed must realize that he is the person addressed and is, at least, expected to speak and at liberty to do so. Where the remarks in question are not addressed to the party⁹ or apparently intended for his consideration,¹⁰ or where, for any other reason, he may rationally think that he is not to be affected by his silence,¹¹ his conduct in the matter may have no probative value whatever.

Inducements to Silence.—If a person is at the time under the influence of fear, in the custody of arresting officers,¹² or is restrained from making reply by the presence of those with whom he is not in the habit of speaking on terms of equality,¹³ the silence may be without logical bearing.

(2) *The Declarant Must be Entitled to Reply.*—The declarant must be one who is a proper person to receive from the party in question information upon the subject to which the statement relates.¹⁴ A mere stranger is entitled to no reply.¹⁵ Reticence due to mere disinclination to discuss private affairs with others¹⁶ especially with those who by reason of intoxication,¹⁷ or for some other cause, are in no present condition to rationally consider what is said, has, in many cases, little, if any, logical significance. The person making the statement need, however, have no relation to the case in

3. *Wheeler v. State*, 109 Ala. 56, 19 So. 993 (1894); *Adams v. Morgan*, 150 Mass. 143, 22 N. E. 708 (1889); 2 Chamb., Ev., § 1429, n. 2.

4. *Matthews v. Forslund*, 112 Mich. 591, 70 N. W. 1105 (1897); *State v. Henderson*, 80 Mo. App. 482 (1900); 2 Chamb., Ev., § 1429, n. 3.

5. *Walbridge v. Arnold*, 21 Conn. 424 (1852); *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 150, 23 L. R. A. 244 (1893); 2 Chamb., Ev., § 1429, n. 4.

6. *Hicks v. Lawson*, 39 Ala. 90 (1863); *State v. Reed*, 62 Me. 129 (1874).

7. *Guy v. Manuel*, 89 N. C. 83 (1883).

8. *People v. Foo*, 112 Cal. 17, 44 Pac. 453 (1896).

9. *State v. Mullins*, 101 Mo. 514, 14 S. W. 625 (1890); *Pry v. Stowers*, 92 Va. 13, 22 S. E. 500 (1895); 2 Chamb., Ev., § 1429, n. 8.

10. *Pierce v. Pierce*, 60 Vt. 369 (1894).

11. *Ludwig v. Blackshere*, 102 Iowa 366, 71 N. W. 356 (1897); *Gerding v. Funk*, 64 N. Y. Supp. 423, 48 App. Div. 603 (1900); 2 Chamb., Ev., § 1429, n. 10.

12. *Infra*, § 593; 2 Chamb., Ev., § 1530.

13. *Bob v. State*, 32 Ala. 560 (1858).

14. *Drury v. Hervey*, *supra*; *Blanchard v. Evans*, 55 N. Y. Super. Ct. 543 (1888); *Geiger v. State*, 25 Ohio Cir. Ct. 742 (1904); 2 Chamb., Ev., § 1430, n. 1.

15. *Larry v. Sherburne*, 2 Allen (Mass.) 34 (1861); *People v. Page*, 162 N. Y. 272, 56 N. E. 750 (1900); 2 Chamb., Ev., § 1430, n. 2.

16. *Thornton v. Savage*, 120 Ala. 449, 25 So. 27 (1898); *Vail v. Strong*, 10 Vt. 457 (1838).

17. *Jones v. State*, 2 Ga. App. 433, 58 S. E. 559 (1907); *Francis v. Edwards*, 77 N. C. 271 (1877).

which it is offered.¹⁸ In any case, the person addressed must be aware that he is entitled to speak.¹⁹

Duty to Speak.—Where the circumstances are such as to impose upon the party a duty to speak,²⁰ as where persons are met for the express purpose of adjusting the matter under consideration,²¹ or, for some other reason, it is evident that the party whose silence is being considered is under some moral or legal duty to declare his position,²² the inferences to be drawn from silence grow to be more cogent in proportion as the duty of full disclosure becomes plain and pressing.

Husband and Wife.—Statements by a wife in presence of her husband, or *vice versa*,²³ are subject to the same tests as are applied to the statements of persons standing in less intimate relations.²⁴

(3) *Time Should be Appropriate for Denial.*—Should the circumstances be such that it would not be natural to expect a reply at that particular time,²⁵ as where an immediate denial would constitute an unseemly interruption of solemn²⁶ or orderly proceedings then in progress; where, for example, the declarant is a minister in the course of the delivery of a sermon,²⁷ failure on the part of hearers to interrupt and correct his statements on the spot implies no acquiescence in their truth. The same rule applies to a judge,²⁸ an examining²⁹ or committing magistrate, prosecuting officers,³⁰ counsel,³¹ parties appearing *pro se*³² or other person³³ discharging an appropriate function in court. For the same reasons a party

18. *Selig v. Rehfuess*, 195 Pa. 200, 45 Atl. 919 (1900); *Boyles v. McCowen*, 3 N. J. L. 253 (1810).

19. *Broyles v. State*, 47 Ind. 251 (1874); *Stowell v. Hall*, 56 Or. 256, 108 Pac. 182 (1910); 2 Chamb., Ev., § 1430, n. 6. *Court Proceedings.*—One in open court is not regarded as being at liberty to speak out in denial of charges of guilt made against him at the time. No adverse inference, therefore, arises from his silence. *Com. v. Walker*, 13 Allen (Mass.) 570 (1866); *State v. Mullins*, 101 Mo. 514 (1890); *People v. Willett*, 92 N. Y. 29 (1883); 2 Chamb., Ev., § 1430, n. 6.

20. *Giles v. Vandiver*, 91 Ga. 102 (1892); *Bulfer v. People*, 141 Ill. App. 70 (1908).

21. *Darlington v. Taylor*, 3 Grant (Pa.) 195 (1855).

22. *Des Moines Sav. Bank v. Colfax Hotel Co.*, 88 Iowa 4, 55 N. W. 67 (1893); *Reid v. Barnhart*, 34 N. C. 142 (1853); 2 Chamb., Ev., § 1430, n. 9.

23. *Pierce v. Pierce*, 66 Vt. 369 (1894).

24. *Owen v. Christensen*, 106 Iowa 394, 76 N. W. 1003 (1898); *Boyles v. McCowen*, 3 N. J. L. 253 (1810); 2 Chamb., Ev., § 1430, n. 11.

25. *McElmurray v. Turner*, 86 Ga. 215 (1890); *Johnson v. Holliday*, 79 Ind. 151 (1881); 2 Chamb., Ev., § 1431, n. 1.

26. *R. v. Mitchell*, 17 Cox Cr. 503 (1892). Statements made by a dying man, in presence of accused, regarding the circumstances attending the infliction of the fatal injury have, however, been received in evidence. *Donnelly v. State*, 26 N. J. L. 463, 504, 601, 612 (1857); *People v. Driscoll*, 107 N. Y. 414, 424, 14 N. E. 305 (1887).

27. *Johnson v. Trinity Church Soc.*, 11 Allen (Mass.) 123 (1865).

28. *Keith v. Marcus*, 181 Mass. 377, 63 N. E. 924 (1902).

29. *Weaver v. State*, 77 Ala. 26 (1884).

30. *R. v. Hollingshead*, 4 C. & P. 242 (1830).

31. *Puett v. Beard*, 86 Ind. 104 (1882); *Little v. R. Co.*, 72 N. H. 61, 55 Atl. 190 (1903); 2 Chamb., Ev., § 1431, n. 7.

32. *Abercrombie v. Allen*, 29 Ala. 281 (1856); *Brainard v. Buck*, 25 Vt. 573 (1853).

33. *Johnson v. Holliday*, *supra*; *Varnum v. Hart*, 47 Hun (N. Y.) 18 (1888).

is not at liberty to make instant contradiction of the statements of a witness, even though the person testifying should have been called by himself,³⁴ while the latter is giving testimony in a judicial hearing,³⁵ coroner's inquest³⁶ or preliminary investigation.³⁷ The rule is the same where a person is engaged in giving his testimony as a deponent.³⁸ If no suitable opportunity for reply is afforded later, non-denial of statements so made is meaningless, in an evidentiary sense.³⁹

Failure to Deny Later.— Failure to improve a subsequent known opportunity for denial, as where the party might testify as a witness⁴⁰ or testifying as a witness might have denied the statement but failed to do so,⁴¹ may be as significant as if an opportunity for instant denial were offered and allowed to pass.⁴²

Effect of Arrest.— The courts of several jurisdictions have deemed the position of one under arrest on a criminal charge as presenting an instance of the application of the rule which regards as insignificant statements made in a person's presence at a time inopportune for denying it, however false.⁴³ They have accordingly denied all force to the making of unanswered statements in the prisoner's presence. The same considerations have not impressed other courts to the same effect.⁴⁴ When the relation of the speaker to the accused is such as to make a reply appropriate,⁴⁵ the person addressed knows that he is at liberty to speak,⁴⁶ and other circumstances of probative force are presented in connection with the failure to reply,⁴⁷ the evidence has been received, even when the party in question was under arrest. No rule of exclusion has been formulated by the prevailing current of authority, due weight, in each case, being accorded to the fact of arrest, as furnishing a possible explanation of silence.⁴⁸ The question of admissibility in each case is decided upon the facts presented to the court.⁴⁹ It is generally agreed,

34. *McElmurray v. Turner, supra.*

35. *Id.*; *State v. Hale*, 156 Mo. 102, 56 S. W. 881 (1900); *Leggett v. Schwab*, 97 N. Y. Supp. 805, 111 App. Div. 341 (1906); 2 Chamb., Ev., § 1431, n. 11.

36. *State v. Mullins, supra*; *People v. Willett*, 36 Hun (N. Y.) 500 (1885).

37. *Bell v. State*, 93 Ga. 557, 19 S. E. 244 (1894); *Com. v. Zorambo*, 205 Pa. 109, 54 Atl. 716 (1903); 2 Chamb., Ev., § 1431, n. 13.

38. *Tobacco Co. v. McElwee*, 96 N. C. 71 (1887).

39. *Persons v. Jones*, 12 Ga. 371, 58 Am. Dec. 476 (1853); 2 Chamb., Ev., § 1431, n. 15.

40. *Blanchard v. Hodgkins*, 62 Me. 119 (1873); *Connell v. McNett*, 109 Mich. 329, 67 N. W. 344 (1896).

41. *State v. Dexter*, 115 Iowa 678, 87 N. W. 417 (1901).

42. *Supra*, § 566; 2 Chamb., Ev., § 1418.

But see, to the contrary, *Blackwell D. T. Co. v. McElwee*, 96 N. C. 71, 1 S. E. 676 (1887).

43. *Smith v. Duncan*, 181 Mass. 435, 63 N. E. 938 (1902); *State v. Foley*, 144 Mo. 600, 46 S. W. 733 (1898); *Hanger v. U. S.* (W. Va. 1909), 173 Fed. 54, 97 C. C. A. 372; 2 Chamb., Ev., § 1431, n. 19.

44. *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342 (1874); *Murphy v. State*, 36 Ohio St. 628 (1881); *Green v. State*, 97 Tenn. 50, 36 S. W. 700 (1896); 2 Chamb., Ev., § 1431, n. 20.

45. *Id.*

46. *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134 (1909).

47. *Spencer v. State*, 20 Ala. 24 (1852).

48. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794 (1901).

49. *People v. Smith*, 172 N. Y. 210, 64 N.

however, that when the officer enjoins silence upon the prisoner or cautions him not to speak, no inference of acquiescence in the statements subsequently made in his presence can properly be drawn.⁵⁰ Conduct in the presence of an officer immediately before arrest stands practically in the same position as conduct after arrest has taken place.⁵¹

Silence of Prudence.—No inference of acquiescence arises from failure to deny statements made in cases of difficult or dangerous discretion where a reasonable prudence would suggest the wisdom of reticence until an unusual state of affairs can be diagnosed under competent advice. *In general, where, for any reason, a party is not at liberty to speak, e.g., because he has agreed not to do so,⁵² or he is acting under advice,⁵³ in accordance with previous instructions,⁵⁴ or for some other reason at the time by some influence outside of the free exercise of his own volition,⁵⁵ his silence implies no acquiescence or assent.*

§ 570. *Same; Adequate Knowledge.*—Failure to reply to statements made in one's presence is not an adoption or acquiescence in their truth to such an extent as to make them those of the person addressed, nor is such failure even a relevant fact, unless it can be affirmatively shown that the person so addressed was, at the time possessed of adequate knowledge,⁵⁶ as to the truth or falsity of the statements. He must know the facts.⁵⁷

§ 571. *[Admissions by Conduct]; Party Must be Physically and Mentally Capable of Reply.*—It is further necessary that the party in question should be in a physical and mental condition such as to enable him, when addressed, to reply if he so desires. Where the individual in whose presence a statement has been made is so severely injured by shooting⁵⁸ or other violence, as to be unable to answer, remarks addressed to him, and received by him in silence, cannot be taken to have secured his assent. If he is merely sick,⁵⁹ or in course of transportation in an ambulance,⁶⁰ and though suffering some discomfort, is able to answer, if so disposed, his failure to reply may still be significant, by leading to an inference of assent. The rule is the same where the person addressed is suffering such agony, grief⁶¹ or other mental

E. 814 (1902); *Murphy v. State*, *supra*; 2 Chamb., Ev., § 1431, n. 25.

50. *People v. Kennedy*, 164 N. Y. 449, 58 N. E. 652 (1900); *People v. Kessler*, 13 Utah 69, 44 Pac. 97 (1896).

51. *People v. Wennerholm*, 166 N. Y. 567, 60 N. E. 259 (1901).

52. *Slattery v. People*, 76 Ill. 217 (1875).

53. *Killian v. Georgia, etc., R. Co.*, 97 Ga. 727, 25 S. E. 384 (1895).

54. *People v. Kessler*, *supra*.

55. *Flanagin v. State*, 25 Ark. 92 (1867); *Sindall v. Jones*, 57 Ga. 85 (1876).

56. *Robinson v. Blen*, 20 Me. 109 (1841);

Corser v. Paul, 41 N. H. 24 (1860); 2 Chamb., Ev., § 1432, n. 1.

57. *Griffith v. Zipperwick*, 28 Ohio St. 388 (1876); *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553 (1896); 2 Chamb., Ev., § 1432, n. 2.

58. *Dean v. State*, 105 Ala. 21, 17 So. 28 (1895); 2 Chamb., Ev., § 1433, n. 1.

59. *Lallande v. Brown*, 121 Ala. 513, 25 So. 997 (1899).

60. *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361 (1893).

61. *State v. Blackburn*, 7 Pennw. (Del.) 479, 75 Atl. 536 (1892).

agitation as to be unable to understand or answer⁶² any remarks made in his presence.

§ 572. [Admissions by Conduct]; Probative Force and Effect.⁶³— Admissions by conduct are properly classified, as to force and effect, with extra-judicial statements.⁶⁴ An admission by silence, being in reality another's statement adopted by a party to be affected, not being controlled by the rules of procedure, rests for its force and effect entirely upon its logical quality. In this respect, it is to be judged as any other admission⁶⁵ and may be controlled and explained in like manner.⁶⁶ It has been said that the probative force of this evidence is not great and that it should be received with caution.⁶⁷

§ 573. [Admissions by Conduct]; Statements and other Facts.⁶⁸— The statement that "admissions by conduct" are to be classed as admissions of the extra-judicial type should not, it would seem, be accepted as correct. In point of principle, and the symmetry which comes from consistency, such a course seems objectionable, in that it ignores two distinctions deeply embedded in the frame work of the English law of evidence: (a) that between statements and other acts, (b) that between the respective operation of procedure and logic. In reality, these two distinctions are different illustrations of a single fact which is yet more fundamental in the law of evidence, that while logic recognizes no distinction between statements and other acts of a party, procedure, as applied to the law of evidence, asserts the existence of a wide one. In other words, procedure places statements, whether made by a party or not, in a class by themselves in any connection where the statement is used as proof of the fact asserted in it.

This distinction appears artificial and invalid and is an incidental result of the jury system. There is no real distinction between the testimony of a witness concerning a statement he has heard and other facts he has observed.

62. *State v. Epstein*, 25 R. I. 131, 55 Atl. 204 (1903).

63. 2 Chamberlayne, Evidence, § 1433.

64. *Yarborough v. Moss*, 9 Ala. 382 (1846); *Yates v. Shaw*, 24 Ill. 368 (1860).

65. *White v. White*, 47 N. Y. Supp. 273, 20 App. Div. 560 (1897); *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 846 (1897); 2 Chamb., Ev., § 1434, n. 2.

66. *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923 (1897); *Webster v. Kansas*

City, etc., R. Co., 116 Mo. 114, 22 S. W. 474 (1893); 2 Chamb., Ev., § 1434, n. 3.

67. *Stephens v. Barnwell*, 154 Ala. 124, 45 So. 233 (1907); *Godwin v. State*, 1 Boyce (24 Del) 173, 74 Atl. 1101 (1910). As to the distinctions between statements and other facts, see 2 Chamb., Ev., §§ 1435, 1436, 1437; and as to deliberative facts, § 1438.

68. 2 Chamberlayne, Evidence, §§ 1435-1438.

CHAPTER XX.

OFFERS OF COMPROMISE.

Offers of compromise; rule of exclusion, 574.

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§ 574. **Offers of Compromise; Rule of Exclusion.**¹—If peace between parties to a controversy could reasonably have been the motive for making the offer of compromise, it will be assumed that the thought was to buy peace regardless of liability.² It is, accordingly the rule of procedure that the statement should not be received against the party making it. It is peremptorily rejected when offered for such a purpose.³ Any act, other than a statement, done for the purpose of facilitating a compromise settlement will be excluded for the same reasons, should the inference from it tend to establish a concession of liability on the part of the doer.⁴

Collateral Purposes.—Even for collateral purposes the *bona fide* offer to settle a dispute by paying or receiving a given sum is excluded as evidence of an indebtedness or of any fact injuriously affecting the rights of the

1. 2 Chamberlayne, Evidence, §§ 1439–1441. Admissibility of evidence of offers made in way of compromise. See note, Bender Ed., 144 N. Y. 901.

2. Chicago, B. & Q. R. Co. v. Roberts, 26 Colo. 329, 57 Pac. 1076 (1899); Sanborn v. Neilson, 4 N. H. 501, 509 (1828); White v. Old Dominion S. S. Co., 102 N. Y. 660, 6 N. E. 289 (1886); 2 Chamb., Ev., §§ 1439, 1440, n. 1.

3. Mahan v. Schroeder, 236 Ill. 392, 86 N. E. 97 (1908); Boylan v. McMillan, 137 Iowa 142, 114 N. W. 630 (1908); Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601 (1903); New York Life Ins. Co. v. Rankin (Mo.), 162 Fed. 103 (1908); Tennant v. Dudley, 144 N. Y. 504, 39 N. E. 644 (1895); Schiavone v. Callahan, 102 N. Y. Supp. 538, 52 Misc.

654 (1907); Sherer v. Piper, 26 Ohio St. 476 (1875); Richards v. Noyes, 44 Wis. 609 (1878); West v. Smith, 101 U. S. 263, 25 L. ed. 809 (1879); 2 Chamb., Ev., § 1440, n. 2.

4. Stranahan v. East Haddam, 11 Conn. 507 (1836); O'Brien v. New York City Ry. Co., 105 N. Y. Supp. 238, 55 Misc. 228 (1907); Gehm v. People, 87 Ill. App. 158 (1899).

5. White v. Old Dominion S. S. Co., *supra*; West v. Smith, *supra*. The offer cannot, for example, be used to impeach the declarant as a witness by evidence of it as being a statement contradictory of his present testimony. Walbridge v. Barrett, 118 Mich. 433, 76 N. W. 973 (1898); Neal v. Thornton, 67 Vt. 221, 31 Atl. 296 (1894).

offerer.⁵ Documents prepared for use in negotiations for a compromise cannot be given in evidence whether executed or not.⁶

§ 575. [Offers of Compromise]; Concessions of Liability Received; Accepted Offers.⁷—A limitation upon the rule is that as soon as the offer of compromise is accepted, no further objection exists to proving the fact or the terms⁸ of such offer, the fact of its having been accepted,⁹ or as to any conditions attaching to the acceptance,¹⁰ or any other relevant fact relating to the existence of a contract for settlement.¹¹

Incidental Admissions of Liability.—It is at all times possible for a party,¹² even during the progress of compromise negotiations,¹³ to make a distinct admission of liability,¹⁴ or one by implication,¹⁵ as well as a specific admission of an individual fact.¹⁶ Such a declaration is at once competent.¹⁷

Liability Assumed.—Where negotiations for the settlement or adjustment of a claim are conducted without denial of liability on the part of the debtor expressed or implied, the existence and scope of the negotiations are intelligible only upon the theory that the liability itself was assumed by both parties to exist.¹⁸ For example, should the only questions discussed be as to what is the amount properly due,¹⁹ or as to what are the best terms of payment which will be conceded by the creditor,²⁰ whether some collateral indulgence will be

6. *Sterrett v. Metropolitan St. Ry. Co.*, 35 S. E. 762 (1900); *Hyde v. Stone*, 722 Mo. 99, 123 S. W. 877 (1910); *Roome v. Robinson*, 90 N. Y. Supp. 1055, 99 App. Div. 143 (1904); 2 *Chamb., Ev.*, § 1441.

7. 2 *Chamberlayne*, *Evidence*, §§ 1442–1444.

8. *Miller v. Campbell Commission Co.*, 13 Okl. 75, 74 Pac. 507 (1903); 2 *Chamb., Ev.*, § 1442, n. 1.

9. *Harman v. Vanhatten*, 2 *Vern.* 717 (1716).

10. *International, etc., R. Co. v. Ragsdale*, 67 Tex. 24, 2 S. W. 515 (1886).

11. *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748 (1896); *Pym v. Pym*, 118 Wis. 662, 96 N. W. 429 (1903); 2 *Chamb., Ev.*, § 1442, n. 4.

4. A stricter rule.—It has, however, also been held that not until the contract for a settlement has actually been carried out into an accord and satisfaction does the rule excluding a compromise offer cease to apply. *Rideout v. Newton*, 17 N. H. 71 (1845); *Tennant v. Dudley*, *supra*.

12. *Tenhet v. Atlantic Coast Line R. Co.*, 82 S. C. 465, 64 S. E. 232 (1909).

13. *Hartford Bridge v. Granger*, 4 Conn. 142 (1822); *Hudson v. Williams* (Del. 1908), 72 Atl. 985.

14. *Story v. Nidiffer*, 146 Cal. 549, 80 Pac. 692 (1905); *Teasley v. Bradley*, 110 Ga.

35 S. E. 762 (1900); *Hyde v. Stone*, 722 Mo. 99, 123 S. W. 877 (1910); *Roome v. Robinson*, 90 N. Y. Supp. 1055, 99 App. Div. 143 (1904); 2 *Chamb., Ev.*, § 1443, n. 4.

15. *Hopkins v. Rodgers*, 91 N. Y. Supp. 749 (1905); *Mason v. Agricultural Ins. Co.*, 150 Mo. App. 17, 129 S. W. 472 (1910); 2 *Chamb.*, § 1443, n. 5.

16. *Infra*, §§ 578, *et seq.*; 2 *Chamb., Ev.*, §§ 1451 *et seq.*

17. *Paris v. Waddell*, 139 Mo. App. 288, 123 S. W. 79 (1909); *Bartlett v. Tarbox*, 1 *Keyes* (N. Y.) 495, 1 *Abb. Dec.* 120 (1864); 2 *Chamb., Ev.*, 1443, n. 7. For example, an offer to retract a libellous statement cannot be treated as an offer of compromise. *Dalziel v. Press Pub. Co.*, 102 N. Y. Supp. 909, 52 *Misc.* 207 (1906).

18. *Kutcher v. Love*, 19 Colo. 542, 36 Pac. 153 (1894); *Armour v. Gaffey*, 165 N. Y. 630, 59 N. E. 1118 (1901).

19. *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 *Am. St. Rep.* 454 (1888); *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059, 62 *Am. St. Rep.* 47 (1893); 2 *Chamb., Ev.*, § 1444, n. 2.

20. *Teasley v. Bradley*, *supra*; *Snow v. Batchelder*, 8 *Cush.* (Mass.) 513 (1851); *Ferguson v. Davidson*, 147 Mo. 664, 49 S. W. 859 (1899); *Bartlett v. Tarbox*, *supra*; 2 *Chamb., Ev.*, § 1444, n. 3.

afforded the declarant other than as to time of payment,²¹ the evidence of acts or statements of the debtor made or done under such circumstances will be competent as admissions.²²

§ 576. [Offers of Compromise]; By Whom Compromise Offer May be Made; Plaintiff.²³—The peace offer may have been made by a plaintiff who agrees to accept a payment of money or other act in discharge of his claim, not as constituting a measure of his true demand, but as a concession made as an inducement for the purpose of obtaining an adjustment.²⁴ If his offer be refused, he is entitled to insist that he shall not be prejudiced by having made it.²⁵ Nor should he be permitted to suffer from having intimated a willingness to consider a peace-offer if his adversary should see fit to make one.²⁶

Defendant.—The typical peace-offer is perhaps more frequently made by the debtor than by the creditor, by the defendant, than by the plaintiff.²⁷ Such an offer will be denied all evidentiary force as an admission.²⁸

Agent.—An offer of compromise, in the sense of a peace-offer, may be made by an agent on behalf of his principal.²⁹

§ 577. [Offers of Compromise]; Independent Relevancy.³⁰—An offer of compromise may be independently relevant.³¹ Such an offer may render a relevant reply intelligible.³² It may serve to transfer the obligation of paying costs after it was made.³³ An otherwise unexplained lapse of time may be accounted for in this way.³⁴ Mental states other than consciousness of liability may be established in the same way.³⁵ Composite facts such as waiver,³⁶ good faith

21. *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421 (1893); *Wallace v. Hussey*, 63 Pa. 24 (1869); 2 Chamb., Ev., § 1444, n. 4.

22. *St. Louis & S. F. R. Co. v. Stone*, 78 Kan. 505, 97 Pac. 471 (1908); *Tapp v. Dibrrell*, 134 N. C. 546, 47 S. E. 51 (1904).

23. 2 Chamberlayne, Evidence, §§ 1445–1449.

24. *South Covington & C. St. Ry. Co. v. McHugh*, 25 Ky. L. Rep. 1112, 77 S. W. 202 (1903); *City of San Antonio v. Stevens* (Tex. Civ. App. 1910), 126 S. W. 666.

25. *Fox v. Barrett*, 117 Mich. 162, 75 N. W. 440 (1898); *Tennant v. Dudley*, 144 N. Y. 504, 39 N. E. 644 (1895); 2 Chamb., Ev., § 1445, n. 2.

26. *Pentz v. Pennsylvania F. Ins. Co.*, 92 Md. 444, 48 Atl. 139 (1900); *Edwards v. Watertown*, 13 N. Y. Supp. 300 (1891); 2 Chamb., Ev., § 1445, n. 3. Object other than to buy peace. See *Daniels v. Woonsocket*, 11 R. I. 4 (1874); 2 Chamb., Ev., § 1446.

27. *Acker, Merrill & Condit Co. v. McGaw*, 106 Md. 536, 68 Atl. 17 (1907); *Union Bank of Brooklyn v. Deshel*, 123 N. Y. Supp. 585,

139 App. Div. 217 (1910); 2 Chamb., Ev., § 1447, n. 1.

28. *Georgia Ry. & Electric Co. v. Wallace & Co.*, 122 Ga. 547, 50 S. E. 478 (1905); *Greibenstein v. Stone & Webster Engineering Corp.*, 205 Mass. 431, 91 N. E. 411 (1910).

29. *Beattie v. McMullen, Weland & McDermott*, 82 Conn. 484, 74 Atl. 767 (1909); *Larsen v. City of Ledro-Woolley*, 49 Wash. 134, 94 Pac. 938 (1908); 2 Chamb., Ev., § 1448. *Explanation Permitted.*—See 2 Chamb., Ev., § 1449.

30. 2 Chamberlayne, Evidence, § 1450.

31. *Western Union Telegraph Co. v. Stubbs* (Tex. Civ. App. 1906), 94 S. W. 1083; 2 Chamb., Ev., § 1450.

32. *Lucas v. Parsons*, 27 Ga. 593 (1859).

33. *Brown v. People*, 3 Colo. 115 (1876).

34. *Jones v. Foxall*, 15 Beav. 388 (1852).

35. *Cross v. Kistler*, 14 Colo. 571, 23 Pac. 903 (1890).

36. *Gould v. Dwelling-House Ins. Co.*, 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717 (1890).

in advancing a claim,³⁷ alleging a defense³⁸ or the like³⁹ in which a relevant mental state forms an important element, stand in the same position.

§ 578. [Offers of Compromise]; Specific Admissions.⁴⁰—Statements of a party asserting the existence of facts other than liability are not within the rule which rejects offers of compromise and are, therefore, so far as relevant,⁴¹ received. Unlike the concessions of liability implied in an offer of compromise, such statements are in the great proportion of instances, made as and because the actual facts are believed to be as they are asserted to be.⁴² They are therefore received in evidence as admissions either by statement⁴³ or conduct.⁴⁴

Connection With Compromise Negotiations.—That assertions of this nature were made in the course of treaties for peace⁴⁵ does not conclusively establish their unavailability as evidence. That the specific admission of a separate fact was given at an interview held for the purpose of effecting a compromise settlement,⁴⁶ furnishes no ground for its rejection. The admission of any distinct fact, made *eo nomine*, is competent,⁴⁷ though made in course of proceedings for a compromise.⁴⁸ That such admissions of independent facts are connected, to some extent, with compromise negotiations,⁴⁹ may always be brought to the attention of the tribunal as bearing on probative force.

§ 579. [Offers of Compromise]; What offers are for Peace.⁵⁰—The vital question in every such connection is one of intention⁵¹ or, more properly speaking,

37. *Anderson v. Robinson*, 73 Ga. 644 (1884); *Whitney Wagon Works v. Moore*, 61 Vt. 230, 17 Atl. 1007 (1888); 2 Chamb., Ev., § 1450, n. 7. *The courts of New York carry immunity for compromise offers so far as to deem them immaterial in this connection also.* *York v. Conde*, 20 N. Y. Supp. 961, 66 Hun 316 (1892).

38. *List's Ex'x v. List*, 26 Ky. L. Rep. 691, 82 S. W. 446 (1904).

39. *Watson v. Reed*, 129 Ala. 388, 29 So. 837 (1900); *Butler Ballast Co v. Hoshaw*, 94 Ill. App. 68 (1900) (interest in result).

40. 2 Chamberlayne, Evidence, §§ 1451-1455

41. *Pentz v. Pennsylvania F. Ins. Co.*, *supra*.

42. *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658 (1896); *Domm v. Hollenbeck*, 142 Ill. App. 439 (1908); *Durgin v. Somers*, 117 Mass. 55 (1875); *Hess v. Van Auken*, 32 N. Y. Supp. 126, 11 Misc. 422 (1895); *White v. Old Dominion S. S. Co.*, *supra*; 2 Chamb., Ev., § 1451, n. 3.

43. *Perkins v. Concord R. Co.*, 44 N. H. 223 (1862).

44. *Grimes v. Keene*, 52 N. H. 330 (1872). See, however, *Kierstead v. Brown*, 23 Neb. 595, 37 N. W. 471 (1888); *Boylan v. McMullan*, 137 Iowa 142, 114 N. W. 630 (1908).

45. *State v. Lavin*, 80 Iowa 555, 46 N. W. 553 (1890); *Snow v. Batchelder*, *supra*; *Bartlett v. Tarbox*, *supra*; 2 Chamb., Ev., § 1452, n. 1.

46. *Akers v. Demond*, 103 Mass. 318 (1869); *Wason v. Burnham*, 68 N. H. 53, 44 Atl. 693 (1896).

47. *Hartford Bridge Co. v. Granger*, *supra*.

48. *Kutcher v. Love*, *supra*. *Subsequent admissions made independently of compromise offers are competent beyond question.* *Akers v. Kirke*, 91 Ga. 590, 18 S. E. 366 (1893); *Cole v. Cole*, 33 Me. 542 (1852). An absolutely independent fact, though evidenced by statements, is competent. *Sasser v. Sasser*, 73 Ga. 275 (1884).

49. *Rose v. Rose*, *supra*; *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985 (1890); 2 Chamb., Ev., § 1453, n. 2. As to statements partly incompetent, see *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23 (1895); *Pelton v. Schmidt*, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462 (1895); 2 Chamb., Ev., § 1454, n. 2. *Treaties for peace assisted.*—See 2 Chamb., Ev., § 1455, and cases cited.

50. 2 Chamberlayne, Evidence, §§ 1456-1462.

51. *Hartford Bridge v. Granger*, 4 Conn. 142 (1822); *Colburn v. Groton*, 66 N. H.

any similar phrase ⁷⁹ will be construed as constituting an express reservation from the declarant's statement or offer of any probative quality as an admission. The rule is the same in Canada.⁸⁰

§ 581. [Offers of Compromise]; Reasons for the Rule; Value of Peace.⁸¹—Prominent among the reasons which have been regarded as justifying the rule of procedure rejecting concessions of liability made by way of compromise⁸² is the undoubtedly correct proposition that it is good public policy to adjust differences by mutual concessions.⁸³ It has been felt that the attainment of so desirable an end ought not to be rendered difficult, if not impossible, by knowledge on the part of the conceding litigant that, should the negotiations fail, he may be penalized by having his concessions used against him on any subsequent litigation as constituting his admissions.⁸⁴

335 (1889); *Re River Steamer Co.*, L. R. 6 Ch. App. 822 (1871).

79. *Jardine v. Sheridan*, 2 C. & K. 24 (1846). See also 2 Chamb., Ev., §§ 1465, 1466, 1467.

80. *Stewart v. Muirhead*, 29 N. Pr. 273 (1890); *Pirie v. Wyld*, 11 Ont. 422 (1886); 2 Chamb., Ev., 1468, n. 1.

81. 2 Chamberlayne, Evidence, §§ 1469-1471.

82. *Colburn v. Groton*, 66 N. H. 151, 28 Atl. 95 (1889); *Lee v. Prudential Life Ins. Co.*, 206 Mass. 440, 92 N. E. 709 (1910).

83. *Harrington v. Lincoln*, 4 Gray (Mass.) 563 (1855); *Perkins v. Concord R. Co.*, 44 N. H. 223 (1862); 2 Chamb., Ev., § 1469, n. 2.

84. *West v. Smith*, 101 U. S. 263, 25 L. ed 809 (1879). For a discussion of the reason that the jury may be misled, and the value of the rule, see 2 Chamb., Ev., §§ 1470, 1471.

CHAPTER XXI.

CONFESSIONS.

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§ 582. **Confessions.**¹—"There is no branch of the law of evidence in such inextricable confusion as that relative to confessions."² The general rule that a confession, a statement by one accused of crime directly or by necessary inference admitting his guilt, is receivable in evidence, provided it complies with certain requirements of procedure,³ is not questioned in any quarter.⁴ The difficulty with regard to the matter is, in large measure due to the fact that an attempt is being made, in this connection, on certain alleged grounds of public policy, rigidly to maintain rules of procedure, as matters of substantive law, which are hard to sustain in point of reason. Just here has been, as it were, a fierce struggle in the law of evidence between the formalism of the past and the rationalism of the future. Here, the influence of formal though still comparatively recent,⁵ procedure in the law of evidence reaches its highest point, as nowhere else in this branch of the law, not even in respect to the hearsay anomaly⁶ is definite determinable force accorded the existence of certain facts, entirely regardless of their logical effect. While a certain procedural resemblance to offers of compromise⁷ is, as is elsewhere more fully noticed⁸ distinctly observable, the rules governing confessions are nevertheless essentially unique and comparatively unrelated to other regulations of procedure. Procedural rules controlling confessions are in main two;—one affirmative, the other negative. The affirmative rule may be thus stated: An incriminating statement,⁹ directly suggesting guilt of the crime charged, certain¹⁰ and complete¹¹ in itself, made by a defendant in a criminal proceeding¹² or by some one entitled, under the rules of substantive law, to affect him by declarations,¹³ is admissible against such a defendant;—provided that such a declaration is voluntary.¹⁴ Each of these requirements is one of procedure, and enforced

1. 2 Chamberlayne, Evidence, § 1472.

2. State v. Paterson, 73 Mo. 695, 705 (1881), per Sherwood, C. J.

3. Steph. Dig. "Evidence" (May's Ed. 1877), 72. See also, 1 Greenl. Ev. (12th Ed.) §§ 219 *et seq.*; 2 Ben. & Heard Lead. Crim. Cas. (2d Ed.) 484, 630; 2 Russ. Crimes (8th Ed.) 824; 1 Whart. Crim. Law (17th Ed.) § 683." U. S. v. Stone, 8 Fed. 254, 262 (1881), per Hammond, J.

4. People v. Bedet, 110 N. Y. Suppl. 750, 125 App. Div. 860 (1908); People v. Rogers, 192 N. Y. 331, 85 N. E. 135 (1908).

5. **Early views.**—While the procedural rules relating to confessions are, at the present day, radical and enforced with peculiar stringency, it can scarcely be said that they are of much antiquity in the law of England. Early cases contain no reference to any settled rule that a confession influenced by hope, fear or duress is to be rejected. Incriminating statements extorted from the declarant even by the use of the rack or other instru-

ments of torture are freely received without objection. Pain's Trial, 10 How. St. Tr. 754 (1690) (Scotland); Tong's Trial, 6 How. St. Tr. 259 (1664) (threatened with the rack); Judicial Use of Torture, by A. Lawrence Lowell, 11 Harv. L. Review, 293 (1898). Confessions as evidence. See note, Bender Ed., 103 N. Y. 587. Admissibility of confessions in criminal cases. See note, Bender Ed., 121 N. Y. 280. Admissibility of confessions. See note, Bender Ed., 159 N. Y. 346, 362.

6. §§ 837 *et seq.*

7. §§ 574 *et seq.*

8. § 608.

9. § 583.

10. § 583.

11. § 583.

12. § 583.

13. §§ 538 *et seq.*

14. §§ 583 *et seq.* Nothing about this rule can be said to be remarkable. That which calls for comment, not unmixed with surprise are the additional procedural rules of *rejection*.

with much stringency. The negative rule is to the effect that no confession not voluntary will be received in evidence. Strangely enough, it is apparently deemed an equivalent statement of the negative portion of the rule to say that: Any inducement operating on the mind by way of fear or hope, however slight, any promise or threat whatever, if held out by a person in authority over criminal proceedings and relating to some benefit or injury in connection with such proceedings, suffice to exclude a confession so induced.¹⁵

§ 583. [Confessions]; Requisites of Admissibility.¹⁶—As seen in connection with the rule of procedure permitting the receipt of confessions of guilt,¹⁷ it is essential to the admissibility of such confession that it should (a) have been a declaration made by a party accused of the crime involved in the proceedings or by some one legally entitled to speak for him, (b) be incriminating, (c) certain, (d) complete in itself and, above all, (e) the voluntary act of the declarant. It may be convenient briefly to consider the requisites for admissibility in this order.

The confession must in the first place be made by the defendant in the case on trial¹⁸ and the admission of a third person is not available to the defendant as a confession of the former.¹⁹

It must also be incriminating in the sense of admitting liability²⁰ and it is not enough that it admits the overt act and at the same time sets up a justification.²¹ This is the distinction between a confession and an admission as the word admission may be properly applied to any admission of a relevant fact while confession is confined to an admission of criminal liability.²²

The confession must be sufficiently certain to identify the crime and the criminal but need not in terms state the time and place to which it refers.²³

The confession must also be complete in itself and the entire statement must be put in evidence in justice to the defendant as well as to the government.²⁴

tion which cluster as it were, about this plain fundamental rule of admissibility and seem, at times, practically to obscure and even nullify it.

15. *Bartley v. People*, 156 Ill. 234, 40 N. E. 831 (1895).

16. 2 Chamberlayne, *Evidence*, §§ 1473-1482.

17. § 583.

18. *Lowe v. State*, 125 Ga. 55, 59 S. E. 1038 (1906) (conspiracy); *Campos v. State* (Tex. Cr. App. 1906), 97 S. W. 100.

19. *State v. Bailey* (Kan. 1906), 87 Pac. 189; *State v. Jennings* (Or. 1906), 87 Pac. 524 [denied in 89 Pac. 421 (1907)].

20. *Pilgrim v. State* (Tex. Cr. App. 1910), 128 S. W. 128. "A confession in its legal sense means an acknowledgment of guilt." See *McCann v. People*, 226 Ill. 562, 80 N. E.

1061 (1907), citing 1 Greenleaf on Evid., § 170.

21. *Powell v. State*, 101 Ga. 9, 29 S. E. 309 (1897) (murder); *State v. Cadotte*, 17 Mont. 315, 42 Pac. 857 (1895); *Folds v. State*, 123 Ga. 167, 51 S. E. 305 (1905) (accident).

22. *Oregon*.—*State v. Porter*, 32 Or. 135, 49 Pac. 964 (1897).

23. *Cook v. State* (Ga. 1906), 53 S. E. 104, 124 Ga. 653.

24. *Davis v. State* (Ala. 1910), 52 So. 939.

"All parts of the confession, inculpatory or exculpatory, should be weighed together." *State v. McDonnell*, 32 Vt. 491, 532 (1860).

Admission partial.—A distinct admission of guilt contained in a letter which has been torn is admissible in evidence as the rule that the whole instrument must be read must

Only a voluntary statement by the accused is admissible²⁵ and this means that the statement must be free and uninfluenced by inducement, threat or undue influence.²⁶

§ 584. [Confessions]; **Misleading Inducements.**²⁷— In general, what is meant by saying that a confession is “involuntary” is that it has been induced by the hope of receiving some benefit²⁸ or by the fear of suffering some injury²⁹ in connection with pending proceedings³⁰ which has been held out to the declarant by a person in authority³¹ over the course of the investigation.³²

The well recognized misleading motives under the influence of which procedure anticipates danger to judicial administration under certain circumstances, are hope and fear. The risk run by a tribunal in relying upon incriminating statements so induced has found judicial expression of great frequency and clearness. “It is not because the law is afraid of having truth elicited,” said Mr. Justice Williams,³³ “that these confessions are excluded, but because the law is jealous of not having the truth.”³⁴

The degree of fear, assuming it to be sufficient to affect the truthfulness of the statement,³⁵ is not material, so far as the exclusion of the statement is concerned, if the fear has been applied in connection with the proceedings by some person in authority.³⁶ To have the effect of rejecting a statement in-

be taken with some qualifications and a party may always offer a distinct and severable portion of a writing in evidence leaving to the other party the right to put in the other portions which he claims qualify it. *State v. Corpening*, 157 N. C. 621, 73 S. E. 214, 38 L. R. A. (N. S.) 1130 (1911)

25. *Sims v. State* (Fla. 1910), 52 So 198. “A confession is a voluntary admission of guilt.” *Ransom v. State*, 2 Ga. App. 826, 59 S. E. 101 (1907); *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031 (1907).

Confession.— A confession not shown to be voluntary is not admissible even to impeach the defendant when he testifies. *Jones v. State*, 97 Neb. 151, 149 N. W. 327. A confession not shown to be voluntary is not admissible at the trial of a prosecution for perjury committed at the trial of the crime to which the confession pertained. *Murff v. State* (Tex. Crim. App.), 172 S. W. 238. Confession made by a man overcome with heat to a sheriff who is taking care of him is voluntary and admissible in evidence. *Shelleuburger v. State*, 97 Neb. 498, 150 N. W. 643, L. R. A. 1915 C 1163 (1915)

26. A confession is not admissible when made by one charged with murder who is sick and in fear of being lynched and is approached by a newspaper man who says he is a

Spiritualist and can look into his heart and see the crime he has committed. This is more than fear induced by a threat of punishment after death. *Johnson v. State*, 107 Miss 196, 65 So. 218, 51 L. R. A. (N. S.) 1183 (1914).

27. 2 Chamberlayne. Evidence, §§ 1483-1493.

28. *Com. v. Flood*, 152 Mass. 529 (1890); *Colburn v. Groton*, 66 N. H. 151 (1889); *People v. Cassidy*, 14 N. Y. Suppl. 349 (1891).

29. §§ 585 *et seq.*

30. § 590.

31. §§ 592 *et seq.*

32. *State v. Brooks*, 220 Mo. 74, 119 S. W. 353 (1909).

33. *R. v. Mansfield*, 14 Cox Cr. 639 (1881).

34. “The reason for the rule excluding involuntary confession is not based on the thought that truth thus obtained would not be acceptable, but because confessions thus obtained are unreliable.” *State v. Novak*, 109 Iowa 717, 79 N. W. 465 (1899).

35. *Stephen v. State*, 11 Ga. 225 (1852).

36. Fear inspired by other causes than threats of those in authority will not constitute a falsifying inducement. *Com v Smith*, 119 Mass. 305 (1876). It may constitute duress §§ 1558 *et seq*

duced by it, the fear in question must appear to have been an *alarming* ingredient added to the natural effect of the accusation,³⁷ arrest for crime,³⁸ and normal apprehension of punishment.³⁹

§ 585. **Misleading Inducements; Hope and Fear; How Mental State is Established; Subjective Considerations.**⁴⁰—To decide this issue it is necessary to determine the mental state of the accused. Such an inquiry will divide itself, roughly, into three main lines. (a) A consideration of the resisting power of the declarant's mind. (b) Examination of the kind and strength of pressure brought to bear upon it. (c) What administrative or procedural assumptions may properly be made as to the continuance of any mental state once shown to exist.

The investigation must examine the mental capacity⁴¹ of the accused and influences on children⁴² will be more carefully scanned than on adults and so of feeble-minded persons⁴³ or those made insane through crime⁴⁴ or intoxicated persons⁴⁵ or those affected by sleep or wounds or pain.⁴⁶

§ 586. **[Misleading Inducements]; Objective Considerations; Hope.**⁴⁷—The inducement held out to the accused which will invalidate his confession may be of any nature so long as material,⁴⁸ though vague,⁴⁹ but any mere sugges-

37. *Com. v. Mitchell*, 117 Mass. 431 (1875).

38. *Com. v. Smith*, 119 Mass. 305 (1876).

39. *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494 (1885); *People v. Thomas*, 3 Park. Cr. (N. Y.) 256 (1855); *Honeycutt v. State*, 8 Baxt. (Tenn.) 371 (1875); *State v. Coella*, 3 Wash. 99, 28 Pac. 28 (1891).

40. 2 Chamberlayne, Evidence, § 1494.

41. The consideration will necessarily affect the weight of the declaration. *Williams v. State*, 69 Ark. 599, 65 S. W. 103 (1901); *People v. Miller*, 135 Cal. 69, 67 Pac. 12 (1901); *Flagg v. People*, 40 Mich. 706 (1879).

42. *Hoover v. State*, 81 Ala. 51, 1 So. 574 (1886); *State v. Mason*, 4 Idaho 543, 43 Pac. 63 (1895).

43. *Peck v. State* (Ala. 1906), 41 So. 759.

44. "Public policy forbids that confessions should be used in evidence against the prisoner which are drawn from him by appliances of this nature, brought to bear upon his mind by those who have authority over him, and when it may be supposed his mental agitation unfits him to resist their influence, however slight they may be." *State v. York*, 37 N. H. 181, 184 (1858).

45. *Com. v. Howe*, 9 Gray (Mass.) 110 (1857).

In vino veritas.—The probative force of a statement induced by the use of intoxicants

is not materially diminished where the only effect observed is the loosening of the tongue. *Clark v. State*, 8 Humphr. (Tenn.) 671, 676 (1848). See also, *Jeffers v. People* (Supm. Ct. Gen. T.), 5 Park. Crim. (N. Y.) 522, 549 (1862). "Drunken men sometimes reveal truths which they conceal when sober." *Shannon v. Swanson*, 109 Ill. App. 274, 276 (1902), per Dibell, J.

46. *Isler v. Dewey*, 75 N. C. 466 (1876).

Effect of pain upon trustworthiness.—In connection with similar statements by a declarant who is, at the time, in physical pain, the effect of the infirmative consideration has received judicial attention. Thus the statements of one suffering severely from the effects of recent bodily injuries have received scant attention from the courts when offered as admissions of his own negligence in the matter. *Taylor v. General Acc. Assur. Corp.*, 208 Pa. St. 439, 57 Atl. 830 (1904).

47. 2 Chamberlayne, Evidence, §§ 1495-1502.

48. *Com. v. Corcoran*, 182 Mass. 465, 65 N. E. 821 (1903).

49. *Green v. State*, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167 (1891); *Gates v. People*, 14 Ill. 433 (1853); *Com. v. Taylor*, 5 Cush. 605 (1850). (use his influence in prisoner's favor).

tion as to the general desirability of confession is not sufficient to show the influence of hope.⁵⁰ Among the more common misleading inducements held out are the hope of averting or delaying punishment⁵¹ or the discontinuance of the proceedings against him,⁵² the hope of pardon,⁵³ or the mitigating of the punishment⁵⁴ or an offer of a pecuniary reward for a confession.⁵⁵

§ 587. [Misleading Inducements]; Assumption of Continuance.⁵⁶—The presiding judge may properly invoke, in aid of the procedural rule, excluding “involuntary” confessions, the allied administrative power, of judicial assumption, frequently referred to as a presumption of law.

It may accordingly be assumed by him that a state of mental feeling in a criminal defendant once established continues to operate, for a reasonable time, unless and until some change in respect to it is affirmatively shown to have taken place.⁵⁷ To prove this fact of change, clear and convincing evidence⁵⁸ will be required. Should it be made, in any case, affirmatively to appear that by reason of the occurrence of subsequent events the inducements no longer continued to operate on the mind of the declarant at the time of the making of the statement, his declaration will be received in evidence,⁵⁹ notwithstanding the existence of the previous inducements.

§ 588. [Misleading Inducements]; Physical or Mental Discomfort.⁶⁰—Where the judgment has simply been misled by the desire to escape a threatened evil state, physical or mental, the endurance of which is regarded as a possible alternative to confession, the declaration must be regarded as *voluntary* and properly admissible under suitable instructions from the court. Should the threatened danger of physical violence or mental anguish be so immediate and

50. *Steele v. State*, 83 Ala. 20, 3 So. 547 (1887); *State v. Grover*, 96 Me. 363, 52 Atl. 757 (1902) (no worse off in case of confession); *State v. Bradford*, 156 Mo. 91, 56 S. W. 898 (1900).

51. *State v. Wooley*, 215 Mo. 620, 115 S. W. 417 (1908).

52. *Austine v. People*, 51 Ill. 238 (1869).

A subsequent intimation by one in authority, given prior to the making of the confession, that the proceedings must nevertheless continue has been held to nullify the mental effect of the prior promise. *Ward v. People*, 3 Hill (N. Y.) 395 (1842).

53. *Beggarly v. State*, 8 Baxt. 520, 526 (1875); *State v. Carr*, 37 Vt. 191 (1864).

54. *People v. Johnson*, 41 Cal. 453 (1871); *State v. Jay*, 116 Iowa 264, 89 N. W. 1070 (1902); *Com. v. Curtis*, 97 Mass. 377 (1867); *State v. Smith*, 72 Miss. 420, 18 So. 482 (1895).

There need be no promise.—Hazarding a mere surmise that it might be better to con-

fess has been held, when made by one in authority, to exclude the confession. *Harvey v. State* (Miss. 1896), 20 So. 837; *State v. Drake*, 113 N. C. 624, 626, 18 S. E. 166 (1893).

55. *State v. Wooley*, 215 Mo. 620, 115 S. W. 417 (1908).

The requirement has been added that the reward must appear in some affirmative way, to have influenced, if not induced, the confession. *State v. Wentworth*, 37 N. H. 219 (1858).

56. 2 Chamberlayne, Evidence, §§ 1503-1508.

57. *People v. Stewart*, 75 Mich. 21, 42 N. W. 662 (1889); *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404 (1828).

58. *McGlothlin v. State*, 2 Coldw. (Tenn.) 223 (1865); *Thompson v. Com.*, 20 Gratt (Va.) 724 (1870).

59. *People v. Mackinder*, 29 N. Y. Suppl. 842, 80 Hun 40 (1894); *State v. Gregory*, 50 N. C. 315 (1858).

60. 2 Chamberlayne, Evidence, § 1509.

pressing as fairly to overpower the will to the making of an indicated statement, the latter may properly be regarded as a result of *duress*, not the act of the declarant, but rather that of those applying force and consequently inadmissible. It will be significant, for example, that the accused was solitary and in darkness;⁶¹ that he had previously been placed in irons,⁶² chained,⁶³ or subjected to other physical pain.⁶⁴ In short, any facts calculated to cause physical pain or mental alarm, e.g., being bitten by dogs while defenceless against their attacks,⁶⁵ having one's head placed in the noose of a rope,⁶⁶ and the like, must be carefully considered, both singly and in combination with other facts, in determining to what extent, if any, the will of the declarant was controlled rather than misled.

§ 589. [Misleading Inducements]; Pain.⁶⁷—Prominent among considerations affecting the trustworthiness, as “voluntary,” of a confession, is the actual or prospective infliction of pain. It may, of course, happen that the physical suffering is so direct and overwhelming in its operation as to constrain the will of the declarant and amount to duress.⁶⁸ Where, for example, a master is shown, in the early cases to have flogged his slave in order to extort a confession of guilt,⁶⁹ the statement might well have been regarded as obtained by duress.

§ 590. [Misleading Inducements]; Threats.⁷⁰—A threat, in and of itself, so long as its fulfilment is strictly *in futuro*, can seldom, in case of a mind of ordinary firmness, constitute duress. A threat of some injury to body or mind has, however, very naturally, been deemed an important factor to be considered in deciding how far the declaration made under its influence is trustworthy.⁷¹ And the same rule has been held to apply to a threat of mental suffering.⁷² As a matter of authority, it is held that this powerful induce-

61. *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044 (1897).

62. *U. S. v. Nardello*, 4 Mackey (D. C.) 503 (1886).

63. *Young v. State*, 68 Ala. 569 (1881); *State v. George*, 50 N. C. 233 (1858).

64. *Ammons v. State*, 80 Miss. 592, 32 So. 9 (1902) (use of “sweat box”—room eight feet by six feet); *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044 (1897) (dark cell).

65. *Simon v. State*, 37 Miss. 288 (1859).

66. *State v. Young*, 52 La. Ann. 478, 27 So. 50 (1900).

67. 2 Chamberlayne, Evidence, § 1510

68. §§ 602 *et seq.*

69. *Brister v. State*, 26 Ala. 107, 129 (1855); *Van Buren v. State*, 24 Miss. 512 (1852); *Hector v. State*, 2 Mo. 166 (1829).

70. 2 Chamberlayne, Evidence, §§ 1511–1515

71. § 1, *Beckman v. State*, 100 Ala. 15, 17, 14 So. 859 (1893); *Joe v. State*, 38 Ala. 422 (1863).

72. *State v. Brittain*, 117 N. C. 783, 23 S. E. 433 (1895) (by husband to abandon wife). A threat to put the accused in the “dark room” of the jail has been regarded as reasonably calculated to induce a false accusation and the statement has accordingly been rejected. *People v. Rankin*, 2 Wheel. Cr. (N. Y.) 467 (1807).

The question of admissibility is largely one of degree.—Thus the threat of a medical man to examine the body of a female defendant accused of concealing a new born child is not deemed a threat invalidating her confession. *Cain's Case*, 1 Crawf. & D. 37 (1839). At the same time the threat made by a constable to search the house unless informed of the whereabouts of the child has

ment to confession will not invalidate the statement unless, under all the circumstances, it may reasonably be inferred that it undermined the nerve and judgment of the declarant to an extent which has led him to misrepresent the truth.⁷³

Thus the confession may be invalidated by a threat of punishment for the crime unless confession be made⁷⁴ or by the use of firearms in a threatening way.⁷⁵ The confession is not however affected by the use of threats not connected with the fate of the accused in the pending proceedings⁷⁶ as connected with the treatment of the accused during the trial⁷⁷ when concerning independent matters not connected with the trial at all.⁷⁸

Threats made after the confession can have no effect on it and do not invalidate it.⁷⁹

§ 591. [Misleading Inducements]; Moral or Religious.⁸⁰—Proof that an incriminating statement was made by one accused of crime under the influence of a moral or religious inducement to make a statement, is in reality a guaranty of its truth, rather than any real impairment of its probative force.⁸¹ Should the sole inducement for the confession be a desire by the declarant to follow the precepts of moral obligation, or to gain a spiritual advancement⁸² as by obliging a third person,⁸³ the existence of such an inducement does not affect the validity of the confession.⁸⁴

There is much conflict in the cases as to whether a mere exhortation or suggestion to tell the truth contains such an implied threat as to make the con-

been held to exclude the statement of the mother made in consequence of the officer's announcement. *Cain's Case*, 1 *Crawf. & D.* 37 (1839).

73. *State v. Freeman*, 12 *Ind.* 100 (1859); *Maxwell v. State* (*Miss.* 1906), 40 *So.* 615 ("might get his neck broken").

It is necessary that the threats or promises should be "such as to afford a reasonable presumption that the defendant's answers were influenced." *Com. v. Myers*, 160 *Mass.* 530 (1894).

74. *State v. Albert*, 50 *La. Ann.* 481, 23 *So.* 609 (1898) (sheriff)

Great excitement on the part of the accused when arrested is no ground for excluding a confession. *People v. Cokahnour*, 120 *Cal.* 253, 32 *Pac.* 585 (1898); *Balls v. State* (*Tex. Cr. App.* 1897), 40 *S. W.* 801.

75. *State v. Albert*, 50 *La. Ann.* 481, 23 *So.* 609 (1898) (sheriff).

76. *State v. Grant*, 22 *Me.* 174 (1842) (escape of brother).

77. *R. v. Lloyd*, 6 *C. & P.* 393 (1834) (allowing prisoner to see his wife); *State v. Tatro*, 50 *Vt.* 483 (1878); *State v. Cruse*, 74

N. C. 491 (1876); *Rex v. Lloyd*, 6 *C. & P.* 393, 25 *E. C. L.* 454 (1834); *Hunt v. State*, 135 *Ala.* 1, 33 *So.* 329 (1902).

78. *Com. v. Howe*, 2 *Allen (Mass.)* 159 (1861).

79. *Kollenberger v. People*, 9 *Colo.* 233, 11 *Pac.* 101 (1886); *Simpson v. State*, 4 *Humphr (Tenn.)* 456 (1844); *Geimsinger v. State* (*Tex. Cr. App.* 1901), 69 *S. W.* 583; *State v. Jenkins*, 2 *Tyler (Vt.)* 377 (1803).

80. 2 *Chamberlayne, Evidence*, §§ 1516-1520.

81. *Com. v. Drake*, 15 *Mass.* 101 (1818) (confession to fellow church members).

82. *State v. Potter*, 18 *Conn.* 178 (1846); *State v. Harman*, 3 *Harr (Del.)* 567 (1842); *R. v. Sleeman*, 6 *Cox Cr.* 245 (1853) (avoiding sin); *R. v. Hewett*, *Carr. & M.* 534 (1842) (obtaining forgiveness).

83. *Shifflet's Case*, 14 *Gratt.* 665 (1858) (relieving mother of suspicion); *R. v. Hodgson*, 1 *Lew Cr. C.* 103 (1827) (mistress).

84. *Com. v. Nott*, 135 *Mass.* 269 (1883); *People v. Kennedy*, 159 *N. Y.* 346, 54 *N. E.* 51 (1899).

fession inadmissible. These all depend on the facts of each case. The statement to one accused of crime that he would better tell the truth may⁸⁵ or may not⁸⁶ be a threat depending on the circumstances under which it is uttered. The same considerations apply to a statement that the accused "had better confess."⁸⁷

Fear of Death.—The fear of impending death has no tendency to impair the trustworthiness of a confession.⁸⁸

§ 592. [Misleading Inducements]; Who are "Persons in Authority."⁸⁹—Persons in authority,⁹⁰ within the meaning of the procedural rule now under consideration, are such as are legally entitled to control the liberty of the accused, to decide as to what shall be done with the defendant or, in other respects, to direct the course of the criminal proceedings.⁹¹ Authority in this connection may be delegated expressly or by implication.⁹² The term "person in authority" may therefore, extend, so far as to designate any one who acts in the presence of a person clothed with legal authority, under color of his power in the matter, without contradiction or rebuke from the latter.⁹³ The procedural rule under examination goes so far as to provide that when a confession has been made by one to whom threats or promises have been addressed by such a person in authority that it will be judicially assumed, in the absence of evidence to the contrary, that the confession was made in pursuance of the inducement.⁹⁴ It is not sufficient that the person extending a misleading inducement should have been *believed*, reasonably and necessarily, to be a person in authority. He must, actually and legally, have been a person in authority.

The mere fact that the person who induces the confession is an officer is not enough to bar it; he must be connected with the prosecution and have authority by virtue of that relation.⁹⁵ The assent of the prosecuting officer to the in-

85. *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506 (1907). See also, *Biscoe v. State*, 67 Md. 6 (1887); *Com. v. Myers*, 160 Mass. 530 (1894); *Com. v. Preece*, 140 Mass. 277, 278, 5 N. E. 494 (1885); *Com. v. Nott*, 135 Mass. 269 (1883).

86. *New York*.—*People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112 (1909).

87. Statement admitted.—*State v. Vey* (S. D. 1908), 114 N. W. 719.

Statement excluded.—*State v. Brockman*, 46 Mo. 569 (1870); *R. v. Coley*, 10 Cox Cr. 536 (1868) (constable); *Mitchell v. State* (Miss. 1898), 24 So. 312; *People v. Ward*, 15 Wend. (N. Y.) 231 (1836).

88. *State v. Gorham*, 67 Vt. 365 (1894) (effects of poison).

89. 2 Chamberlayne, Evidence, §§ 1521-1529

90. *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55 (1906).

91. *R. v. Stacey*, 14 Q. B. 789, 14 Jur. 549 (1850).

92. *R. v. Garner*, 2 C. & M. 920, 3 Cox. C. C. 175, 1 Den. C. C. 320, 12 Jur. 944, 18 L. J. M. C. 1, 3 New Sess. Cas. 329, F & M. 7, 61 E. C. L. 920 (1848).

93. *Morehead v. State*, 9 Humphr. (Tenn.) 635 (1840); *R. v. Millen*, 3 Cox C. C. 507 (1840); *R. v. Laughner*, 2 C. & K. 225, 2 Cox C. C. 134, 61 E. C. L. 225 (1846). And see *Johnson v. State*, 76 Ga. 76 (1885).

94. *Green v. State*, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167 (1891); *Com. v. Myers*, 160 Mass. 530, 36 N. E. 48 (1894).

95. *Beggary v. State*, 8 Baxt. 520 (1875); *Com. v. Smith*, 10 Gratt. (A) 734 (1853); *U. S. v. Stone*, 8 Fed. Rep. 254, 262 (1881), per Hammond, J.; *R. v. Moore*, 2 Den. 522,

duancements may be implied,⁹⁶ as where made in his presence⁹⁷ or where he assents to the presence of the person who makes the threats or other inducement in the prisoner's cell⁹⁸ at an unusual time.⁹⁹ However the mere fact that the statement was secured by the public prosecutor is not of itself enough to make it incompetent.¹ Persons in authority include the committing magistrate² but not in most jurisdictions the injured party or private prosecutor.³ Bystanders⁴ or friends⁵ or fellow-prisoners⁶ are not persons in authority though their statements may serve to disqualify when made in the presence of one in authority or by his implied assent.⁷

§ 593. [Misleading Inducements]; Effect of Arrest.⁸—The mere fact that the incriminating statement is made while the declarant is under arrest,⁹ or is in the hand of the sheriff¹⁰ or police officer¹¹ is not, of necessity, sufficient to exclude his statement. Even should the restraint imposed upon the declarant go so far that he is not only actually in prison,¹² but is also tied hand and

96. *State v. Vaigneur*, 5 Rich. (S. C.) 391, 400 (1852).

97. *State v. Sherman* (Mont. 1907), 90 Pac. 981.

98. *Johnson v. State*, 61 Ga. 305 (1878) (confession at jail).

99. "None of these persons was the officer in charge; but their admission to the cell, at such an unreasonable hour carried with it an implication of the officer's consent to their mission, and respondent could scarcely fail to be impressed that their assurances were made with full authority." *People v. Wolcott*, 51 Mich. 612 (1883).

1. *State v. Stibbens*, 188 Mo. 387, 87 S. W. 460 (1905).

2. *Austine v. People*, 51 Ill. 236 (1869); *U. S. v. Cooper*, 25 Fed. Cas. No. 14,864 (1857); *R. v. Clewes*, 4 C. & P. 221, 19 E. C. L. 485 (1830).

3. *People v. Piner* (Cal. App. 1909), 105 Pac. 780; *Ward v. People*, 3 Hill (N. Y.) 395 (1842); 1 Whart. Crim. L. (7th ed.), §§ 692, 686.

Whatever the authority of the injured party to promise immunity to the accused, a subsequent retraction by the arresting officer of such a promise renders the declarant's confession thereafter competent. *Ward v. People*, 3 Hill (N. Y.) 395 (1842).

4. *State v. Darnell*, 1 Houst. Cr. C. (Del.) 322 (1870); *R. v. Gibbons*, 1 C. & P. 97 (1823).

5. *State v. Potter*, 18 Conn. 178 (1864); *State v. Caldwell*, 50 La. Ann. 666, 23 So. 869 (1898); *State v. Grant*, 22 Me. 171

(1842); *State v. Garrick*, 16 Nev. 128 (1881) (bondsmen).

6. *R. v. Shaw*, 6 C. & P. 372 (1823). See, *contra*, *Freeman v. Brewster* (Ga. 1894), 21 S. E. 165.

7. *R. v. Millen*, 3 Cox Cr. C. 507 (1849). But see, *contra*, *R. v. Parker*, 8 Cox Cr. 465 (1861). Inducements offered by civilians, see note, Bender ed., 195 N. Y. 224.

8. 2 Chamberlayne, Evidence, §§ 1530—1536.

9. *Com. v. Devaney*, 182 Mass. 33, 64 N. E. 402 (1902); *People v. Egnor*, 175 N. Y. 419, 67 N. E. 906 (1903); *State v. McDaniel*, 39 Or. 161, 65 Pac. 520 (1901).

10. *Sands v. State*, 80 Ala. 201 (1885); *Republic v. Hang Chong*, 10 Hawaii 94 (1895); *Spiers v. State* (Texas Cr. App.), 69 S. W. 538 (1902).

11. *R. v. Cheverton*, 2 F. & F. 833 (1862). Individual judges have even doubted the credibility of confessions testified to by police officers in cases where such evidence was necessary to warrant a conviction. *R. v. Thompson*, 13 Cox Cr. 182 (1876), per Cave, J. See also, *Lambe's Case*, 2 Leach Cr. L. (3d ed.) 552 (1791), per Grose, J.

12. *California*.—*People v. Siemson*, 95 Pac. 863 (1908).

Florida.—*Green v. State*, 40 Fla. 191, 23 So. 851 (1898).

Georgia.—*Hilburn v. State*, 121 Ga. 344, 49 S. E. 318 (1904) (a negro in a calaboose surrounded by white men).

Indiana.—*State v. Laughlin*, 84 N. E. 756 (1908).

foot,¹³ handcuffed,¹⁴ chained,¹⁵ placed in the stocks¹⁶ or otherwise subjected to physical discomfort no necessary rejection of the declaration is involved. That the prisoner is laboring, at the time of making the statement, under strong excitement¹⁷ is a matter of little importance. Nor is it of consequence that in conversation with the accused his guilt was assumed by all persons present.¹⁸ The confession may still be voluntary where the mind or will of the accused is not forced, as in duress, to the making of any particular statement,¹⁹ or where, although apparently induced by one of the parties who conducted the prisoner to gaol, the acts were calculated to excite, not fear of temporal punishment, but horror at the recollection of the crime.²⁰

The circumstance that the accused is under arrest is however to be considered in deciding whether the confession was voluntary as the arrest may well have the effect of cowing the accused²¹ even where the arrest is invalid,²² although there is some authority for rejecting all confessions made by a person under arrest,²³ and the statutes frequently provide that the officer must warn the accused, of his rights before questioning him.²⁴ This warning should

Louisiana.—State v. Chambers, 45 La. Ann. 36, 37, 11 So. 944 (1893).

Massachusetts.—Com. v. Cuffee, 108 Mass. 287 (1871). Fact that one was under arrest outside the state without extradition papers does not render confession inadmissible, see note, Bender ed., 18 N. Y. 9.

13. Franklin v. State, 28 Ala. 9 (1856); Austin v. State, 14 Ark. 555 (1854); State v. Patterson, 73 Mo. 695 (1881); State v. Rogers, 112 N. C. 874 (1893).

14. Dunmore v. State (Miss. 1905), 39 Sq. 69; Sparf v. U. S., 156 U. S. 51 (1895).

15. State v. Whitfield, 109 N. C. 876, 13 S. E. 726 (1891).

16. State v. Nelson, 3 La. Ann. 497 (1848).

17. State v. Pamela, 122 La. 207, 47 So. 508 (1908).

18. State v. Turner, 122 La. 371, 47 So. 685 (1908).

19. State v. Auguste, 50 La. Ann. 488, 23 So. 612 (1898). But should this physical discomfort amount to duress, the confession so obtained will be rejected. Hooper v. State, 81 Ala. 51, 1 So. 574 (1886).

20. R. v. Gibney, Jebb. Cr. C. 15 (1822).

21. Hendrickson v. People, 10 N. Y. 33 (1854). See also, Wheeler's Case, 2 Moody Cr. C. 45, 2 Lew. Cr. C. 157 (1838). This important line of reasoning is excellently expressed in a dissenting opinion rendered in an Irish case: "It is manifest to every one's experience that from the moment a person feels himself in custody on a criminal charge,

his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears." R. v. Johnston, 15 Ir. C. L., 60, 83 (1864), per Hayes, J.

Minors under arrest.—For much the same reason and in an especial degree care will be taken in giving due weight to this intensified amenability to suggestion in case of confessions made by minors, while under arrest. Burton v. State, 107 Ala. 108, 18 So. 284 (1895) (boy of 14); Com. v. Preece, 140 Mass. 276, 5 N. E. 494 (1885).

22. *California.*—People v. Ramirez, 56 Cal. 533 (1880).

Iowa.—State v. Wescott, 104 N. W. 341 (1905).

23. Layton v. State (Tex. Cr. App. 1908), 107 S. W. 819. If, however, the declarant is not aware of being under restraint, no reason exists for excluding his statement. Connell v. State (Tex. Cr. 1903), 75 S. W. 512.

24. Com. v. Willis, 223 Pa. 576, 72 Atl. 857 (1909); Yancy v. State (Tex. Cr. App. 1903), 76 S. W. 571. An interval of six or seven hours may not render a warning inoperative in securing admissibility. Johnson v. State (Tex. Cr. App. 1905), 84 S. W. 824.

New York.—Baltor v. People, 80 N. Y. 484 (1880).

England.—Rex v. Thornton, 1 Moody C. C. 27 (1824). Arrest in another state without a warrant does not exclude a confession ob-

usually take the form of telling the accused that he will gain nothing by confessing and that what he says will be used against him.²⁵

§ 594. [Misleading Inducements]; Effect of Suspicion.²⁶— If the fact of a present arrest is not sufficient to exclude an incriminating statement, *a fortiori*, a mere suspicion of having committed the offense does not warrant its exclusion.²⁷ It follows naturally, moreover, that the statutory warning or caution as to the effect of incriminating statements which is required as a preliminary to the admissibility of confessions made by persons under arrest²⁸ does not apply to those who are merely suspected of having committed the crime in question.²⁹

§ 595. [Misleading Inducements]; Deception.³⁰— The rule of procedure which rejects so called “involuntary” confessions induced by threats or promises by those in authority is based entirely upon an assumed ground of public policy. In reality, like other rules of procedure, it is practically an instance of substantive law controlling the normal exercise of the function of judicial administration.³¹ As at present conducted it proceeds upon no sense of fairness to the prisoner and even, as has been suggested,³² frequently operates against him by substituting private, irresponsible investigation for responsible official inquiry.³³ The rule assumes that those in authority over legal criminal proceedings ought, in the public interest, to refrain from placing pressure upon the free will of their prisoners. What injury he may suffer at the hands of private persons is none of its concern. So long as the accused is not influenced by a person in authority in certain specified ways he may be deceived, flattered, wheedled, tricked, betrayed into a perfectly admissible confession.³⁴

Any impairment of logical force to which the circumstances give rise may properly be brought to the attention of the jury. Should the court feel that the probative force of the statement has been reduced by the circumstances under which it was made below the point at which the jury could rationally act on it, the presiding judge is justified if not required, to reject the evidence. But this has no connection with the rule of procedure under examination. The historical development of the rule of procedure at a time in English his-

tained during its continuance. *Balbo v. People*, 80 N. Y. 484 (1880).

25. *State v. Church*, 199 Mo. 605, 98 S. W. 16 (1906); *Com. v. Johnson*, 217 Pa. St. 77, 66 Atl. 233 (1907); *Salinas v. State* (Tex. Cr. App. 1907), 102 S. W. 116; *Henderson v. State* (Tex. Cr. App. 1906), 95 S. W. 131.

26. 2 Chamberlayne, Evidence, § 1537.

27. *People v. Kief*, 58 Hun (N. Y.) 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896 (1890).

28. § 593.

29. *Com. v. Robinson*, 165 Mass. 426, 43

N. E. 121 (1896); *Boyett v. State*, 26 Tex. App. 689, 9 S. W. 275 (1886).

30. 2 Chamberlayne, Evidence, § 1538.

31. §§ 72 *et seq.*

32. § 592.

33. “But for the very reason that those in authority have no right to require a disclosure, those without authority feel justified in seeking to worm it out by threats, by ill treatment, by fraud, by holding out false hopes, by putting forward false pretences” *Baldwin, Mod. Pol. Inst.*, pp. 125 & 126.

34. *Rex v. White*, 18 Ont. L. Rep. 640 (1909).

tory when a large proportion of the population was in revolt against government and urgently needed the privilege of silence for its protection is shown in this significant circumstance that only as against *authority*, judicial or official, is the keen sense of tenderness for good faith to the prisoner in the slightest degree manifested.

The confession obtained by one not in authority may have been induced by a promise of secrecy³⁵ or by treachery³⁶ or by impersonating another.³⁷ It may be obtained by any sort of unfair treatment³⁸ as by an eavesdropper³⁹ or by assuming the guilt of the accused⁴⁰ even by a person in authority where no hope or fear is held out.

§ 596. [Misleading Inducements]; Illegality.⁴¹—The rejection of a confession, if in itself reliable and trustworthy, merely because obtained by means of an illegal violation of the prisoner's privilege against compulsory self-incrimination is entirely without support in legal analogy.⁴² The confession, viewed as extorted by an act of duress, stands in a different position. It is not the act of the declarant. Accordingly, he is not responsible for it.⁴³

§ 597. Self-incrimination; History of Doctrine.⁴⁴—The modern rule that the accused cannot be forced to testify against himself was not a part of the civil or Roman Law or even of the early English common law under all of which torture was freely practiced. But when the Stuarts came to the English throne a long and severe contest against the Crown arose which largely centered in the courts. Here the power of the Crown was represented by the judge appointed by the King and the popular cause was upheld by magnifying the power of the jury. Many of the trials of most importance were political prosecutions in which the popular side was concerned not with eliciting the truth but in suppressing it and the lawyers opposing the Crown gradually

35. *State v. Novak*, 109 Iowa 717, 79 N. W. 465 (1899).

36. *Sanders v. State*, 113 Ga. 267, 38 S. E. 841 (1901) (opening prisoner's letter); *Com. v. Goodwin*, 186 Pa. 218, 40 Atl. 412 (1898) (retaining prisoner's letter; setting eavesdroppers to hear a private interview).

37. *Com. v. Flood*, 152 Mass. 529, 25 N. E. 971 (1890) (unite in planning a crime); *Price v. State*, 18 Ohio St. 418 (1868) (confession of accomplice); *Pffe v. Com.*, 29 Pa. 435 (1857) (accomplice confessed).

38. Telling a witness who is confessing to having shot the deceased that he had missed him is not such inducement as makes the confession inadmissible. *Lindsay v. State*, 66 Fla. 341, 63 So. 832, 50 L. R. A. (N. S.) 1077 (1913).

39. *Woolfolk v. State*, 85 Ga. 69, 99 (1890); *Com. v. Goodwin*, 186 Pa. 218, 40 Atl. 412 (1898).

40. *Carroll v. State*, 23 Ala. 38 (1853); *People v. McGloin*, 91 N. Y. 245 (1883); *McClain v. Com.*, 110 Pa. St. 269, 1 Atl. 45 (1885); *R. v. Vernon*, 12 Cox Cr. 154 (1872).

41. 2 Chamberlayne, Evidence, § 1539.

42. *People v. McMahon*, 15 N. Y. 386 (1857). "The fact that the arrest was illegal, has no relevancy, if the confession was voluntary." *Balbo v. People*, 80 N. Y. 484 (1880).

43. A conviction for illegally transporting liquor will be set aside where it was obtained by illegally searching the person of the defendant and taking from him forcibly the key to his trunk and opening it and taking from it the liquor which he was charged with transporting. *Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 441, L. R. A. 1916 E 714 (1916); and note citing cases *contra*.

44. 2 Chamberlayne, Evidence, §§ 1540-1544.

established the doctrine that no accused person could be forced to testify against himself. This principle seems not to be of any aid whatever in the procuring of justice but was early adopted in this country as a protection against the fancied danger of unjust prosecutions by appointees of the King. It seems to have no place in a democracy but it is still held in the highest regard as one of the rights of the people.

§ 598. [Self-incrimination; "Nemo tenetur seipsum accusare"] Present Rule Stated.⁴⁵— Under this motto, or maxim, a witness may decline, in any proceeding, civil or criminal, to answer a question which tends either directly to criminate him or which may indirectly produce such an effect.⁴⁶ Certain conditions are however to be noted. For example, the danger apprehended by the witness must be real and not fanciful.⁴⁷ The answer must expose the speaker to a criminal prosecution rather than simply establish a *civil* liability.

§ 599. [Self-incrimination]; Procedure and Reason.⁴⁸— Little but confusion can result from attempting to assign a purely logical basis for the procedural rule which rejects as *involuntary* confessions obtained in violation of the privilege against self-incrimination or of the extension of the principle of the privilege into cases involving the use of misleading inducements by persons in authority.

It would seem fair to conclude that where the confession is *judicial*, i.e., is made by the accused in court, that the whole matter of rejection is nothing with which confession, as a matter of evidence, has primarily anything whatever to do. It is determined simply by the procedural rules framed by the substantive law as to the matter of compulsory self-incrimination under legal process. Where a confession has been reached by compulsion which does not amount to duress, and the declarant enjoys no procedural privilege against self-incrimination, the admissibility of the statement is practically unquestioned.

§ 600. [Self-incrimination]; Knowledge and Waiver.⁴⁹— There is much con-

45. 2 Chamberlayne Evidence, § 1544a.

46. Adams v. Lloyd, 3 H. & N. 362 (1858); Fisher v. Ronalds, 12 C. B. 762 (1852), per Pollock, C. B.; R. v. Garbett, 1 Den. C. C. 236 (1847).

47. Reg. v. Boyes, 1 B. & S. 311, 380 (1861). Privilege from giving self-incriminating testimony, see note, Bender ed., 143 N. Y. 293.

Failure to Produce Books.— A statute is constitutional which provides that in a prosecution for obtaining credit by false statements of ability to pay the complaining party may demand the right to examine the defendant's books and his refusal to produce them shall raise an inference against him. The court holds that the legislature has the

right to prescribe the evidence which shall be received and the effect of that evidence and that this is not forcing the defendant to testify against himself. People v. Mallon, 222 N. Y. 456 (1918).

Taking Finger Prints.— It is not error to admit evidence of finger prints of the defendant obtained by asking him to sign his name where an expert in the subject testifies to their effect. The law must recognize modern scientific inventions. The defendant signed his name voluntarily. State v. Cerciello, 86 N. J. L. 309, 90 Atl. 1112, 52 L. R. A. (N. S.) 1010 (1914).

48. 2 Chamberlayne Evidence, § 1545.

49. 2 Chamberlayne Evidence, § 1546.

dict among the authorities as to when the privilege of silence is waived. To courts impressed with the desirability of fostering the privilege to conceal self-incriminating facts it has seemed proper to require affirmative proof from the proponent of the evidence to the effect that the incriminating statement was voluntarily made after actual knowledge of the privilege.⁵⁰ By tribunals which regard the discovery of truth as the main objective in legal proceedings and any impediment to that end as in the nature of a public menace, the burden of evidence is placed upon him who opposes the reception of a confession so induced. The declarant, as a witness is *assumed* to have been aware of his right to decline to answer an incriminating question on the ground of privilege. If, therefore, he has answered without claiming his right to silence, he has waived it and the statement is voluntary.⁵¹

Where the accused takes the stand voluntarily in his own behalf he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in which he participated and concerning which he is fully informed without subjecting his silence to the inferences to be naturally drawn from it.⁵²

§ 601. [Self-incrimination]; Preliminary Hearings.⁵³—The difficulty of deciding whether the statement of one subsequently accused of crime given as a witness on a preliminary hearing is admissible under the present rule of procedure becomes not a little complicated by the anomalous position in which the witness frequently finds himself. Formal criminal proceedings have not as yet taken final shape. No procedural rights are clearly defined. Apart from any violation of the procedural rules against self-incrimination, little reason is furnished why the confessions or criminal admissions of one testifying as a witness before a committing magistrate⁵⁴ should not be received as a matter of course. The same rule applies to hearings before commissioners in bankruptcy;⁵⁵ or to those held by more casual bodies exercising judicial functions, e.g., investigating committees of the legislature or some branch of a municipality.⁵⁶

A volunteer statement at a preliminary hearing may be properly received⁵⁷

50. Kelly v. State, 72 Ala. 244 (1882); Jackson v. State, 56 Miss. 312 (1879).

51. People v. Taylor, 59 Cal. 650 (1881); State v. Vaigneur, 5 Rich. L. 403 (1852).

52. Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, 37 Sup. Ct. Rep. 192, L. R. A. 1917 F (1917).

Effect of Summons.—Evidence is not involuntary simply because a defendant is summoned into court to testify where he answers the questions put to him without objection. Choate v. State, 12 Okla. Crim. Rep. 560, 160 Pac. 34, L. R. A. 1917 A 1287 (1916).

53. 2 Chamberlayne, Evidence, §§ 1547–1557.

54. State v. Branham, 13 S. C. 389 (1879); State v. Washing, 36 Wash. 485, 78 Pac. 1019 (1904).

55. Judd v. Gibbs, 3 Gray (Mass.) 530, 543 (1855). See also, Faunce v. Gray, 21 Pick. 245 (1838).

56. Com. v. Hunton, 168 Mass. 130, 46 N. E. 404 (1897).

57. Evidence given voluntarily in an earlier action, stands in the same position and is equally competent. Ferrell v. State (Fla. 1903), 34 So. 220.

whether made under oath or not⁵⁸ and even though the declarant was not warned of his rights⁵⁹ or made aware that he was suspected of the crime⁶⁰ and even though the witness is forced by summons to be present and is put on oath.⁶¹ These principles apply to coroner's inquests⁶² even where the witness is present under compulsion and is put under oath,⁶³ and the same rule prevails concerning fire inquests,⁶⁴ former trials⁶⁵ or hearings before the grand jury,⁶⁶ though if he has been forced to testify his statement is not admissible.⁶⁷

§ 602. **Duress.**⁶⁸—A confession, when duress⁶⁹ has been applied to the declarant, becomes absolutely “involuntary.” It is, therefore, inadmissible in evidence from the standpoint either of procedure or from that of reason.⁷⁰

58. *People v. Weiger*, 100 Cal. 352, 357, 34 Pac. 826 (1893); *Jackson v. State*, 39 Ohio St. 37, 39 (1883); *State v. Hatcher*, 29 Or. 309, 44 Pac. 584 (1896).

United States.—*Wilson v. U. S.*, 162 U. S. 613, 16 Sup. Ct. 895 (1896).

59. *State v. Conrad*, 95 N. C. 666 (1886). The contrary has been held.

A witness must be cautioned where the statute expressly so requires. *State v. Spier*, 86 N. C. 600 (1882); *State v. Needham*, 78 N. C. 474 (1878).

60. *Com. v. Sego*, 125 Mass. 210, 213; *Com. v. Myers*, 160 Mass. 530, 532 (1894), per Morton, J. Where, however, he has been formally accused there is authority that the evidence is not admissible. *Woolfolk v. State*, 81 Ga. 564, 8 S. E. 724 (1889); *Treachout v. People*, 41 N. Y. 7 (1869); *Dickerson v. State*, 48 Wis. 288 (1879).

61. *Henderson v. State*, 95 Ga. 326, 22 S. E. 537 (1895); *State v. Briggs*, 68 Iowa 416, 424, 27 N. W. 358 (1886) (plea of guilty); *State v. Bowe*, 61 Me. 174 (1873) (plea of guilty); *People v. Butler*, 111 Mich. 483, 69 N. W. 734 (1897).

Com. v. Clark, 130 Pa. St. 641, 650, 18 Atl. 988 (1890); *Hardy v. U. S.*, 186 U. S. 224, 22 Sup. Ct. 889 (1902). There is, however, strong authority to the contrary. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830 (1903); *State v. Andrews*, 35 Or. 388, 58 Pac. 765 (1899); *State v. Welch*, 34 W. Va. 690, 15 S. E. 419 (1892).

62. *State v. Van Tassel*, 103 Iowa 6, 72 N. W. 497 (1897). See also *Daniels v. State*, 57 Fla. 1, 48 South 747 (1909); 70 L. R. A. 33: Admissibility on trial for murder of testimony of accused at coroner's inquest.

63. *Snyder v. State*, 59 Ind. 105 (1877);

State v. Gilman, 51 Me. 206 (1862); *People v. Mondon*, 103 N. Y. 213, 8 N. E. 496 (1886); *Williams v. Com.*, 29 Pa. St. 102, 105 (1857).

64. *Com. v. Bradford*, 126 Mass. 42 (1878); *Com. v. King*, 8 Gray 503 (1857); *Com. v. Wesley*, 166 Mass. 248, 44 N. E. 228 (1896).

65. *Com. v. Reynolds*, 122 Mass. 455 (1877); *McMasters v. State*, 83 Miss. 1, 35 So. 302 (1903) (stenographer's minutes); *Carr v. Griffin*, 44 N. H. 510 (1863); *Com. v. Reynolds*, 122 Mass. 455 (1877); *McMasters v. State* (Miss. 1903), 35 So. 302.

66. *People v. Sexton*, 132 Cal. 37, 64 Pac. 107 (1901); *State v. Robinson*, 32 Or. 43, 48 Pac. 357 (1897); *State v. Campbell* (Kan. 1906), 85 Pac. 784; *State v. Carroll*, 85 Iowa 1, 51 N. W. 1159 (1892).

67. *State v. Clifford*, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518 (1892); *People v. Lauder*, 82 Mich. 109, 46 N. W. 956 (1890). Admissions of guilt made at the trial of another may be admitted in evidence. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106 (1892).

New York.—*People v. Burt*, 64 N. Y. Suppl. 417, 51 App. Div. 106, 15 N. Y. Cr. 43 (1900), though if compelled to speak they are involuntary and incompetent; *Shoeffler v. State*, 3 Wis. 823 (1854); *State v. Clifford*, 86 Iowa 550 (1892) (prisoner).

68. 2 Chamberlayne. Evidence, §§ 1558–1563.

69. *Phillips v. Henry*, 160 Pa. St. 24, 25, 28 Atl. 477, 40 Am. St. Rep. 706 (1894); *Wolff v. Bluhm*, 95 Wis. 257, 259, 70 N. W. 73, 60 Am. St. Rep. 115 (1897).

70. *People v. Montano* (Cal. App. 1908), 98 Pac. 871; *People v. Perez* (Cal. App. 1908), 98 Pac. 870; *State v. Carrick*, 16 Nev. 120 (1891).

The duress may be mental, as by the use of threats,⁷¹ or physical, by the infliction of physical pain⁷² or by the threat or infliction of injury on a person in the hands of a mob.⁷³

§ 603. **Form of Confessions.**⁷⁴—The form in which a confession is presented to a tribunal is immaterial upon the question of its admissibility in evidence.

The conduct of the accused is always admissible in evidence against him⁷⁵ and the rules excluding confessions deemed involuntary as influenced by hope or fear do not apply to evidence of conduct.⁷⁶ The admission may take the form of silence when an innocent man would naturally speak, as when charged with the crime.⁷⁷ A judicial⁷⁸ confession as by a plea of guilty⁷⁹ made vol-

71. *Hazelrigg v. Donaldson*, 2 Metc. (Ky.) 445, 447 (1859); *State v. Wooley*, 215 Mo. 620, 115 S. W. 417 (1908); *State v. Rose-lair* (Or. 1910), 109 Pac. 865. A confession is not competent when made as the result of a long third degree, the assumption of a dominating and browbeating attitude of the officers toward the defendant and the employment of deceptions, threats and intimidations emphasized with coarse profanity. *People v. Borello*, 161 Cal. 367, 119 Pac. 500, 37 L. R. A. (N. S.) 434 (1911).

72. *Johnson v. State* (Tex. Cr. App. 1906). 97 S. W. 312; *Joe v. State*, 38 Ala. 422 (1863); *Jackson v. State* (Tex. Cr. App. 1906), 97 S. W. 312.

73. *Irwin v. State*, 54 Ga. 39 (1875); *Miller v. People*, 39 Ill. 457 (1866); *State v. Drake*, 82 N. C. 593 (1890).

74. 2 Chamberlayne, Evidence, §§ 1564-1574.

75. *Beery v. U. S.*, 2 Colo. 186 (1873) (identifying stolen goods); *Duffy v. People*, 26 N. Y. 588 (1863) (offer to compromise a larceny).

76. *Michaels v. People*, 208 Ill. 603, 70 N. E. 747 (1904). See §§ 1475, 1476; *State v. Keeland*, 39 Mont. 506, 104 Pac. 513 (1909) (attempts to bribe officer).

77. *Com. v. Trefethen*, 157 Mass. 180 (1892); *Kelley v. People*, 55 N. Y. 565 (1874); *Sparf v. U. S.*, 156 U. S. 51 (1895). Where a husband and wife are together indicted for murder and the wife charges that the husband forced her to commit the crime his failure to contradict her cannot be construed as an admission against him and is not admissible for that purpose. The court remarks that the wise husband attempts to soothe and placate his irate spouse rather than to question her statements, however wide of the truth they may be, and the rule

should be made for the average man and not for the few brave or foolhardy ones. *Riley v. State*, 107 Miss. 600, 65 So. 882, L. R. A. 1915 A 1041 (1914). The mere silence of one accused of crime and his failure to deny charges made against him in his presence are not to be construed as admissions made by him as this contravenes the rule against self-crimination. *Ellis v. State*, 8 Okla. Crim. Rep. 522, 128 Pac. 1095, 43 L. R. A. (N. S.) 811 (1913). "While this character of proof is often entitled to but little weight, there is no rule justifying its entire exclusion. Its value is to be determined by all the circumstances, of which the jury are the peculiar judges: One person may be so confused or embarrassed, so completely taken by surprise by the unexpected and sudden arrest and charge, as, though ever so innocent, to act in a manner strongly indicative of guilt. And yet, another man, cool and self-possessed, may be able at once to command the entire situation, and though the most hardened villain, disarm suspicion and impress those around with his innocence. All these and other circumstances are to be considered. But the fact that he was charged and made no reply or denial, may properly be shown, the effect thereof being left to the jury." Wharton, 345, note 6.

78. The distinction between judicial and extra-judicial confessions is well stated by the court in *State v. Gorman*, 54 Mo. 526.

79. *State v. Branner*, 149 N. C. 559, 63 S. E. 169 (1908). There is authority that a plea of guilty afterwards withdrawn may be put in evidence although it was entered through a misunderstanding between counsel, *State v. Carta*, 90 Conn. 79, 96 Atl. 411, L. R. A. 1916 E 634 (1916), and note showing that the weight of authority is to the contrary.

untarily or by testimony in court⁸⁰ may be received and the confession may also be extra-judicial, outside of court proceedings. The confession may be oral in any form as by question and answer,⁸¹ or it may be written either by him or by another and signed by him.⁸² Where it is written it must be introduced as the best evidence.⁸³ So letters⁸⁴ or other documents may be used as admissions.

§ 604. **Independent Relevancy.**⁸⁵—The statement of the defendant in a criminal prosecution, like any other declaration, may, without conflicting with the procedural rules regulating confessions, be used in evidence as leading to other inferences than that the fact is as stated. The assertion may be relevant independent of its truth or falsity. For example, a confession rejected as evidence of that which it asserts because “involuntary,” may still be received as constituting a contradictory statement.⁸⁶ Thus, should a defendant sign his name to a paper on file in the cause⁸⁷ the prosecution is at perfect liberty to use the signature as a specimen of his handwriting, though it might not be available as a confession.

§ 605. **Introduction of Confession in the Evidence; Hearing on Voir Dire.**⁸⁸—Under the earlier English procedure which has been followed and still prevails in a majority of American courts⁸⁹ the burden of evidence is upon the prosecution to satisfy the court upon tender of the confession in evidence that it was voluntarily given; to the extent, at least, of showing that no threats, promises or other misleading inducements were held out to the declarant by the person to whom the confession was made.

The court may at this stage of the proceedings hear at length both the prosecution and the defendant⁹⁰ to determine whether the confession was really voluntary.⁹¹ The defendant may not only show that the confession was not voluntary but may also prove that he never made it⁹² and the prosecution

80. *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036 (1893). “The statements made by the defendant while testifying at a former trial were competent, either as admissions or for the purpose of contradicting him. They were voluntary statements, in regard to his connection with the transaction, and it is immaterial where or when they were made.” *Com. v. Reynolds*, 122 Mass. 454 (1877)

81. *State v. Peterson*, 110 Iowa 647, 82 N. W. 329 (1900).

82. *State v. Berberick*, 38 Mont. 423, 100 Pac. 209 (1909).

83. *Cicero v. State*, 54 Ga. 156 (1875); *Wright v. State*, 50 Miss. 332 (1874).

84. *Oakley v. State*, 135 Ala. 15, 33 So. 23 (1902).

85. 2 Chamberlayne, *Evidence*, § 1575.

86. *Com. v. Tolliver*, 119 Mass. 312, 315 (1876).

87. *Hunt v. State*, 33 Tex. Cr. 252, 26 S. W. 206 (1894) (application for bail)

88. 2 Chamberlayne, *Evidence*, §§ 1576-1586.

89. *People v. Castro*, 125 Cal. 521, 58 Pac. 133 (1899).

United States.—*Hopt v. Utah*, 110 U. S. 587, 4 Sup. 202 (1883).

90. *Zuckerman v. People*, 213 Ill. 114, 72 N. E. 741 (1904).

91. *State v. Williams* (Nev. 1909), 102 Pac. 974.

92. *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325 (1909); *Com. v. Howe*, 9 Gray (Mass.) 110 (1857); *People v. Fox*, 3 N. Y. Suppl. 359 (1888).

may impeach the evidence of the defendant.⁹³ The question may, in the first instance be decided by the judge in many jurisdictions.⁹⁴

§ 606. [Introduction of Confession into Evidence]; Hearing of the Jury.⁹⁵—Where a confession of guilt is offered, the jury, as a rule, are required to retire from the court room, while the facts regarding the voluntary nature of the prisoner's statement are considered by the court and its admissibility argued by counsel on *voir dire*.⁹⁶ In the absence of statutory regulation to the contrary, making the matter one of substantive or procedural law, the question as to whether, and, if so, how far, witnesses bearing upon the voluntary nature of the confession shall be examined in the presence of the jury, is largely one of administration.⁹⁷

§ 607. [Introduction of Confession into Evidence]; Leaving Question to the Jury.⁹⁸—As the jury has in the last instance to decide the truth and effect of evidence as to a confession many courts have turned over to them at once the hearing of all testimony concerning it.⁹⁹ It then becomes the duty of the jury to determine whether it is voluntary¹ and if so whether the evidence as to it is to be believed.²

§ 608. Probative Force; Infirmative Considerations.³—From the standpoint of reason a confession may be subject to grave infirmative considerations, among others that it is extremely improbable that a person should accuse himself of a serious crime.⁴ It may have been made from some false hope of benefit or fear of injury and still be false.⁵ The mind of the criminal may be excited or diseased⁶ or morbid. The confession may be in the nature of an offer of compromise to the prosecution.⁷

93. *State v. Staley*, 14 Minn. 105 (1867); *Sampson v. State*, 54 Ala. 241 (1875); *State v. Peter*, 14 La. Ann. 521 (1859). See also, *Com v. Culver*, 126 Mass. 464 (1879).

94. *Strickland v. State* (Ala. 1907), 44 So. 90.

Practical Suggestions.—The witness who is to testify to a confession should be first asked to detail the circumstances under which it was obtained, showing that no force or inducement was used and telling just what was said to the declarant and showing if possible that he was cautioned that whatever he said might be used against him and that he need not answer if he did not wish to do so.

95. 2 Chamberlayne, Evidence, § 1587.

96. *State v. Gruff*, 68 N. J. L. 287, 53 Atl. 88 (1902); *Kirk v. Terr.*, 10 Okl. 46, 60 Pac. 797 (1900).

97. *State v. Barker* (Wash. 1910), 106 Pac. 133.

98. 2 Chamberlayne, Evidence, §§ 1588; 1590.

99. *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408 (1898); *Burdge v. State*, 58 Ohio St. 512, 42 N. E. 594 (1896).

1. *Cain v. State*, 18 Tex. 387 (1857); *Com. v. Culver*, 126 Mass. 464 (1879).

2. *Burton v. State*, 107 Ala. 108; 18 So. 255 (1895).

3. 2 Chamberlayne, Evidence, §§ 1591-1593.

4. *State v. Porter*, 32 Or. 135, 49 Pac. 964 (1897).

5. *Bullock v. State*, 65 N. J. L. 557, 47 Atl. 62 (1900); *People v. McGloin*, 91 N. Y. 246 (1883).

6. The drunken condition of an accused when making a confession unless such drunkenness goes to the extent of mania does not affect the admissibility in evidence of such confession but may affect its weight and credibility with the jury. *Lindsay v. State*, 66

§ 609. [Probative Force]; Judicial Confessions.⁸—No confession, as a substitute for evidence, is conclusive. The confessing party is not concluded even by a judicial statement, final as this may be, in a procedural sense, for the purposes of the case itself. The defendant who has pleaded guilty in a criminal case may seek to minimize or control the effect of his statement should it be offered against him on another occasion. He may, for example, show on such an occasion that he did not then know the nature of the charge against him to which he was pleading, or did not suppose the plea would be used as a confession. It is open to him to contend that he is, in point of fact, not guilty of the offense claimed although he has pleaded guilty to it at another time.⁹

§ 610. [Probative Force]; Corroboration required.¹⁰—It has frequently been provided, in pursuance of the idea that it is a proper function of substantive law to control the operations of the reasoning faculty, that a jury should not act upon the mere confession of the accused, however voluntary. To create a *prima facie* case, the confession must be corroborated,¹¹ unless it is a judicial confession as by plea of guilty in open court.¹² Corroboration may constitute any circumstance tending to render the confession more probable¹³ but the corroborating fact need not be connected either with the accused or the confession and need not be established beyond a reasonable doubt.¹⁴ The rule as to corroboration is not a rule of evidence but is a rule of procedure. The fact that a crime has been committed, or the *corpus delicti*, must be proved but evidence of it need not precede the confession.¹⁵ In many jurisdictions the

Fla. 341, 63 So. 832, 50 L. R. A. (N. S.) 1077 (1913). Where the defendant has confessed to the crime charged and his mental capacity is in question it is proper to show that he had previously made a false confession to having committed another crime of which he was not guilty, to show his mental condition. *Shellenberger v. State*, 97 Neb. 498, 150 N. W. 643, L. R. A. 1915 C 1163 (1915).

7. *Austine v. People*, 51 Ill. 236, 240 (1869).

A threat to bring a civil action may render a confession of crime so unreliable and untrustworthy as to be irrelevant, for precisely the same reasons that an offer of compromise is irrelevant. *Cropper v. U. S.*, Morr. (Iowa) 259 (1843).

8. 2 Chamberlayne, Evidence, § 1594.

9. *Murmutt v. State* (Tex. Cr. App. 1902), 67 S. W. 508. Right to impeach or contradict, see note, Bender ed., 187 N. Y. 300.

10. 2 Chamberlayne, Evidence, §§ 1595-1601.

11. *Hubbard v. State* (Ark. 1905), 91 S. W. 11; *Wilson v. State*, 6 Ga. App. 16, 64 S. E.

112 (1909); *West v. State*, 6 Ga. App. 105, 64 S. E. 130 (1909). In an action for divorce on the ground of adultery where the libellant testifies to the adultery and there is evidence of a confession made by the libellee this is insufficient under the rule that the uncorroborated testimony of one of the parties is not enough to obtain a divorce. *Garrett v. Garrett*, 86 N. J. Eq. 293, 98 Atl. 848. Conviction on accomplice's testimony— who is accomplice, see note, Bender ed., 26 N. Y. 523.

12. *People v. Bennett*, 37 N. Y. 117 (1867); *State v. Cowan*, 29 N. C. 239 (1847).

13. *Com. v. Killion* (Mass. 1907), 80 N. E. 222; *State v. Guila*, 10 N. J. L. 163, 18 Am. Dec. 404 (1828).

14. Evidence in corroboration of a confession is sufficient, if it tends materially to connect accused with the crime, and need not show the fact beyond a reasonable doubt. *Douglas v. State*, 6 Ga. App. 157, 64 S. E. 490 (1909).

15. *Anthony v. State* (Fla. 1902), 32 So. 818.

corpus delicti must be established by evidence independent of the confession itself¹⁶ but circumstantial evidence of the *corpus delicti* is sufficient.¹⁷

§ 611. [Probative Force]; A Question for the Jury.¹⁸— A finding by the judge presiding at the trial to the effect that a confession is admissible, receives the statement as evidence in the case. He informs the jury that they may properly consider the probative force, if any, furnished by the confession. This ruling attaches no element of definite credibility. What probative force the confession is to have in the minds of the jury is for them to determine.¹⁹ The same facts which have failed to convince the judge that the confession should be excluded as “involuntary” under the rule of procedure or irrelevant in point of reason to the existence of the facts which it asserts²⁰ may suffice to remove from it, when admitted, all probative force.²¹ The defendant has therefore the right to introduce evidence of such facts²² and comment upon them in argument.²³ The voluntary nature of a confession need not be established beyond a reasonable doubt but any doubt arising in the minds of the jury as to the probable effect upon the veracity of the declarant of inducements held out to him may be considered by them, with all other facts, in deciding whether there remains in their minds, as the resultant of the whole case, a reasonable doubt as to the guilt of the accused.²⁴

§ 612. [Probative Force]; Judicial Views.²⁵— Judges are by no means agreed as to the juridical value of confessions. Courts have treated them as a class, a species of evidence, about which, as a whole, it was safe to dogmatize.

16. *Richardson v. State*, 80 Miss. 115, 31 So. 544 (1902). Until there is some evidence of the *corpus delicti* there is no foundation for the receipt of evidence of confessions. *State v. Brown*, 103 S. C. 437, 88 S. E. 21, L. R. A. 1916 D 1295 (1916). The *corpus delicti* must be proved outside of the defendant's admissions and for this purpose to prove embezzlement by a guardian it is not enough to show the appointment of the guardian and his receipt of the funds and his admission that he did not have them, but the court indicates that a demand and failure to produce them might be enough. *Choate v. State*, 12 Okla. Crim. Rep., 560, 160 Pac. 34, L. R. A. 1917 A 1287 (1916).

17. *Davis v. State* (Ala. 1904), 37 So. 676; *State v. Banusik* (N. J. 1906), 64 Atl. 994; *State v. Rogoway* (Or. 1904), 78 Pac. 987. Evidence of an extra-judicial confession is circumstantial within the meaning of a statute providing that no person shall suffer the death penalty on circumstantial evidence alone. *Damas v. People*, Colo. (1917), 163 Pac. 289, L. R. A. 1917 D 591.

18. 2 Chamberlayne, Evidence, §§ 1602-1604.

19. *State v. Adams* (Dl. 1906), 65 Atl. 510; *Herndon v. State* (Tex. Cr. App. 1907), 99 S. W. 558. The jurors, being the conclusive judges of the credibility of witnesses and the weight to be given to their testimony, may believe or disbelieve any portion of a confession. *Herndon v. State* (Tex. Cr. App. (1907), 99 S. W. 658. See also, *State v. Russo* (Del. O. & T. 1910), 77 Atl. 743.

20. §§ 605 *et seq.*

21. *State v. Von Kutzleben* (Iowa 1907), 113 N. W. 484.

22. *Miller v. State*, 94 Ga. 1 (1894); *Williams v. State*, 72 Miss. 117 (1894).

23. The result is the same where the language of the declarant admits of more than a single meaning. *State v. Taylor*, 54 S. C. 174, 32 S. E. 149 (1898); *Eckert v. State*, 9 Tex. App. 105 (1880) (“shot after”).

24. *Williams v. State*, 72 Miss. 117, 16 So. 296 (1894).

25. 2 Chamberlayne, Evidence, §§ 1605-1608.

Upon the one hand, the claim has been freely and enthusiastically made, by those who must have assumed that all confessions were the reasoned and deliberate act of the person accused, that such statements are of the first rank in probative force²⁶ and, therefore, entitled to the most marked consideration.²⁷

To other courts, regarding the various infirmative considerations attending their use, confessions have presented an entirely different forensic aspect. They are, it is said, to be cautiously received,²⁸ always distrusted²⁹ and never accredited with much probative force.³⁰ There are, for example, many cases known where persons have confessed to crimes they did not commit or as in the case of the witchcraft delusion to crimes which could not have been committed by anyone. The general rule is that each confession should be weighed by its own circumstances.³¹

§ 613. Specific Admissions.³²—However the fact that the confession itself as a confession is excluded as being involuntary will not bar out evidence of independent facts contained in it which are relevant to the issue as admissions.³³ For example, if the accused states that the stolen goods³⁴ or the body of the deceased³⁵ will be found at a certain place evidence of this statement and that investigation showed it to be true is admissible against the defendant.

§ 614. To Whom Extrajudicial Confession is Made.³⁶—An extra-judicial confession may properly be made to any person,³⁷ or collection or body of persons.³⁸ It is not even necessary that the statement should have been addressed to any definite individual. It may have taken the form of a prayer.³⁹ The great majority of confessions of guilt are naturally received by persons in authority, upon the arrest of the accused or while he is in custody.⁴⁰ Though it is in connection with confessions so made that the voluntary character of the statement is most carefully scrutinized,⁴¹ no reason exists why the officer should

26. *Baye v. State*, 45 Neb. 261 (1895); *Hopt v. Utah*, 110 U. S. 584, 4 Sup. Ct. 202 (1883).

27. *State v. Brown*, 48 Iowa 382 (1878).

28. *Daniels v. State*, 57 Fla. 1, 48 So. 747 (1909); *Marshall v. State*, 32 Fla. 462, 14 So. 92 (1893); *Coney v. State*, 90 Ga. 140, 15 S. E. 746 (1892); *People v. Borgetto*, 99 Mich. 336, 58 N. W. 328 (1894).

29. *State v. Fields, Peck* (Tenn.), 140 (1823); *State v. McDonnell*, 32 Vt. 491, 532 (1860).

30. *Keithler v. State*, 10 Sm. & M. (Miss.) 192 (1848); *People v. Jones*, 2 Edw. Sel. Cas. (N. Y.) 86 (1849).

31. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (1897).

32. 2 Chamberlayne, Evidence, §§ 1609-1614.

33. *State v. Red*, 53 Iowa 69 (1880).

34. *Johnson v. State*, 119 Ga. 257, 45 S. E. 960 (1903).

35. *Gregg v. State*, 106 Ala. 44, 17 So. 321 (1894) (child); *Lowe v. State*, 88 Ala. 8 (1889); *State v. Motley*, 7 Rich. (S. C.) 327 (1854).

36. 2 Chamberlayne, Evidence, § 1615.

37. *Speer v. State*, 4 Tex. App. 474 (1878).

38. *Com. v. Drake*, 15 Mass. 161 (1818) (church members).

39. *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814 (1890).

40. *State v. Simon*, 15 La. Ann. 568 (1860).

41. *State v. Dodson*, 14 S. C. 628 (1880); §§ 593 et seq.

not testify as to what has been said to him. The prosecuting attorney,⁴² committing magistrate⁴³ or even the trial judge⁴⁴ are equally competent as witnesses to the making of a voluntary confession by one accused of crime.

§ 615. **Administrative Detail.**⁴⁵—As a rule, judicial administration imposes no limit to the number of confessions which may be received. Where a defendant makes a confession on more than one occasion, each confession may be separately proved.⁴⁶ The scope, moreover, which a confession may cover is by no means rigidly limited to the *res gestæ* of the crime under investigation. It is no objection to a confession that it relates also to the commission of other crimes.⁴⁷ Nor is the order of proof other than elastic. A confession, for example, may be introduced at the stage of rebuttal.⁴⁸

§ 616. **The Evolution of Reason.**⁴⁹—To a certain extent, the history of the evolution of the law of confessions is that of most rules in the law of evidence. As is said elsewhere,⁵⁰ the early history of that law from the time when the jurors ceased to be witnesses⁵¹ down to the close of the sixteenth century was largely, though decreasingly, one of administration. The judge was accorded a wide discretion, as part of the executive of the crown for the promotion of justice in advising jurors as to what they might safely use as evidence in course of a trial. There were practically no *rules*, certainly none having the force of law.⁵² At most, the action of the judges in this respect was determined by the custom, or practice of the various circuits of the king's courts. The effort was to administer the customs of the realm or other provisions having the force of law with legal reason, as that term was then understood, for the attainment of substantial though, of course, conventionalized, justice.

In respect to confessions, the term being then restricted to judicial confessions by way of pleas of guilty,⁵³ the administration of humane judges was to make sure that the prisoner really meant what he said in pleading guilty and was fully aware of the consequences of his act. In view of the severity of

42. *Walker v. State*, 136 Ind. 663, 36 N. E. 356 (1893); *People v. Howes*, 81 Mich. 396, 45 N. W. 961 (1890); *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518 (1890).

43. *State v. McLaughlin*, 44 Iowa 82 (1876); *State v. Monie*, 26 La. Ann. 513 (1874); *Wolf v. Com.*, 30 Gratt. (Va.) 833 (1878).

44. *State v. Chambers*, 45 La. Ann. 36, 11 So. 944 (1893).

45. 2 Chamberlayne, Evidence, § 1616.

46. *Lowe v. State*, 125 Ga. 55, 53 S. E. 1038 (1906).

47. *State v. Dalton* (Wash. 1906), 86 Pac. 590.

48. *Ince v. State* (Ark. 1906), 93 S. W. 65.

49. 2 Chamberlayne, Evidence, §§ 1617, 1618.

50. § 120.

51. § 120.

52. "These defects in the system of trial in the seventeenth century, I own, strike me as being almost less important than the utter absence which the trials show of any conception of the true nature of judicial evidence on the part of the judges, the counsel and the prisoners. The subject is even now imperfectly understood, but at that time the study of the subject had not begun. I do not think any writer of the seventeenth century has anything of importance to say about it." Stephen, *Hist. Crim. Law*, p. 399.

53. § 603.

the penal code then in force, the disproportionate punishment frequently awarded for comparatively unimportant offences and the disabilities under which the accused labored, it seemed but just that before the judge should allow a prisoner, undefended by counsel, without the aid of witnesses, and hurriedly tried, often with almost indecent haste, to foreclose his last chance of escape by plea of guilty, he should make sure that the act was a deliberate one made with full knowledge of its consequences.

The political conditions of the sixteenth century⁵⁴ resulted in the crystallization of these tendencies into rules of law which resulted in many cases in gross miscarriage of justice.⁵⁵ Our courts have followed these vicious precedents⁵⁶ but the modern tendency is to break away from these strict rules and to regard confessions on the merits of each case.⁵⁷

54. See *ante*, § 582. Social conditions in the England of that time were such as might well ground a contention that any inducement, however slight, held out to a prisoner to induce him to confess would tend to lead him to criminate himself, even falsely. *R. v. Baldry*, 2 Den. Cr. C. 445 (1852).

55. *Bram v. U. S.*, 168 U. S. 532, 18 Sup. 183 (1897).

56. *State v. Edwards*, 126 N. C. 1051, 35 S. E. 540 (1900).

57. *State v. Grover*, 96 Me. 363, 52 Atl. 757 (1902).

CHAPTER XXII.

FORMER EVIDENCE.

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§ 617. **Former Evidence.**¹— A final branch or topic in the law of evidence which continues to exhibit in a marked though waning degree the power of the procedural or substantive law is that which permits a proponent to submit to the tribunal, under certain circumstances, the evidence given by a witness at a former trial. The prevailing rule upon this subject may be stated as follows. Whenever it shall be made to appear to the reasonable satisfaction of the trial judge that a suitable administrative necessity for so doing exists, the proponent of relevant facts covered by the testimony of a witness upon a former trial may be permitted to give in evidence, as proof of the facts therein asserted, the report, verified under oath, of a duly qualified witness who heard the original testimony; — *provided* that the issue is substantially the same in

1. 2 Chamberlayne, Evidence, § 1619.

the two actions, that a party against whom the evidence is offered or some one identified with him in legal interest cross-examined the witness upon the former occasion concerning the topic on which his evidence is now offered, or, at least, was afforded a reasonable opportunity for doing so, and that the reporting witness should be able to state the testimony with satisfactory fullness. As these procedural requirements are insisted upon by the courts with considerable, though relaxing, strictness, it would appear desirable to consider them separately and, so far as practicable, in this order.

§ 618. **Administrative Attitude of the Court.**²—In the absence of primary evidence³ secondary evidence may be introduced by the testimony of a witness at a former trial⁴ if relevant.⁵ The opponent has the same rights to object to it as if the witness were on the stand⁶ and he may impeach the witness by proving that he has contradicted himself⁷ or in other ways.

§ 619. **Adequate Necessity.**⁸—In order that a party should be able to introduce evidence taken at a former trial, the judge will require that he establish the necessity⁹ for resorting to it.¹⁰ It is only required that the necessity should be established so far as relates to the particular witness. It is not essential that the proponent also show that he can prove the fact itself in no other way.¹¹ The evidence being, in its nature, secondary, i.e., inferior in a probative point of view, less decisive and convincing than the face to face testimony of the witness himself,¹² the party tendering the less probative proof must show to the reasonable satisfaction of the judge presiding at the trial that it is impossible for him to procure the attendance of the witness himself.¹³ This may be for one of several reasons. The witness may be dead, insane, sick or absent from the jurisdiction. The former witness may now refuse to

2. 2 Chamberlayne, Evidence, §§ 1620-1623.

3. Doncaster v. Day, 3 Taunt. 262, 12 Rev. Rep. 650 (1810).

4. Limitations on scope of rule.—The rule does not apply in any connection where the object of the tender of evidence is merely to show that the statement was made, not that it was true. People v. Lem You, 97 Cal. 224, 226, 82 Pac. 111 (1893) (perjury). The parties may be different, in such a case and the issues dissimilar, while the statements may still be admissible. Kutzmeyer v. Ennis, 27 N. J. L. 371 (1859).

5. Williams v. Smith, 29 R. I. 562, 72 Atl. 1093 (1909) (deposition).

6. Crary v. Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110 (1834).

The effect, by way of waiver, of failing to object at a former trial when the difficulty now, perhaps, beyond redress, might have been cured will, however, receive due adminis-

trative consideration. Crary v. Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110 (1834); Petrie v. Columbia, etc., R. Co., 29 S. C. 303, 317, 7 S. E. 515 (1888).

7. Sharp v. Hicks, 94 Ga. 624, 21 S. E. 208 (1894).

8. 2 Chamberlayne, Evidence, § 1624.

9. Lyttle v. Denny, 222 Pa. 395, 20 L. R. A. (N. S.) 1027, 71 Atl. 841 (1909) (deposition). "The admissibility of this species of evidence depends upon the necessity of the case." U. S. v. Macomb, 26 Fed. Cas. No. 15,702, p. 1134, 5 McLean 286, 292 (1851), per Drummond, D. J.

10. Wells v. Ins. Co., 187 Pa. 166, 40 Atl. 802 (1898).

11. Thurmond v. Trammell, 28 Tex. 371, 91 Am. Dec. 321 (1866); Wright v. Doe, 1 A. & E. 3, 28 E. C. L. 28 (1834).

12. Goodlett v. Kelly, 74 Ala. 213 (1883).

13. Carr v. Am. Loco. Co., 70 Atl. 196 (1908).

testify on the ground of self-incrimination. He may claim some other privilege of silence, and so on.

E converso, should the witness himself be present in court, he must be called, in the first instance, by the party who relies on his evidence.¹⁴ For purpose of corroboration or impeachment,¹⁵ as constituting an admission,¹⁶ or the like, the former evidence is obviously competent, although the declarant be available as a witness¹⁷ or, indeed, have testified as one.

Failure to summon.—Should the proponent have failed to subpoena a witness but have relied upon his promise to be present and testify, no ground is furnished for admitting the former testimony of a witness, should the latter fail to appear and testify as agreed.¹⁸

§ 620. [Adequate Necessity]; Absence from Jurisdiction.¹⁹—Absence of a witness from the jurisdiction of the forum, if permanent, and such as to prevent the effectual service of compulsory process upon him may be a sufficient justification for failure to produce the person in question as a witness.²⁰ This is equally true whether the evidence of the absent witness be desired in a civil²¹ or criminal²² proceeding. Absence in a foreign country,²³ sister state,²⁴ or territory will furnish a sufficient administrative reason for receiving former testimony. Even preparation for immediate departure from the jurisdiction of the forum, e.g., presence on ship ready to sail,²⁵ "starting to move,"²⁶ has been regarded as sufficient "absence" within the rule.

If a party procures the absence of one of his opponent's witnesses the latter may introduce his former testimony.²⁷ In many cases the party has been required to show in addition that it is impossible to take the deposition of the absent witness.²⁸ Temporary absence is treated like permanent absence as it

14. *State v. Coleman*, 199 Mo. 112, 97 S. W. 574 (1906).

15. *Bess v. Commonwealth*, 26 Ky. L. Rep. 839, 82 S. W. 576 (1904).

16. *Lush v. Incorporated Town of Parkersburg*, 127 Iowa 701, 104 N. W. 336 (1905).

17. *Dambmann v. Metrop. St. Ry. Co.*, 106 N. Y. Suppl. 221, 55 Misc. 60 (1907).

18. *Chicago, M. & St. P. Ry. Co. v. Newsome*, 174 Fed. 394, 98 C. C. A. 1 (1909).

19. 2 Chamberlayne, *Evidence*, §§ 1625-1631.

20. *Dolph v. Lake Shore & M. S. Ry. Co.*, 149 Mich. 278, 112 N. W. 981, 14 Detroit Leg. N. 426 (1907). Evidence that a witness has moved to another state and a subpoena is issued for him and returned showing that the sheriff cannot find him is sufficient to authorize the admission of a copy of his evidence at the former trial. *Henry v. State*, 7 Okla. Crim. Rep. 715, 136 Pac. 982, 52 L. R. A. (N. S.) 113 (1913). In a criminal case the state may introduce the evi-

dence of a witness who testified in a previous trial and was cross-examined when he has disappeared and cannot be found where there is no evidence of collusion in keeping him away by the state as otherwise the defence could prevent prosecution simply by taking witnesses out of the jurisdiction. *Edwards v. State*, 9 Okla. Crim. Rep. 306, 131 Pac. 956, 44 L. R. A. (N. S.) 701 (1913).

21. *Reynolds v. Powers*, 98 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059 (1895).

22. *State v. Simmons*, 98 Pac. 277 (1908).

23. *People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (1904).

24. *Long v. Davis*, 18 Ala. 801, 803 (1854).

25. *Fonsick v. Agar*, 6 Esp. 92 (1806).

26. *McCutchen v. McCutchen*, 9 Port. 650, 654 (1839).

27. *Williams v. State*, 19 Ga. 402 (1856); *Stout v. Cook*, 47 Ill. 530 (1868); *State v. Houser*, 26 Mo. 431 (1858); *Kirchner v. Laughlin*, 5 N. M. 365, 23 Pac. 175 (1890).

28. *Southern Car & Foundry Co. v. Jen-*

has the same effect on the party who needs to use the witness²⁹ and even the temporary return of the witness to the jurisdiction where the evidence is not available does not prevent the use of his former evidence.³⁰

§ 621. [Adequate Necessity]; Claim of Privilege Against Self-Incrimination.³¹ — When a witness who has once testified to a fact without objection, maintains with success, on a second trial, that the giving of similar testimony on the pending trial would tend to incriminate him, and, therefore, cannot be compelled to answer, he is practically as unavailable to a proponent as if he were dead or absent from the jurisdiction. But if the present statement would incriminate the witness, the introduction of his former declaration would be equally effective to that end. The former testimony has on this ground been rejected.³²

§ 622. [Adequate Necessity]; Death.³³ — The most conclusive necessity which the proponent of the secondary evidence given at a former trial can urge in asking to be allowed to introduce secondary evidence is that the witness has since deceased. Under the earlier law this was the sole cause which sufficed to excuse the party from producing the original witness.³⁴ No question has arisen in civil cases as to the validity of this reason for failing to produce the witness himself and receiving the secondary evidence of his former testimony.³⁵ Proof of the death of the original witness is sufficient, other conditions being satisfied, to admit evidence of his former testimony.

The fact of death must, however, be affirmatively established to the satisfaction of the presiding judge, by clear, positive and convincing testimony.³⁶ The validity of death as a ground for receiving secondary evidence of the testimony of a witness is not, however, confined to civil actions. The same rule has been invoked in criminal prosecutions,³⁷ although there is some slight authority to the contrary.³⁸

§ 623. [Adequate Necessity]; Imprisonment.³⁹ — Except in so far as otherwise regulated by statute⁴⁰ the fact that the former witness is now in prison

nings, 136 Ala. 247, 34 So. 1002 (1903); Harbison & Walker Co., Southern Department v. White (Ky. 1908), 114 S. W. 250; People v. Long, 44 Mich. 296, 6 N. W. 673 (1880).

²⁹. Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811 (1886); Monroe Bank v. Gifford, 79 Iowa 300, 44 N. W. 558 (1890); Wright v. Cumpsty, 41 Pa. St. 102 (1861).

³⁰. Hobbs v. State (Tex. Cr. App. 1909), 117 S. W. 811; Fonsick v. Aga, 6 Esp. 92 (1806).

³¹. 2 Chamberlayne, Evidence, § 1632.

³². Hayward v. Barron, 38 N. H. 366 (1859).

³³. 2 Chamberlayne, Evidence, §§ 1633, 1634.

³⁴. Le Baron v. Crombie, 14 Mass. 234 (1817); Crary v. Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110 (1834).

³⁵. Detroit Baseball Club v. Preston Nat. Bank, 113 Mich. 470, 71 N. W. 833 (1897).

³⁶. Johnson v. Com., 70 S. W. 44, 24 Ky. L. Rep. 842 (1902).

³⁷. State v. Herlihy, 102 Me. 310, 66 Atl. 643 (1906).

³⁸. Finn. v. Com., 5 Rand. (Va.) 701 (1827); Brogg v. Com., 10 Gratt. (Va.) 722 (1853); U. S. v. Sterland, 27 Fed. Cas. No. 16,387 (1858).

³⁹. 2 Chamberlayne, Evidence, § 1635.

⁴⁰. People v. Putnam, 129 Cal. 258, 61 Pac. 961 (1900).

does not, in and of itself, suffice to admit his original testimony. The prisoner is not, in intendment of law, beyond the reach of process and by taking proper steps the proponent may procure his deposition or even compel his personal attendance as a witness in court.⁴¹ Additional facts may, however, cause the trial judge to admit the secondary evidence. This may happen, for example, where the prisoner contumaciously refuses to testify and his punishment, imposed for prior offences, is already so great that it is legally impossible to add to it.⁴²

§ 624. [Adequate Necessity]; Inability to Find.⁴³—A clear administrative necessity for receiving the secondary evidence may be furnished where the proponent, after the exercise of due diligence, finds himself entirely without knowledge, or the means of acquiring it, as to the present whereabouts of the former witness. The administrative necessity is complete and the former evidence is properly received.⁴⁴ “If the party cannot find a witness, then he is, as it were, dead unto him.”⁴⁵ One condition judicial administration imposes upon the proponent, in this connection. It is not sufficient for him to show simply that he is ignorant as to where the witness is. He must go further and prove affirmatively to the court that he has used due diligence.⁴⁶

§ 625. [Adequate Necessity]; Infamy.⁴⁷—Should a witness who has once testified since become disqualified by reason of infamy, e.g., by conviction on a charge of felony, he is equally unavailable to the proponent as a witness as if he were dead, and his former testimony should, therefore, in point of principle, be admitted, were the matter to be decided entirely by the right of the proponent to prove his case.⁴⁸ However, the rule is settled that the former statements of a convicted person are inadmissible, should he have been rendered infamous.⁴⁹ The suspicion cast upon the credibility of the former testimony by reason of the subsequent conviction, has not escaped notice.

§ 626. [Adequate Necessity]; Interest.⁵⁰—A much more satisfactory administrative rule and one more in accordance with the modern trend of the law of evidence, has been adopted in jurisdictions which still retain rules disquali-

41. *State v. Conway*, 56 Kan. 682, 44 Pac. 627 (1896).

42. *Switzer v. Boulton*, 2 Grant Ch. 693 (1851).

43. 2 Chamberlayne, Evidence, §§ 1636-1639.

44. *Maloney v. State* (Ark. 1909), 121 S. W. 728; *Boyd v. St. Louis S. W. Ry. Co. of Texas* (Tex. 1908), 108 S. W. 813 [reversed. *St. Louis S. W. Ry. Co. of Texas v. Boyd* (Tex. Civ. App. 1907), 105 S. W. 519].

45. *Anon., Godbolt*, 326 (1623), per Chamberlain and Dodderidge, JJ.

46. *State v. Riddle*, 179 Mo. 287, 78 S. W. 606 (1904); *State v. Evans*, 65 Mo. 574 (1877).

47. 2 Chamberlayne, Evidence, § 1640.

48. *State v. Valentine*, 7 Ired. (N. C.) 225, 227 (1847); §§ 334 *et seq.*

49. *Redd v. State*, 65 Ark. 475, 47 S. W. 119 (1898); *State v. Conway*, 56 Kan. 682, 44 Pac. 627 (1896); *LeBaron v. Crombie*, 14 Mass. 235 (1817); *Webster v. Mann*, 56 Tex. 119 (1882).

50. 2 Chamberlayne, Evidence, §§ 1641-1643.

fying witnesses on the ground of interest in the result when one who has testified on a former trial has become thus disqualified. From the standpoint of the party who would otherwise again offer the original witness, the bar of legal disqualification is as insuperable as would be that of death or absence from the jurisdiction.⁵¹ Under such circumstances, former evidence has been held to become admissible.⁵²

Under the rule that prevails in some states that where one party to a pending controversy dies the surviving litigant will not be allowed to testify against the estate of the former the former testimony of the person who is no longer permitted to testify is received.⁵³ Even at common law the defendant in an action for malicious persecution could show his testimony supporting the criminal charge he made.⁵⁴

§ 627. [Adequate Necessity]; Mental Incapacity.⁵⁵—Circumstances may exist, under which, though the witness be alive, within the jurisdiction, even actually present in court,⁵⁶ and subject to no legal disqualification; and yet a sufficient administrative necessity may unquestionably be presented for receiving secondary evidence of his former testimony. Prominent among such circumstances may be certain conditions of mind or body. The proponent, for example, may be prevented from putting his witness on the stand by reason of some mental incapacity on the part of the latter. Thus, insanity, either in civil⁵⁷ or criminal proceedings⁵⁸ and whether hopelessly chronic or temporary⁵⁹ may, if it has arisen since the former evidence was given,⁶⁰ excuse the actual production of the witness. The same rule will be applied should

51. "He (the witness) was disabled to give evidence by the act of God, so that it was in effect, the same thing as if he were dead." *Tilly's Case*, 1 Salk. 286 (1703), per Trevor, C. J., *dissentiente*.

Marriage.—Former testimony at a previous trial of one who has since then married the defendant is not admissible as against the defendant in a manslaughter case. *Langham v. State*, 12 Ala. App. 46, 68 So. 504.

52. *Smithpeters v. Griffin*, 10 B. Mon. (Ky.) 259 (1850).

53. *Morehouse v. Morehouse*, 41 Hun (N. Y.) 146 (1886) (statute); *Walbridge v. Knipper*, 96 Pa. St. 48 (1880); *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666 (1891). See also, *Bowie v. Hume*, 13 App. Cas. (D. C.) 286 (1898). But see, to the contrary effect, *Barker v. Hebbard*, 81 Mich. 267, 45 N. W. 964 (1890); *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142 (1896). Where a witness is precluded from testifying to transactions with a deceased person, his testimony at a former trial when the other party was alive may be put in evidence as

full opportunity for cross-examination had been given. *New v. Smith*, 94 Kan. 6, 145 Pac. 880, L. R. A. 1915 F 771 (1915).

54. *Kansas & Texas Coal Co. v. Galloway* (Ark. 1903), 74 S. W. 521.

55. 2 Chamberlayne, Evidence, § 1644.

56. *Rothrock v. Gallaher*, 91 Pa. St. 108 (1879).

57. *Stout v. Cook*, 47 Ill. 530 (1868).

New Jersey.—*Berney v. Mitchell*, 34 N. J. L. 337 (1870).

Pennsylvania.—*Emig v. Diehl*, 76 Pa. St. 359, 373 (1874).

58. *Lucas v. State*, 96 Ala. 51, 11 So. 216 (1892); *State v. Wheat*, 111 La. 860, 35 So. 955 (1903).

59. *R. v. Marshall*, Car. & M. 147 (1841). It has, however, been held that the former evidence of the witness is not admitted though he is temporarily insane. *State v. Canny*, 158 Mass. 210 (1893).

60. *Thompson v. State*, 106 Ala. 67, 17 So. 512 (1895); *Howard v. Patrick*, 88 Mich. 799 (1878); *Whitaker v. Marsh*, 62 N. H. 478 (1883).

the memory of the witness⁶¹ or his other mental faculties have become so greatly impaired by reason of old age⁶² or other cause as to make it impossible for him to testify with advantage to the cause of justice.

§ 628. [Adequate Necessity]; Official Duty.⁶³—Inability on the part of a witness to attend a trial owing to the requirements of official⁶⁴ duty, will usually be deemed sufficient administrative warrant for receiving the secondary evidence of his former testimony. The validity of the excuse rests with the trial court.

§ 629. [Adequate Necessity]; Physical Incapacity.⁶⁵—While the mental powers of a witness may be adequate to the task of testifying, his bodily health may be so greatly impaired as to make the effort to testify dangerous to life or impossible of accomplishment. A witness may be so sick⁶⁶ by reason of an acute⁶⁷ or chronic⁶⁸ disease; may be so enfeebled by old age⁶⁹ or completely prostrated by great bodily infirmity⁷⁰ apart from old age or any definite disease, as actually to be, at the time of trial, physically unable to attend and testify.⁷¹ Such a situation will justify the presiding judge in admitting secondary evidence of the former testimony of the witness;—if, indeed, it does not require him to adopt this course.

The same result follows where the witness loses his voice⁷² or hearing⁷³ or eye-sight.⁷⁴ Fear of abuse of this privilege has caused its rejection however

61. *Central R. & B. Co. v. Murray*, 97 Ga. 328, 22 S. E. 972 (1895) (old age).

62. *Central R., etc., Co. v. Murray*, 97 Ga. 326, 22 S. E. 972 (1895); *Whitaker v. Marsh*, 62 N. H. 477 (1883); *Thornton v. Britton*, 144 Pa. St. 126, 131, 22 Atl. 1048 (1891).

63. 2 Chamberlayne, Evidence, § 1645.

64. *Noble v. Martin*, 7 Mart. (N. S.) [La.] 282 (1828) (deputy sheriff); *Mushrow v. Graham*, 1 Hayw. (N. C.) 361 (1796) (collector of customs).

65. 2 Chamberlayne, Evidence, §§ 1646-1651.

66. *Berney v. Mitchell*, 34 N. J. L. 337 (1870).

67. *Chase v. Springvale Mills Co.*, 75 Me. 156 (1883) (typhoid fever delirium).

A merely temporary illness is, however, not an excuse. *Siefert v. Siefert*, 123 Mich. 664, 82 N. W. 511 (1900).

68. *Miller v. Russell*, 7 Mart. (N. S.) [La.] 266 (1828) ("laboring with disease").

69. *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928 (1903) (deposition: unable to talk); *Johnson v. Sargent*, 42 Vt. 195 (1889) (deposition).

70. *R. v. Harney*, 4 Cox Cr. 441 (1850)

(recent childbirth); *Reg. v. Wilshaw, C. & M.* 143, 41 E. C. L. 84 (1841).

71. *State v. Granville*, 34 La. Ann. 1088 (1882) ("lying sick in hospital"); *Rogers v. Raborg*, 2 G. & J. 60 (1829).

Michigan.—*Howard v. Patrick*, 38 Mich. 795, 799 (1878).

New Jersey.—*Berney v. Mitchell*, 34 N. J. L. 341 (1870).

Pennsylvania.—*Perrin v. Wells*, 155 Pa. 299, 300, 26 Atl. 543 (1893) (too ill to be present).

72. *R. v. Cockburn*, 7 Cox Cr. 265 (1857).

73. *R. v. Cockburn*, 7 Cox Cr. 265 (1857).

74. *Houston v. Blythe*, 60 Tex. 506, 509, 512 (1883) (aged); *Kinsman v. Crooke*, 2 Ld. Raym. 1166 (1705).

75. *Chicago, etc., R. Co. v. Mayer*, 91 Ill. App. 372 (1899); *Doe v. Evans*, 3 C. & P. 221 (1827), *Vaughan, B.*

Physical sickness at the time of trial will not justify receipt of the evidence, though it is such as absolutely to prevent attendance. *Com. v. McKenna*, 158 Mass. 207, 33 N. E. 389 (1893); *State v. Staples*, 47 N. H. 113, 119, 90 Am. Dec. 565 (1866).

in some cases, both civil ⁷⁵ and criminal ⁷⁶ and wherever possible the deposition of the witness will be preferred to his former testimony.⁷⁷

§ 630. "Former Trial."⁷⁸—Where the more important conditions of admissibility are met, a broad administrative liberality is exercised in determining what shall be deemed to constitute a "former trial."⁷⁹ "It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination."⁸⁰ In order that former testimony may be provable, it must have been taken in the course of some judicial proceeding in a competent tribunal, the character of the latter being immaterial, so long as it is judicial in character.⁸¹ Whether the earlier hearings were preliminary or final,⁸² a former trial of the same case,⁸³ or an entirely independent proceeding, whether one or both hearings were formal or informal, are matters not regarded as of the least importance. Evidence taken in equity may be used on a trial at law.⁸⁴

The prior proceedings may have never been completed⁸⁵ or may have been in an inferior court⁸⁶ or may have been in a court lacking jurisdiction⁸⁷ or in preliminary proceedings.⁸⁸

§ 631. The Hearsay Rule.⁸⁹—The reception of secondary proof of evidence given at a former trial is not an exception to the rule excluding hearsay. In fact, it lies entirely outside the scope of the hearsay rule and is not affected by the mischiefs against which the great exclusionary rule, rejecting unsworn statements in their assertive capacity, was intended to provide. The procedural rules, the rules of substantive law relating to procedure, against which the evidence of an unsworn statement when used as hearsay apparently offends are two. A party litigant is entitled to insist that all evidence intro-

76. *Com. v. McKenna*, 158 Mass. 207, 210, 33 N. E. 389 (1893); *State v. Staples*, 47 N. H. 113 (1866); *People v. Newman*, 5 Hill (N. Y.) 295 (1843). See also, *McLain v. Com.*, 90 Pa. St. 97 (1881).

77. *Berney v. Mitchell*, 34 N. J. L. 341 (1870).

78. 2 Chamberlayne, Evidence, §§ 1652-1655.

79. *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331 (1891); *Orr v. Hadley*, 36 N. H. 575 (1858); *Young v. Valentine*, 177 N. Y. 347, 69 N. E. 643 [affirming 79 N. Y. Suppl. 536 (1904)].

80. *Orr v. Hadley*, 36 N. H. 575, 580 (1858), per Eastman, J. A hearing before a committee of the United State senate is not regarded as a judicial proceeding in this connection. *In re Hilton's Petition* (Utah 1905), 81 Pac. 83.

81. *Putnal v. State* (Fla. 1908), 47 So. 864.

82. § 1655.

83. *Clealand v. Huey*, 18 Ala. 343 (1850); *People v. Devine*, 46 Cal. 46 (1873); *Orr v. Hadley*, 36 N. H. 575 (1858).

84. *Rogers v. Rogers* (Del. 1907), 66 Atl. 374.

85. *Taft v. Little*, 79 N. Y. Suppl. 507, 78 App. Div. 74 (1903); *Lawson v. Jones*, 1 N. Y. Civ. Proc. 247, 61 How. Pr. (N. Y.) 424 (1881), disagreement; *Hutchings v. Corgan*, 59 Ill. 70 (1871); *Hocker v. Jamison*, 2 Watts & S. (Pa.) 438 (1841), non-suit.

86. *Gannon v. Stevens*, 13 Kan. 447 (1874); *Cumberland Coal, etc., Co. v. Jeffries*, 27 Md. 526 (1867).

87. *Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570 (1895). See also, *McAdams v. Stilwell*, 13 Pa. St. 90 (1850).

88. *Com. v. Lenousky*, 206 Pa. St. 277, 55 Atl. 977 (1903).

89. 2 Chamberlayne, Evidence, § 1656.

duced against him shall be given (a) under oath and (b) received subject to cross-examination. Neither of these procedural rights is infringed by the admission of the former testimony of an unavailable witness, when the reception is conditioned as above stated. The right of confrontation,⁹⁰ which is frequently conferred by statute on the accused, and the right of cross-examination are not affected by the reception of former evidence where there was full opportunity for cross-examination and it was conducted by anyone who was privy to the accused and where it would have been natural for the cross-examination to have covered the facts now offered on account of identity of issues.⁹¹

§ 632. **Identity of Issue.**⁹²—It is incumbent upon the party offering the secondary evidence⁹³ to show, in an affirmative manner, to the satisfaction of the judge,⁹⁴ either by the evidence of witnesses or by production of the record of the former suit,⁹⁵ that the issues in the two cases are identical.⁹⁶ In most cases, it will be sufficient to show that they are so similar as to render it probable that the party or his privy had a fair opportunity for cross-examination as to the facts offered on the subsequent hearing.⁹⁷ This is the essential point, to which the attention of the court is directed. The mere opportunity to cross-examine⁹⁸ even though waived⁹⁹ is enough. The issues must, however, be the same¹ although they arise in different forms of actions² and the position of the parties on the record may be even reversed³, or in a criminal case the evidence may have been offered in different indictments.⁴

§ 633. **Identity of the Parties.**⁵—It is incumbent upon the proponent of evidence of a witness given at a former hearing to satisfy the court that the party against whom the testimony is now offered was present on the earlier occasion,

90. *State v. Walton*, 99 Pac. 431 (1909) [rehearing *denied*, 101 Pac. 389].

91. *Fender v. Ramsey & Phillips*, 131 Ga. 440, 62 S. E. 527 (1908), *ex parte* affidavit rejected.

92. 2 Chamberlayne, Evidence, §§ 1660–1667.

93. *Bryant v. Owen*, 2 Stew. & P. (Ala.) 134 (1832); *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61 (1889); *Mitchell v. State*, 71 Ga. 128 (1883); *Neff v. Smith*, 91 Iowa 87, 58 N. W. 1072 (1894).

94. *Chase v. Springvale Mills Co.*, 75 Me. 156 (1883).

95. *Ephraims v. Murdock*, 7 Blackf. (Ind.) 10 (1843); *Kutzmeyer v. Ennis*, 27 N. J. L. 371 (1859). See also, *Tritch v. Perry* (Colo. 1910), 108 Pac. 981.

96. *Watson v. R. Co.*, 76 Minn. 358, 79 N. W. 308 (1899) (amended declaration).

97. *Simmons v. State*, 129 Ala. 41, 29 So. 929 (1900).

99. *Bradley v. Mirick*, 91 N. Y. 293 (1883); *Cazenove v. Vaughan*, 1 M. & S. 4, 14 Rev. Rep. 377 (1813).

1. *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61 (1889). It is not enough that the same fact is in issue in both cases.

2. *Mabe v. Mabe*, 122 N. C. 552, 29 S. E. (1898) (ejectment and contract on notes given for the purchase money of the land). The former testimony of a witness may be introduced in evidence in a civil action for the same injury as the criminal proceeding in which the testimony was given. *Ray v. Henderson*, 44 Okla. 174, 144 Pac. 175.

3. *Morgan v. Nicholl*, L. R. 2 C. P. 117, 12 Jur. N. S. 963, 36 L. J. C. P. 86, 15 L. T. Rep. N. S. 184, 15 Wkly. Rep. (1866).

4. *Reynolds v. U. S.*, 98 U. S. 145, 25 L. ed. 244 (1878).

5. 2 Chamberlayne, Evidence, §§ 1668–1675.

98. *In re Durant*, 80 Conn. 140, 67 Atl. 497 (1907).

either personally, or through some one, who, under the rules of substantive law, was entitled to represent him, in this particular connection. If this condition is complied with the secondary evidence, so far as identity of parties is concerned, is admissible, provided that when the present party was represented by another at the former trial, the latter should have had an adequate motive effectively to present to the court the interest which the party himself now holds.⁶

In proceedings *in rem* the court may treat as a party one who might have taken that status in the proceedings.⁷ The former action may have been between privies.⁸ Agency is not privity,⁹ but the presence of a nominal party on the record does not alter the situation.¹⁰ Privity may be by blood¹¹ or by estate¹² or by representation.¹³

§ 634. **Scope of Proof; Extension.**¹⁴—Before admitting the secondary evidence of what was stated at a former trial, the court will, as a matter of sound administration, require satisfactory proof or assurances by counsel, that the witnesses or documents by which it is proposed to establish the former testimony cover it, both as to extension and intension, with the fullness and precision called for in that jurisdiction, by the rules of practice or substantive law relating to procedure which prevail there. As to what the report of the former testimony shall be required to cover, by way of extension, substantial unanimity exists among the courts of England and America. With the particu-

6. *Stewart v. Register*, 108 N. C. 588, 591, 13 S. E. 234 (1891); *Bryan v. Malloy*, 90 N. C. 508, 510 (1884).

7. *Llanover v. Homfray*, L. R. 19 Ch. D. 224 (1880); *In re Wiltsey's Will* (Iowa 1906), 109 N. W. 776.

8. *Fredericks v. Judah*, 73 Cal. 604, 15 Pac. 305 (1887).

9. *Goodrich v. Hanson*, 33 Ill. 498, 508 (1864); *Domville v. Ferguson*, 17 N. Br. 40 (1877).

10. *Holmes v. Boydston*, 1 Neb. 346, 354 (1870); *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570 (1897); *Wright v. Tatham*, 1 A. & E. 3 (1834).

Should the new party possess a substantial interest, the former evidence may still be competent against the newcomer should the latter stand in some relation of privity to an original party. *Goodlett v. Kelly*, 74 Ala. 219 (1883). Otherwise, where new parties having substantial rights are added in the subsequent suit, the former evidence is excluded. *Brown v. Zachary*, 102 Iowa 433, 71 N. W. 413 (1897); *Kerr v. Gibson*, 8 Bush 129, (1871). (evidence excluded as to new party).

11. *Atlanta & W. P. R. Co. v. Venable*, 67 Ga. 697, 699 (1881) (first suit, mother suing for injuries; child suing for her death from same injuries; admitted); *Parsons v. Parsons*, 45 Mo. 265 (1870).

12. *Shaw v. New York Elevated R. Co.*, 187 N. Y. 186, 79 N. E. 984 (1907) [judgment affirmed, 96 N. Y. Suppl. 1145, 110 App. Div. 892 (1905)].

13. *Fredericks v. Judah*, 73 Cal. 604, 608, 15 Pac. 305 (1887) (executrix and heir: admitted). The testimony of a witness for the defendant in an action by a father in the name of a minor child for her injury is admissible in a later action by the father after the death of the witness for damages for injuries to himself growing out of the same injury as the issues were the same, and the father had the full management of the first suit and employed the same counsel who cross-examined the witness at length. *Lyon v. Rhode Island Co.*, 38 R. I. 252, 94 Atl. 893, L. R. A. 1916 A 983 (1915).

14. 2 Chamberlayne, Evidence, §§ 1676-1680.

larity, or intension, called for in that jurisdiction, the witness must be able to report the entire examination of the original witness,¹⁵ both upon direct and at the state of cross-examination,¹⁶ so far as relates to the facts or propositions for which the secondary evidence is being offered.¹⁷ It follows that where the reporting witness, on account of deafness,¹⁸ or other sufficient cause cannot well be sure that he heard all that was said by the original witness, his testimony is to be rejected. If part of the former evidence is admitted, the whole is competent in accordance with the canon of completeness.¹⁹

The witness need not however state at just what stage of the proceedings the testimony was given²⁰ and may even forget immaterial portions of the testimony.²¹ This evidence may be supplemented by the opposing side.²² Where the evidence is introduced solely to show an admission²³ or to contradict the the witness²⁴ only the fact relied on need be given.

§ 635. **Scope of Proof; Intension; Precision in Recollection.**²⁵—When the rule permitting the introduction of former testimony was first promulgated the court required that the exact language of the witness should be repeated²⁶ but the impossibility of satisfying this requirement in most cases resulted in relaxing this strict requirement and in some courts only the essential words need be repeated²⁷ and in others only the substance of the former evidence need be given²⁸ and in some jurisdictions merely the effect of the former evidence is enough.²⁹ In all cases the burden of satisfying the court that the witness can satisfy the requirements is upon the party offering him.³⁰

§ 636. **[Media of Proof]; Official Documents.**³¹—Except where otherwise expressly provided, each medium of proof, i.e., by documents or witnesses, as a

15. *Brie v. Carver*, 73 N. C. 264 (1875).

16. *Denson v. Denson*, 111 Ga. 809, 35 S. E. 680 (1900); *Puryear v. State*, 63 Ga. 692 (1879); *Aulger v. Smith*, 34 Ill. 534 (1864).

17. *Scheerer v. Harper*, 36 Ind. 536 (1871); *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809 (1908); *Johnson v. Powers*, 40 Vt. 611 (1868).

18. *Brie v. Carver*, 73 N. C. 264 (1875).

19. *Aulger v. Smith*, 34 Ill. 534 (1864).

20. *Pratt v. State* (Tex. Cr. App. 1908), 109 S. W. 139.

21. *Helper v. Bank*, 97 Pa. St. 420, 424 (1881).

22. *Burnett v. State*, 87 Ga. 622, 13 S. E. 552 (1891); *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185 (1898).

23. *State v. Sortor*, 52 Kan. 531, 540, 84 Pac. 1036 (1893).

24. *Zibell v. Grand Rapids*, 129 Mich. 659, 89 N. W. 563 (1902).

25. *Burnett v. State*, 87 Ga. 622, 13 S. E.

552 (1891); *Bryson v. Hamilton, N. Br.*, Stevens Dig. 1880, p. 619 (1873). See also, *State v. Ripey* (Mo. 1910), 129 S. W. 646.

26. 2 Chamberlayne, Evidence, §§ 1681-1687.

27. *Ephraims v. Murdock*, 7 Blackf. 10 (1843). But see *Horner v. Williams*, 23 Ind. 37 (1864) (overruling early law).

28. *Earl v. Tupper*, 45 Vt. 275 (1873).

29. *Central of Georgia Ry. Co. v. Carleton* (Ala. 1909), 51 So. 27; *State v. Herlihy*, 102 Me. 310, 66 Atl. 643 (1906); *Keim v. City of Reading*, 32 Pa. Sup. Ct. 613 (1907).

30. *Garrott v. Johnson*, 11 Gill & J. (Md.) 173, 35 Am. Dec. 272 [*distinguished in Black v. Woodrow*, 39 Md. 194] (1840); *Helper v. Mt. Carmel Sav. Bank*, 97 Pa. St. 420, 39 Am. Rep. 813 (1881); *Kendrick v. State*, 10 Humphr. (Tenn.) 479 (1850).

31. *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627 (1855).

32. 2 Chamberlayne, Evidence, §§ 1688-1695.

rule, is equally competent, provided it comply with the prescribed conditions. To this course of administrative dealing with proof of former evidence, the courts have, in practical application, apparently established a single exception. In cases where the regularity; and disinterestedness of official business enter into the consideration of the course to be pursued, a not unnatural inclination to give special force to these circumstances is observable. Even where the act is not done in obedience to an official duty, the same action is frequently taken by the courts. In pursuance of this administrative principle, it has been held that statements reduced to writing by one under an official duty so to do are to be preferred to oral testimony, as constituting a higher grade of proof, either in case of the former testimony of a party,³² or that of a witness.³³

Depositions prepared under the requirement of positive law are often admitted as evidence *per se* as in case of transcripts of the evidence by the judge himself.³⁴ The same consideration applies to certain court papers as an agreed statement of facts³⁵ but a bill of exceptions is usually regarded as too biased to be received.³⁶ Even briefs of evidence have been admitted for this purpose³⁷ and may in any event be used as admissions against the party who signed them.³⁸ A record made by an official under no duty to make it is not admissible as an official record.³⁹ Under the majority view the official record is not conclusive.⁴⁰

§ 637. [Media of Proof]; Unofficial Documents; Memoranda.⁴¹—Some doubt has been expressed as to the propriety of permitting former evidence to be proved by memoranda which create no *present* recollection as to the evidence itself on the part of the reporting witness, i.e., where his present power of statement is confined to identifying the memoranda as those which he made on a former occasion and then knew to be accurate.⁴² Certain courts decline to receive memoranda only identified and authenticated to this extent as proof of the statements of the original witness.⁴³ The greater weight of authority, however, repudiates any distinction between the admissibility of contempora-

32. *Leggett v. State*, 97 Ga. 426, 24 S. E. 165 (1896).

33. *People v. Hinchman*, 75 Mich. 587, 589, 42 N. W. 1006 (1889).

34. *Bennett v. State*, 84 Ark. 97, 104 S. W. 928 (1907).

35. *Smith v. State*, 28 Ga. 19, 23 (1859).

36. *Breitenwischer v. Clough*, 116 Mich. 340, 74 N. W. 507 (1898).

37. *Owen v. Palmour*, 111 Ga. 885, 36 S. E. 969 (1900). But see *Sloan v. Somers*, 20 N. J. L. 66 (1843).

38. *Lathrop v. Adkisson*, 87 Ga. 339, 13 S. E. 517 (1891); *Dwyer v. Bassett*, 1 Tex. Civ. App. 513, 21 S. W. 621 (1892). But see,

Houston, etc., R. Co. v. Smith (Tex. Civ. App. (1899), 51 S. W. 506.

39. *Grimsinger v. State* (Tex. 1902), 69 S. W. 583. The contrary has, however, been held in South Carolina. *State v. Branham*, 13 C. 389, 396 (1879).

40. *People v. Curtis*, 50 Cal. 95 (1875); *State v. Hull*, 26 Iowa 293, 297 (1868). See also, *Poe v. State* (Ark. 1910), 129 S. W. 292.

41. 2 Chamberlayne, Evidence, §§ 1696-1701.

42. Best on Ev. (Chamberlayne's 3d Amer. ed), pp. 218, 219.

43. *Yancey v. Stone*, 9 Rich. Eq. (S. C.) 429 (1857); *U. S. v. Woods*, 28 Fed. Cas. No. 16,756, 3 Wash. 440 (1818).

neous memoranda in this way and their similar use in other connections. The practice, therefore, is to receive memoranda in these courts, although no one testifies to a present knowledge of the fact that the original witness made these precise statements, except so far as such a declaration on the part of the reporting witness may be implied from the assertion that he made the memoranda at the time and then knew them to be accurate.⁴⁴

The memoranda themselves must be produced as the "best evidence."⁴⁵ Notes taken by attorneys should be received with caution⁴⁶ as taken in haste and apt to be incomplete and even notes of the presiding judge are not evidence *per se* but must be proved by his oath.⁴⁷

§. 638. [Media of Proof; Unofficial Documents; Memoranda]; Stenographers.⁴⁸ — Great as is the advantage over other methods, in point of accuracy and fullness, presented by stenographic transcripts of the former testimony of witnesses, judicial appreciation does not reach the point of constituting it into a separate class or grade of secondary evidence. It is not, in any sense "best evidence."⁴⁹ If it appear that such a transcript of the evidence has been made, its production will not, as a rule,⁵⁰ be required nor need its absence be explained as a preliminary to receiving oral testimony. It may be said, generally, that a stenographic report of testimony given on a former trial is admissible, when a proper basis therefor is laid.⁵¹ An essential condition upon the admissibility of the transcript of an unofficial stenographer is that it should affirmatively be made to appear that the notes taken by the stenographer were a faithful copy, in phonetic character, of the evidence actually given and that⁵² the longhand transcription, if any, faithfully reproduces the notes.⁵³

The evidence of an official stenographer has no advantage and is not evi-

44. *Luetgert v. Volker*, 153 Ill. 385, 39 N. E. 113 (1894); *Moore v. Moore*, 39 Iowa 461 (1874).

Amor v. Stoekele, 76 Minn. 180, 78 N. W. 1046 (1899).

45. *Sanford v. State* (Ala. 1905), 39 So. 370.

46. "It is no part of the counsel's duty to take down the whole testimony of a witness. and in most cases it would be impracticable for him to do so; generally he does no more than note down those parts of the testimony which appear to him to be material, or most worthy to be noted or tending to support his own side of the case; and to admit the notes thus taken to be read in evidence, as proof of the testimony which had been given, would be a very unsafe practice; and we do not find it sanctioned by any decided case." *Waters v. Waters*, 35 Md. 531, 539 (1872); per *Bartol, C. J.*

47. *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124 (1859); *Com. v. Ryan*, 134 Mass. 223, 225 (1883); *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024 (1898).

48. 2 Chamberlayne, *Evidence*, §§ 1702-1705.

49. *Golden Georgia v. McManus*, 113 Ga. 982, 39 S. E. 476 (1901).

50. *Brown v. State*, 76 Ga. 626 (1886); *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157 (1897); *State v. McDonald*, 65 Me. 467 (1876). See also, *State v. Dean* (Iowa 1910), 126 N. W. 692.

51. *Iowa Life Ins. Co. v. Haughton* (Ind. App. 1908), 85 N. E. 127.

52. *State v. Kendig* (Iowa 1907), 110 N. W. 463; *Morawitz v. State* (Tex. Cr. App. 1906), 91 S. W. 227.

53. *Degg v. State* (Ala. 1907), 43 So. 484. See also, *Wiener v. Zweib* (Tex. Civ. App. 1910), 128 S. W. 699.

dence *per se*⁵⁴ except so far as it has been made so by statute⁵⁵ in many states.

§ 639. [Media of Proof]; Witnesses; Independent Memory.⁵⁶— Until the enactment of statutes authorizing the appointment of official court stenographers, the machinery of a trial under the English system of judicial procedure included no person designated and bound to report the evidence as it was submitted. Anyone who originally heard the evidence and can testify as to it, to the extent and with the intension required by law, at all times has been competent as a witness.⁵⁷ The speaker may be the judge who presided at the former trial.⁵⁸ Such a person may testify either from an unaided memory, or from a recollection refreshed by the use of suitable memoranda.⁵⁹ It is merely the usual privilege of a witness⁶⁰ which enables a person who has taken contemporaneous notes of the former evidence to refresh his memory by the aid of these notes when testifying with regard to his evidence on a former occasion.⁶¹ The competency of the evidence is not impaired by the fact that the witness has no independent recollection, i.e., that he only remembers the evidence in connection with his notes, as his memory is refreshed by them.⁶²

54. *Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222 (1897).

55. *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482 (1907).

56. 2 Chamberlayne, *Evidence*, §§ 1706–1708.

57. *State v. Mushrush*, 97 Iowa 444, 66 N. W. 746 (1896) (jury man).

58. *Freeman v. Com.*, 103 S. W. 274, 31 Ky. L. Rep. 639 (1907).

59. "What a witness has sworn . . . may be given in evidence either from the judge's notes, or from notes that have been taken by any other person who will swear their

accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given." *Doncaster v. Day*, 3 Taunt. 262 (1810) per Mansfield, C. J.

60. *Best on Ev.* (Chamberlayne's 3d Amer. ed.), p. 218.

61. *Costigan v. Lunt*, 127 Mass. 354 (1879).

62. *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118 (1852); *Dowd v. State* (Tex. Cr. App. 1908) 108 S. W. 389; *Reg. v. Plummer*, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600 (1844); *Reg. v. Child*, 5 Cox C. C. 197 (1851).

CHAPTER XXIII.

RELEVANCY.

Relevancy, 640.

Stephen's definition, 641.

Stephen's definition considered, 642.

§ 640. Relevancy.¹— It is in terms of relevancy, rather than in those of reasoning that the underlying rule of the English law of evidence is commonly stated.² All facts which are relevant will be received in evidence.³ Facts which are not relevant are excluded.⁴ All facts having rational probative value are admissible unless some specific rule forbids.⁵ The law of evidence is one of exclusion. Nothing could apparently be more precise.

Meaning of Terms.— It may be said that the main lines of mental operation on the part of the court during the trial at law, though probably in a state of constant flux, are practically three, proving, measuring and weighing, and it will be found that the facts admitted in evidence are received in aid of these several processes for the reason that they respectively possess, from this relationship to the act of reasoning a relevancy which is (1) probative, (2)

1. 3 Chamberlayne, Evidence, §§ 1711-1716.

2. Relation between relevancy and reasoning.— Adopting the nomenclature of the present treatise, facts rationally adapted to assist in the process of proving are spoken of as probatively relevant. Those logically tending to assist in the process of weighing *res gestæ* and other facts in the probative scales are said to be deliberatively relevant. Facts which reasonably assist the mental act of measuring these facts by some standard of fact or law are designated as being constitutently relevant. See General Nature of Proof: Judicial Reasoning in General. 3 Chamb., Ev., §§ 1709, 1710, 1710a.

3. *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299 (1895); *Payson v. Village of Milan*, 144 Ill. App. 204 (1908); *Mosby v. McKee, etc., Commission Co.*, 91 Mo. App. (1902); *O'Horo v. Kelsey*, 70 N. Y. Supp. 14, 80 App. Div. 604 (1901); *Findlay Brewing Co. v. Bauer*, 50 Ohio St. 580, 35 N. E. 55 (1893); *Atkins v. Payne*, 190 Pa. 5, 47 Atl. 378 (1899); *Nelson v. U. S.*, 201 U. S. 92,

26 S. Ct. 358, 50 L. ed. 673 (1906); 3 Chamb., Ev., § 1711, n. 2. Evidence will be received if relevant upon any issue of the case. *Reagan v. Manchester St. Ry. Co.*, 72 N. H. 298, 56 Atl. 314 (1903).

4. *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324 (1905); *Hanman v. Anderson*, 15 Colo. App. 433, 62 Pac. 961 (1900); *Darnall v. Georgia Ry. & Electric Co.*, 134 Ga. 656 (1910); *City of Marengo v. Eichler*, 245 Ill. 47, 91 N. E. 758 (1910); *Clemons Electrical Mfg. Co. v. Walton*, 206 Mass. 215, 92 N. E. 459 (1910); *State v. Wilson*, 223 Mo. 173, 122 S. W. 701 (1909); *People v. Cahill*, 188 N. Y. 489, 81 N. E. 453 (1907); *Indian Land & Trust Co. v. Clement*, 22 Okl. 40, 109 Pac. 1089 (1908); *State v. Clem.*, 49 Wash. 273, 94 Pac. 1079 (1908); 3 Chamb., Ev., § 1711, n. 3. A party is not at liberty to offer evidence in one case on the ground that it will be relevant in another. *In re Shawmut Min. Co.*, 87 N. Y. Supp. 1059, 94 App. Div. 156 (1904).

5. *Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614 (1907).

constituent and (3) deliberative.⁶ To the quality which enables the existence of one fact to prove the reality of another the term probative relevancy may properly be applied.⁷ The characteristic quality of a fact or set of facts which enable them, with or without others, to constitute a fulfillment of the conditions imposed by a given rule, term or definition, may, with apparent propriety, be called constituent relevancy.⁸ Facts logically tending to assist in the process of weighing *res gestae* and other facts, by the use of reason, have been denominated deliberative and their ability to assist the judgment of the jury may properly be spoken of as deliberative relevancy.⁹

Underlying Conception.—"Relevancy,"¹⁰ and "relevant,"¹¹ reveal their essential meaning in the primary and derivative significance stated in the dictionary and judicial definitions. The primary conception of the term "relevant" is at once seen to be that of *upholding*, sustaining an effort of some kind; and, in connection with the use of reasoning, logical or legal, of advancing or furthering an intellectual effort of some sort. Where the proposition urged is controverted, that may be said to be relevant which supports, or tends to prove or disprove the truth of, either of these contentions.¹²

§ 641. *Stephen's Definition.*¹³—In the first edition of his Digest of Evidence, Stephen adopts from his Introduction to the Indian Evidence Act¹⁴ an excellent, if not unexceptionable definition of relevancy, frequently quoted with approval.¹⁵ "Facts," he says, "whether in issue or not, are relevant to each

6. 3 Chamb., Ev., § 1711a.

7. 3 Chamb., Ev., § 1712.

8. 3 Chamb., Ev., § 1713.

9. 3 Chamb., Ev., § 1714.

10. See definitions, Cent. Dict. *Other definitions.*—Evidence which tends to establish any part of plaintiff's case or dispute any defense thereto is admissible as against the objection that it is irrelevant. *Tifton, T. & G. Ry. Co. v. Butler*, 4 Ga. App. 191, 60 S. E. 1087 (1908). In *Trull v. True*, 33 Me. 367, it was held that "testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability or improbability of the fact in issue." *State v. O'Neill*, 13 Or. 183, 9 Pac. 286 (1885). "Relevant," as applied to testimony, means that the testimony bears upon the issues so as to tend to prove or disprove them, but testimony may be relevant if it is only a link in the chain of evidence tending to prove the issues by reasonable inference, though not directly bearing upon them. *San Antonio Traction Co. v. Higdon* (Tex. Crim. App. 1910), 123 S. W. 732. Relevancy is that which conduces to the proof of a pertinent hypothesis. Hence it is relevant to put in

evidence any circumstances which tend to make the proposition at issue more or less improbable. Whart. Ev., §§ 20, 21; 3 Chamb., Ev., § 1715, n. 1.

11. See definitions, Cent. Dict. *Further definitions.*—The meaning of the word relevant, as applied to testimony, is that it directly touches upon the issue which the parties have made in their pleadings, so as to assist in getting at the truth of it. *Moran v. Abbey*, 58 Cal. 163 (1881); *Porter v. Valentine*, 41 N. Y. Supp. 507, 18 Misc. 213, (1896); *Platner v. Platner*, 78 N. Y. 90, 95 (1879); *Walls v. Walls*, 170 Pa. 48, 32 Atl. 649 (1895); 3 Chamb., Ev., § 1715, n. 2.

12. 3 Chamb., Ev., § 1715, n. 3.

13. 3 Chamberlayne, Evidence, § 1717.

14. Indian Evidence Act. I of 1872. Introduction by James Fitzjames Stephen.

15. *Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998, (1895); *Seller v. Jenkins*, 97 Ind. 430 (1884); *Louisville Ry. Co. v. Ellerhorst*, 33 Ky. L. Rep. 605, 110 S. W. 823 (1908); *Fishman v. Consumers' Brewing Co.*, 78 N. J. L. 300, 73 Atl. 231, (1909); *McNair v. National Life Ins. Co.*, 18 Hun (N. Y.) 144 (1878); 3 Chamb., Ev., § 1717, n. 2.

other when one is, or probably may be, or probably may have been — the cause of the other; the effect of the other; an effect of the same cause; a cause of the same effect; or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other.”¹⁶ The definition in the third Edition of his instructive Digest of the Law of Evidence, though made cautious by acute though always appreciative and friendly criticism, does not greatly differ from that of the first. “The word ‘relevant’ means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.”¹⁷

§ 642. **Stephen's Definition Considered.**¹⁸— That the foregoing definition of relevancy is an excellent statement of that relation between facts which has hereinbefore been spoken of as probative¹⁹ seems unquestionable. Equally obvious is it that as a definition of relevancy in general, it is insufficient. It takes no account of those important relations of facts to the proper conduct of judicial processes of reasoning which have been denominated constituent²⁰ or deliberative²¹ relevancy. But, for practical objects, the definition suffices.²²

16. Digest Law of Evid. (1st Ed.) Ch. 2, Art. 9.

17. Stephen, Dig. Law of Evid. (3rd Ed.) Ch. 1, Art. 1.

18. 3 Chamberlayne, Evidence, §§ 1718–1718m.

19. *Supra*, § 640; 3 Chamb., Ev., § 1712.

20. *Supra*, § 640; 3 Chamb., Ev., § 1713.

21. *Supra*, § 640; 3 Chamb., Ev., § 1714.

22. 3 Chamb., Ev., § 1718. For a full discussion of Stephen's theory and a critical consideration of Stephen's definition, see 3 Chamb., Ev., §§ 1716, 1717, 1718, 1718a, 1718b, 1718c, 1718d, 1718e, 1718f, 1718g, 1718h, 1718i, 1718j, 1718k, 1718l, 1718m. See also Discussion of Substantive and Adjective Law, 3 Chamb., Ev., §§ 1719, 1720, 1720a, 1720b, 1720c, 1720d.

CHAPTER XXIV.

INCORPORATION OF LOGIC.

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§ 643. **Incorporation of Logic.**¹—At this point of the consideration of the general topic of Reasoning by the court or by witnesses, it seems essential to make what is, in appearance at least, a digression.

The subject in hand, the modern law of evidence, properly embraces, with immaterial exceptions, the consideration of but two main factors each invoking and conditioned by the true laws of thought, canons of correct reasoning. First is the appropriate judicial province of the jury, the ascertainment of truth, the reality of things, as to the *res gestae*. Second, and of still higher social import as an integral part of the law of evidence, is the judge's executive function of administration, using sound legal reasoning for the attainment of justice. The result is the practical incorporation, by reference, of the rules of logic into the law of evidence. This reference to logic, as the science of the laws of thought, is incessant, though usually tacit. At every turn in the judicial work of the jury or the executive administration of the court, wherever action of any sort is to be taken by either branch of the tribunal, the standards prescribed by logic are constantly applied and regularly enforced.

§ 644. **[Incorporation of Logic]; Logic Defined.**²—“Logic,” says Mr. John Stuart Mill,³ “comprises the science of reasoning, as well as an art founded on that science.” The important fact to observers regarding this familiar definition is that logic refers simply to reasoning itself and is in no way concerned as to the subject matter to which that reasoning is applied. It is a

1. 3 Chamberlayne, Evidence, § 1721.

2. 3 Chamberlayne, Evidence, § 1722.

3. Mill's Logic. Intro. § 2 (8th Ed.), 18.

regulator of the means by which belief may properly be engendered. The object of the belief is immaterial. "Logic is the common judge and arbiter of all particular investigations. It does not undertake to find evidence, but to determine whether it has been found. Logic neither observes, nor invents, nor discovers; but judges." ⁴ The science of the laws of reasoning, the limitations of logic, is thus seen to deal only with the modes of thought.

§ 645. [Incorporation of Logic]; Propositions.⁵—While Stephen, as is well known, indicates as the objective to which evidence is to be offered, what he terms "facts in issue" it is, nevertheless, fairly obvious that his critic in the Solicitors Journal ⁶ is entirely right in saying that the object to be established by proof is not a fact but a *proposition*. The purpose of evidence, proof by the use of inference, is the creation of a belief in the truth or actuality of something. "Whatever can be an object of belief or even of disbelief," says Mr. Mill,⁷ "must when put into words assume the form of a proposition."⁸ It may, accordingly, be profitable to consider, in barest outline, the nature of propositions. A proposition is defined by logic as a sentence which affirms or denies.⁹

The law of evidence has to do only with what is placed in issue by the pleadings, what has a past or present existence and which may be called a proposition of fact.

§ 646. [Incorporation of Logic]; Mental Operations.¹⁰—In view of the vast range of subjects to which a court for purposes of adjudication may be called upon to apply the reasoning faculty, and the almost innumerable administrative connections in which it may be required to apply reason to judicial problems, it may fairly be said that the law of evidence is limited to no particular form of mental operation specialized in the law of logic. Still, as has been observed, the main processes of judicial reasoning are three:—*proving* by facts probatively relevant, *measuring* facts constitutently relevant, and *weighing* by means of facts characterized by deliberative relevancy.

§ 647. [Incorporation of Logic; Mental Operations]; Intuition.¹¹—Most uncontrovertible in its effect in the production of belief as to the existence of a mental impression regarding any fact, physical or psychological, is that transcendent property of the mind denominated intuition. Intuition, the mental operation by which consciousness becomes aware of the results of sense-per-

4. Mill's Logic. Intro. § 5 (8th Ed.), 21.

5. 2 Chamberlayne, Evidence, §§ 1723, 1724.

6. 20 Sol. Jour. p. 857.

7. Mill Logic. i 21, P. 12a quoted in Gulson, Philosophy of Proof, § 52.

8. "Introspection will show at once that when we hold an object before the mind, there is an inevitable tendency to think some as-

sertion about it. The expression of this mental assertion or judgment in language is a proposition." Jones, Logic Inductive and Deductive, p. 66.

9. Whately, Logic, 41, quoted in Gulson, Philosophy of Proof, § 52.

10. 3 Chamberlayne, Evidence, § 1725.

11. 3 Chamberlayne, Evidence, §§ 1726-1728.

ception or observation is carefully to be distinguished, in connection with the law of evidence, from inference, the reasoning of *proof*. Intuition seems to be not so much a branch of reasoning as engaged in presenting, to the witness or to the tribunal (according to whether the observation is made *in pais* or in the court room), the data or raw material upon which reasoning is based. It is, therefore, a mental operation of the highest importance and most intimate in connection with legal logic.

§ 648. [Mental Operations]; Deductive Reasoning.¹²— Every instance of deduction is conducted by the use of *two* propositions which are, for that reason, called premises.¹³ The truth of these, or, in case of a fact, their existence, being assumed, the conclusion, the truth of a third proposition is logically deduced, or inferred, by an act of the reasoning faculty.¹⁴ Deduction, as understood in logic, is that process of “reasoning, which consists in combining two or more general propositions synthetically, and thus arriving at a conclusion which is a proposition or truth of less generality than the premises, that is to say, it applies to fewer individual instances than the separate premises from which it was inferred.”¹⁵ The concluding from generals to particulars characteristic of deduction is in main conducted by the use of the syllogism.

For the purposes of the law of evidence much of this is usually syncopated; and the varieties in the subdivision of the syllogistic form of reasoning are greatly restricted. The major premise, the first and more comprehensive of the two, is usually suppressed. No one cares to be told nor would a court consent to waste the time called for in hearing, still less in proving, that all men are mortal.

§ 649. [Mental Operations]; Inductive Reasoning.¹⁶— Induction may be defined as that process of reasoning which consists in combining less general or even individual facts into more general propositions, truths, or so-called laws in the natural world or in the domain of conduct and other human affairs. “An Induction, that is an act of Inductive reasoning, is called Perfect when all the possible cases or instances to which the conclusion can refer, have been examined and enumerated in the premises. If, as usually happens, it is impossible to examine all cases, since they may occur at future times or in distant parts of the earth, or other regions of the universe, the Induction is called Imperfect.” Induction observes uniformity of operation in the natural world

12. 3 Chamberlayne, Evidence, §§ 1728a-1729.

13. Whately, Logic. 17.

14. “Every conclusion or inference is in reality deduced or drawn from two propositions or premises, which, together with the conclusion itself, are styled an ‘argument,’ or, in the more strictly technical language of

logic, a ‘syllogism.’” Gulson, Philosophy of Proof, § 130.

15. Jevons, Element. Logic, ch. 25, p. 210.

“An inference from a law or general principle to some consequence of the principle is a *deductive* inference.” Jones, Logic Inductive and Deductive, p. 111.

16. 3 Chamberlayne, Evidence, §§ 1730-1732.

or in that of human conduct and it infers therefrom that what is true in certain observed instances will, by reason of this uniformity, continue to be so in all other cases.

§ 650. [Mental Operations]; Inference from Experience.¹⁷— In the process of reasoning, so far as this is deductive and confined to objective relevancy, a probative fact, *factum probans*, recognized by the mind as being within the scope of the general proposition which constitutes the major premise is established by evidence, and thus forms the minor premise of the syllogism. The deduction of logical reasoning from these two premises is a *conclusion* which establishes, with a more or less probability, the existence of a *factum probandum*. It will be observed that the only point at which evidence itself is applied is the minor premise; — the major having been tacitly assumed as a matter of common knowledge and the conclusion being reached by an act of judgment, i.e., an inference which indeed was implicit in the mental act which recognized the relevancy or connection between the fact offered in evidence as a minor premise and the general proposition of experience used as a major. Such continues to be the fact in the other stages of any direct line of proof.

§ 651. [Mental Operations]; Deduction the Basis of Induction.¹⁸— The relation between induction and deduction goes further. Each real deduction or inference is based upon a major premise in the form of a general proposition which is itself, as has been seen, reached as a matter of induction. This, however, is by no means all. Every act of observation used in the induction itself is made effective by a preliminary deduction from a general proposition still more comprehensive which has been, in its turn, obtained by means of a prior induction. Even the fundamental general proposition which is, in most cases, the announcement of a uniformity, natural or moral, that what is true of certain things in a class or placed under a common designation will be found to be true of all of them, is itself the result of a large number of observed instances of the application of such a rule. In the average act of induction, this major proposition of uniformity is suppressed. The alternation of induction and deduction is the same in case of direct or circumstantial evidence; the difference being, that in case of circumstantial evidence, additional terms in the series are needed before the ultimate *facta probanda* are reached.

§ 652. [Incorporation of Logic]; Mental Certainty.¹⁹— It will be at once found that according as the mental process employed by it is that of intuition, on the one hand, or inductive and deductive reasoning, on the other, will the degree of mental certainty produced in the mind of a tribunal in connection with proof of a fact be found to vary. Where the mental action is intuitive, the effect is

17. 3 Chamberlayne, Evidence, §§ 1733, 1734.

19. 3 Chamberlayne, Evidence, §§ 1736-1740.

18. 3 Chamberlayne, Evidence, § 1735.

demonstration. Inductive and deductive reasoning can produce in the mind of a court or jury only that lower form of certainty properly classed as moral. As commonly employed in connection with the law of evidence, a demonstration is an act or series of acts of intuitive reasoning, which, produce upon the mind of a person to be affected an absolute certainty of mental conviction.

Mental certainty may arise by direct observation by sight or hearing, which observation is however subject to error especially in case of the untrained observer, or it may arise through mathematical or other hypothetical reasoning. The court itself may as in case of experiments conducted in court use its intuitive faculties. However in most cases all that can be accomplished is proof to a moral certainty or probability.

§ 653. [Incorporation of Logic]; Hypotheses.²⁰— A general rule of administrative action, modified by various considerations to which attention is soon to be called; is that either party may prove such facts as are reasonably necessary to substantiate his hypothesis or theory of the case or to invalidate that of his opponent. Strictly speaking, the term hypothesis may well be specifically applied to proof of a particular fact or to any relevant existence, e.g., the credibility of a witness. As commonly employed, however, the use of a term is almost exclusively related to the question as to what are the actual *res gestae* facts involved in any particular inquiry. Speaking generally, were the *res gestae* of the case established, by agreement or otherwise, the need for hypothesis would not arise. The inquiry, under such circumstances, would be merely one of constituent relevancy, as to what the *res gestae* amount to, in terms of law or of fact. As the *res gestae*, however, are disputed in most trials at law, it would be fairly accurate to restate the administrative rule in question by saying that, in general, a litigant will be allowed to introduce into evidence such probatively relevant facts as are reasonably necessary to establish his hypothesis as to what the *res gestae* facts actually are.

The hypothesis of the litigant having the burden of proof necessarily is, in the normal case, that the *res gestae* facts, sufficient to establish the right or liability asserted, actually exist. His claims for administrative indulgence in the range and variety of his proof necessarily depend in large measure upon whether he is able to produce direct evidence, i.e., the statements of witnesses or the declarations of documents as to the existence of the *res gestae*: or is, on the other hand, compelled to produce other probative facts in proof of these *res gestae*. His main position, however, as exhibited in his hypothesis, is that these *res gestae* facts actually exist.— If the right in pursuance of which the actor claims administrative indulgence be the right to prove his case that of the non-actor in so doing is the equally important forensic right of testing the case of his adversary. It is the object of the actor, therefore, to present a case of maximum efficiency for the establishment of the *res gestae* claimed in his

²⁰. 3 Chamberlayne, Evidence, §§ 1740a-1740c.

hypothesis and meet, so far as he is able, attacks made upon the credibility of the witnesses or the existence of these *res gestae*. It is sufficient for the non-actor if he should prevent the accomplishment of the actor's purpose. He may, therefore, content himself with testing, probing, weighing.

CHAPTER XXV.

PROBATIVE RELEVANCY.

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§ 654. **Canons of Relaxation; Claim of the Crux.**¹—The right of a party to prove the *res gestae* of his case is a substantive one and has already been stated as a matter of right.² In dealing with the admissibility of any particular fact not strictly within the field of the *res gestae* the judge is seeking to harmonize, in a rational way, the proper influence of several administrative principles. There are what may be called Canons of Relaxation and certain other principles of judicial administration which may be designated Canons of Requirement. In case of most disputed questions of fact there is a *crux* or *hinge* upon which it will be found to turn. It may be the existence of a particular fact, the credibility of a special witness. Strong administration, therefore, makes all efforts to be sure that this particular point is decided right. Special relaxation is called for and will be accorded to the use of any fact which may reasonably tend, even in a somewhat remote degree, to establish the exact truth regarding so important a matter.³

1. 3 Chamberlayne, Evidence, § 1742.

3. 3 Chamb., Ev., § 1740d.

2. *Supra*, §§ 149 et seq.; 1 Chamb., Ev., §§

334 et seq.

§ 655. [Canons of Relaxation]; Direct and Circumstantial Evidence.— For obvious reasons, the presiding judge will accord a wider range of proof to one who is seeking to establish the *res gestae* by proof of circumstantial evidence than to one whose endeavor is to show the *res gestae* by direct proof,⁴ i.e., by the statements of eye witnesses of the transactions themselves. Facts not susceptible of direct observation are, in most cases, necessarily established by circumstantial evidence. Such evidence is frequently more satisfactory and convincing in character than direct testimony would have been.⁵ Administrative necessity for the securing of proof of essential facts in the only way practically available may go so far as to permit the use of deceit, dissimulation, fraud, or even grave illegality for the purpose of obtaining testimony.⁶ As a legitimate method of corroboration⁷ and even, in many cases involving the employment of circumstantial evidence, as a necessary mode of proving a *prima facie* case a party may properly negative any adverse infirmative suggestion or alternative hypothesis.⁸

§ 656. [Canons of Relaxation]; Inherent Difficulty of Proof.— Not only will administrative indulgence be accorded a party whose case involves an extended use of the element of inference between the *factum probans* and the *factum probandum*, the same canon is applied where the witness himself is forced to make a large use of the element of inference.⁹

Ancient Facts.— Consideration is given in another place¹⁰ to the judicial relaxation which is caused by the inherent difficulty of proving ancient facts.¹¹

4. *Supra*, § 14; 1 Chamb., Ev., § 15.

5. *Kennedy v. Aetna Life Ins. Co.*, 148 Ill. App. 273 (1909), judg. aff'd 242 Ill. 396, 90 N. E. 292; 3 Chamb., Ev., § 1740e. n. 5. Evidence of financial and marital condition in damage case. See note, Bender Ed., 118 N. Y. 95. Of financial condition of defendant in tort case. See note, Bender Ed., 125 N. Y. 224. Propriety of parol evidence as to property of testator. See note, Bender Ed., 112 N. Y. 137.

Negligence.— Evidence to show negligence must be clear and convincing and it is not enough to show by speculation that the accident was due to negligence. *Duncan v. Atchison Topeka & Santa Fe R. Co.*, 86 Kan. 112, 119 Pac. 356, 51 L. R. A. (N. S.) 565 (1911).

Origin of Fire.— Evidence is not to be disregarded or swept aside simply because it is circumstantial. So the origin of a fire may be proved by circumstantial evidence. *Miller v. Northern Pacific R. Co.*, 24 Idaho 567, 135 Pac. 845, 48 L. R. A. (N. S.) 700 (1913). The mere fact that a fire originated on a railroad right of way is not sufficient

evidence that it was started by a train. *Hewitt v. Pere Marquette R. Co.*, 171 Mich. 211, 137 N. W. 66, 41 L. R. A. (N. S.) 635 (1912).

6. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370 (1906); *Ford v. State*, 124 Ga. 793, 53 S. E. 335 (1906); 3 Chamb., Ev., § 1740e, nn. 6, 7, 8.

7. *Infra*, § 670; 3 Chamb., Ev., § 1768.

8. Thus, on a prosecution for kidnapping, in addition to showing that the child was stolen, the impossibility of his being drowned without observation in a nearby Sound may be established by the prosecution. *State v. Harrison*, 145 N. C. 408, 59 S. E. 867 (1907).

9. 3 Chamb., Ev., § 1741.

10. *Infra*, § 938; 4 Chamb., Ev., § 2960.

11. Thus, evidence will be received from old inhabitants of the region affected that the bed of a stream has slowly and gradually changed its position. *Coulthard v. McIntosh*, 143 Iowa 389, 122 N. W. 233 (1909). *Marshland allotments.*— A searcher of ancient records may be allowed to testify as to the facts which appear of record regarding allotments of marshland made in 1654

Facts of Family History.—The administrative indulgence which the court accords to the inherent difficulty of proving facts of family history is treated in connection with the subject of Pedigree.¹²

Identity.—Prominent among facts proof of which presents inherent difficulty is that of identity. A wide range of circumstantial evidence will, therefore, usually be received.¹³ In such a connection, even statements in their independently relevant capacity, e.g., those showing special knowledge¹⁴ are admissible. In like manner, the fact that a person has lived in a particular residence, sojourned in a certain place,¹⁵ country or state¹⁶ may be received as significant. A witness who testifies to the conversation conducted by means of a telephone may properly identify the speaker at the other end by means of his voice.¹⁷ The identification may, however, be established later in other ways.¹⁸

Mental Condition.—Mental conditions present such an inherent difficulty in proof as authorizes relaxation in the strict requirements of relevancy. Whether the condition in question be one of soundness or its opposite it may, as is more fully seen elsewhere,¹⁹ be shown by the inference of observers of its manifestations.²⁰ Any relevant act fairly indicative of the condition of the person's mind will be received in evidence.²¹ But, where the inquiry is not one relating to genealogy, the fact of *insanity* cannot be shown by the hearsay declarations of members of the person's family.²² A *fortiori* reputation in the family is rejected.²³ Likewise, general reputation in the community.²⁴ Among facts to which a witness may testify are those which are psychological.²⁵ A person conscious of the existence of a mental condition or state,²⁶ on his own part

and later. *Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich*, 116 N. Y. Supp. 532, 132 App. Div. 118 (1909), judg. aff'd 200 N. Y. 533, 93 N. E. 1132 (1910). 3 Chamb., Ev., § 1741a, n. 2.

12. *Infra*, § 937; 4 Chamb., Ev., § 2952.

13. *State v. Ah. Chuey*, 14 Nev. 79, 33 Am. Rep. 330 (1879); *Allen v. Halsted* (Tex. Civ. App. 1905), 87 S. W. 754.

14. *Infra*, § 850; 4 Chamb., Ev., § 2667. *Cuddy v. Brown*, 78 Ill. 415 (1875); *American L. Ins., etc., Co. v. Rosenagle*, 77 Pac. 507 (1875); 3 Chamb., Ev., § 1741c, n. 2.

15. *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381 (1882); *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895).

16. *Byers v. Wallace*, *supra*.

17. *National Bank of Ashland v. Cooper*, 86 Neb. 792, 126 N. W. 656 (1910).

18. *Miller v. Leib*, 109 Md. 414, 72 Atl. 466 (1909); *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573 (1908); 3 Chamb., Ev., § 1741c, n. 9.

19. *Infra*, §§ 701, *et seq*; 3 Chamb., Ev., §§ 1892, 2006 *et seq*.

20. *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183 (1902).

21. *In re Mullin*, 110 Cal. 252, 42 Pac. 645 (1895); *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71 (1854); 3 Chamb., Ev., § 1741d, n. 3.

22. *People v. Koerner*, 154 N. Y. 355, 373, 48 N. E. 730 (1897).

23. *Walker v. State*, 102 Ind. 502, 1 N. E. 856 (1885); *People v. Koerner*, *supra*; 3 Chamb., Ev., § 1741d, n. 5.

24. *State v. Holt*, 47 Conn. 518, 36 Am. Rep. 89 (1880); *State v. Coley*, 114 N. C. 879, 19 S. E. 705 (1894); 3 Chamb., Ev., § 1741d, n. 7.

25. *Sharpe v. Hasey*, 141 Wis. 76, 123 N. W. 647 (1909).

26. *People v. Weil*, 244 Ill. 176, 91 N. F. 112 (1910); *Richards v. U. S.*, 175 Fed. 911, 99 C. C. A. 401 (1909); 3 Chamb., Ev., § 1741d, n. 11.

may testify as to it. But a party accused of crime²⁷ or any other witness will not be permitted to testify as to his motive,²⁸ purpose²⁹ or intention³⁰ unless these psychological facts have some material effect upon the right or liability involved.

Mental State.—Some relaxation in the strict rules of relevancy is imperatively required for the establishment of a mental state.³¹ The mental state to be proved must, as a matter of course, be objectively relevant.³² Thus, for example, in any case where the consequences of conduct are involved, an undisclosed intention may be strictly irrelevant. If so, no evidence on the point can be received.³³ Evidence of *good faith* may be rejected as irrelevant because immaterial. Should the fact of good faith be relevant, however, in any of its phases, to an issue in the case, evidence of it may be received. Indeed, the person in question may testify to it himself.³⁴ A witness may give evidence as to the existence of any mental state of his own mind of which he is conscious, should the fact be material.³⁵ He is not, as a rule, entitled to testify directly as to the mental state of any other person.³⁶ The declarations of a party or other person may be shown as manifestations of relevant mental state, whether they be oral³⁷ or in writing.³⁸ The existence of various mental states, e.g., knowledge,³⁹ notice,⁴⁰ and the like⁴¹ may satisfactorily be established by proof of what happened upon other occasions.

27. *Rose v. State*, 144 Ala. 114, 42 So. 21 (1905); *Gordon v. Com.* (Ky. 1910), 124 S. W. 806.

28. *Crumpton v. State*, 167 Ala. 4, 52 So. 605 (1910).

29. *Gray v. Strickland*, 163 Ala. 344, 50 So. 152 (1909).

30. *Pate v. State*, 162 Ala. 32, 50 So. 357 (1909).

31. *White v. White*, 76 Kan. 82, 90 Pac. 1087 (1907); *Cook v. Carr*, 20 Md. 403 (1863).

32. *Millsapugh v. Potter*, 71 N. Y. Supp. 134, 62 App. Div. 521 (1901); *Globe Ins. Co. v. Hazlett*, 1 Phila. (Pa.) 347 (1852); 3 Chamb., Ev., § 1741e, n. 3.

33. *Sampson v. Hughes*, 147 Cal. 62, 81 Pac. 292 (1905); *Dunbar v. Armstrong*, 115 Ill. App. 549 (1904); *Tallant v. Stedman*, 176 Mass. 460, 57 N. E. 683 (1900); *Fresno Home Packing Co. v. Turtle & Skidmore*, 117 N. Y. Supp. 1134, 132 App. Div. 930 (1909); 3 Chamb., Ev., § 1741e, n. 4.

34. *Thatcher v. Phinney*, 7 Allen (Mass.) 146 (1863); *Hubbell v. Alden*, 4 Lans. (N. Y.) 214 (1870); *Moore v. May*, 117 Wis. 192, 94 N. W. 45 (1903); 3 Chamb., Ev., § 1741e, n. 5.

35. *Fagan v. Lentz*, 156 Cal. 681, 105 Pac.

951 (1909); *Partridge v. Cutler*, 104 Ill. App. 89 (1902); *Blaney v. Rogers*, 174 Mass. 277, 54 N. E. 561 (1899); *Grout v. Stewart*, 96 Minn. 230, 104 N. W. 966 (1905); *Hill v. Page*, 95 N. Y. Supp. 465, 108 App. Div. 71 (1905); *Tucker v. Hendricks*, 25 Ohio Cir. Ct. 426 (1903); *Arnold v. Cramer*, 41 Pa. Super. Ct. 8 (1909); 3 Chamb., Ev., § 1741e, n. 6.

36. *Spaulding v. Strang*, 36 Barb. (N. Y.) 310 (1862).

37. *Perry v. State*, 110 Ga. 234, 36 S. E. 781 (1900); *Jacobs v. Whitcomb*, 10 Cush. (Mass.) 255 (1852); *People v. Colmey*, 188 N. Y. 573, 80 N. E. 1115 (1907), aff'g judg. 102 N. Y. Supp. 714, 117 App. Div. 462; *Baker v. Toledo & I. Ry.*, 30 Ohio Cir. Ct. 78 (1907); 3 Chamb., Ev., § 1741e, n. 10. See also, *infra*, §§ 847 *et seq.*; 4 Chamb., Ev., §§ 2643 *et seq.*

38. *Long v. Booe*, 106 Ala. 570, 17 So. 716 (1894).

39. *Joseph Taylor Coal Co. v. Dawes*, 220 Ill. 145, 77 N. E. 131 (1906); *Hadtke v. Grzyll*, 130 Wis. 275, 110 N. W. 225 (1907).

40. *Hanselman v. Broad*, 99 N. Y. Supp. 401, 113 App. Div. 447 (1906).

41. *Baldwin v. People's Ry. Co.*, 7 Pennw. (Del.) 81, 76 Atl. 1088 (1908).

Moral Qualities.—Moral qualities present even greater difficulties in proof than those which inhere in the establishment of mental conditions or states. Under these circumstances, procedure has adopted a formal, semi-mechanical expedient of somewhat doubtful utility.⁴² It proves moral qualities by showing their *effect* upon persons with whom the individual in question habitually comes in contact. In case either of the veracity of a witness⁴³ or some other relevant trait of character,⁴⁴ the only attempt made is to show the *reputation* in the community on the subject.⁴⁵ But reputation itself, in many cases is not probative⁴⁶ of the existence of a particular trait of character, e.g., chastity⁴⁷ or loyalty,⁴⁸ or of character as a whole.

Value.—The special relaxation accorded by administration to the proof of the value or price of real or personal property is given elsewhere.⁴⁹

"State of the Case."—It is not to be inferred, from what has been said, that a party is at liberty, as a matter of right, to prove a fact, even one in the *res gestae*, irrespective of what is commonly called "the state of the case." Administrative relaxation, like any other privilege, may be waived. If a fact be already sufficiently proved⁵⁰ or be admitted⁵¹ or if, though not distinctly admitted, its existence is not seriously controverted⁵² it is within the reasonable exercise of the administrative power of the presiding judge to reject the evidence.

§ 657. Canons of Requirement; Must Accord Equal Privileges.—Any privilege accorded one of the parties which may prejudice his opponent the latter may claim the right to offset in any appropriate way. Thus, a party who asks for the inferences or conclusions of a witness, cannot successfully object to a pursuance of the same method of inquiry.⁵³ Suppose, however, that a party,

42. *Infra*, 1037; 4 Chamb., Ev., § 3310.

43. 3 Chamb., Ev., § 1741f, n. 4.

44. *Infra*, §§ 1033 *et seq.*; 4 Chamb., Ev., §§ 3288 *et seq.*

45. *Boies v. McAllister*, 12 Me. 308 (1835); *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208 (1870).

46. *Baldwin v. Western R. Corp.*, 4 Gray (Mass.) 333 (1855); *Cook v. Parham*, 24 Ala. 21 (1853).

47. *Boies v. McAllister*, *supra*.

48. *Hart v. Reynolds*, *supra*.

49. *Infra*, §§ 762 *et seq.*; 3 Chamb., Ev., §§ 2175a *et seq.*

50. *State v. Trimble*, 104 Md. 317, 64 Atl. 1026 (1906); *Allendorph v. Wheeler*, 101 N. Y. 649, 5 N. E. 42 (1886); 3 Chamb., Ev., § 1742, n. 1.

51. *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230 (1878); *Scheibeck v. Van Derbeck*, 122 Mich. 29, 80 N. W. 880 (1899); *White v.*

Old Dominion S. S. Co., *102 N. Y. 660, 6 N. E. 280 (1886); 3 Chamb., Ev., § 1742, n. 2.

52. *Cole v. Curtis*, 16 Minn. 182 (1870); *Austin v. Austin*, 45 Wis. 523 (1878).

53. *Provident Sav. Life Assur. Soc. v. King*, 216 Ill. 416, 75 N. E. 166 (1905); *Ahnert v. Union Ry. Co. of New York*, 110 N. Y. Supp. 376 (1908); 3 Chamb., Ev., § 1742a, n. 2.

Relevant evidence.—Where one of the litigants has introduced evidence upon a given topic sustaining some logical relation to the case he must, as a rule, be content that his opponent should bring forward countervailing evidence on the same point. *Waters v. Rome & N. Ry. Co.*, 133 Ga. 641, 66 S. E. 884 (1909); *Peter v. Schultz*, 107 Minn. 29, 119 N. W. 385 (1909); *Crawford v. Kansas City Stockyards Co.*, 215 Mo. 394, 114 S. W. 1057 (1908); *Whipple v. Farrelly*, 121 N. Y. Supp. 117, 136 App. Div. 587 (1910); *Schmidt*

having been indulged in the use of perfectly irrelevant testimony, should object when his adversary desires to enter upon a like inquiry in such a way as to prejudice or mislead the jury. There is some, though rather doubtful, authority to the effect that a party who has permitted such evidence to be received against him may, as of right, present similar testimony, on his own behalf, on the same subject.⁵⁴ The court, however, is justified in rejecting immaterial evidence whenever objection is made.⁵⁵

A somewhat different situation is presented when the party who now offers rebutting testimony may fairly be regarded as having himself been injuriously affected by the immaterial facts originally offered. That the trial court may, in discharge of its administrative powers, permit the present proponent to repair any injustice which may have been done to him and receive the rebutting immaterial evidence even against objection, is entirely clear.⁵⁶

§ 658. [Canons of Requirement]; Definiteness Demanded.—Evidence may be rejected because lacking in definiteness.⁵⁷ No fact or the inference to be drawn from it can however properly be rejected as uncertain simply because, standing alone, it may appear to be so. The evidence will be received as definite if other evidence to make it so is produced or promised.⁵⁸ Legally, that is certain which may be made so. It follows, *a fortiori*, that evidence which is simply conjectural in its nature will properly be excluded.⁵⁹ The court will, however, disregard the form of statement and seek the substance. Should the witness, for example, see fit, for any reason, to testify that he

v. Turner, 27 Ohio Cir. Ct. R. 327 (1905); 3 Chamb., Ev., § 1742a, n. 2.

According to the same rule in its reverse form, a party who has objected to the reception of a certain grade or species of evidence when tendered by his adversary, will not be permitted to secure the benefit of introducing it for himself. Shedd v. Seefeld, 126 Ill. App. 375 (1906); Electric Carriage Call & Specialty Co. v. Herman, 123 N. Y. Supp. 231, 67 Misc. 394 (1910).

Completeness required.—In cases where the new evidence is required to complete that which has already been received, an additional administrative reason for receiving the former is furnished. Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (1904); Buedingen Mfg. Co. v. Royal Trust Co., 181 N. Y. 563, 74 N. E. 1115 (1905); Early v. Winn, 129 Wis. 201, 109 N. W. 633 (1906); 3 Chamb., Ev., § 1742a, n. 2.

54. Yank v. Bordeaux, 29 Mont. 74, 74 Pac. 77 (1903); Lessler v. Bernstein, 123 N. Y. Supp. 223 (1910); Warren Live Stock Co. v. Farr, 142 Fed. 116, 73 C. C. A. 340 (1906).

55. San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604 (1891); Stapleton v. Monroe, 111 Ga. 848, 36 S. E. 428 (1900); Farmers', etc., Bank v. Whinfield, 24 Wend. (N. Y.) 419 (1840); 3 Chamb., Ev., § 1742a, n. 4.

56. Illinois Steel Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 110 (1903); Treat v. Curtis, 124 Mass. 348 (1878); Waldron v. Romaine, 22 N. Y. 368 (1860); Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886 (1895); 3 Chamb., Ev., § 1742a, n. 5.

57. Hardwood Mfg. Co. v. Wooten, 126 Ga. 55, 54 S. E. 814 (1906); Phillips v. Middlesex County, 127 Mass. 262 (1879); Slack v. Bragg, 83 Vt. 404, 76 Atl. 148 (1910); 3 Chamb., Ev., § 1743, n. 1.

58. Ashley v. Wilson, 61 Ga. 297 (1878); Blauvelt v. Delaware, L. & W. R. Co., 206 Pa. 141, 55 Atl. 857 (1903).

59. Pond v. Pond, 132 Mass. 219 (1882); Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529 (1906); Newell v. Doty, 33 N. Y. 83 (1865); 3 Chamb., Ev., § 1743, n. 4.

"guesses,"⁶⁰ "presumes,"⁶¹ or "supposes"⁶² any fact to exist, or say he has an "impression"⁶³ that a thing is so, when he really knows such to be the case, his statement, conjectural in form, may be used as one of fact. An inference which is speculative, not based upon observation or any fact established in the case, is incompetent under this principle.⁶⁴

§ 659. [Canons of Requirement]; Time Must be Economized.— In exercising administrative function the trial judge who at the stage of right was called upon to hear all reasonable necessary evidence regardless of its consumption of time,⁶⁵ may at this stage properly reject, at his option, evidence which for any reason, fails to convince him that it will warrant using the court's time — which frequently is in reality the time of other litigants — long enough to hear it.⁶⁶ The judge may properly refuse to consume time in hearing evidence the effect of which, if any, would be slight.⁶⁷ This is particularly true where the party offering the evidence has, himself, suppressed important testimony.⁶⁸

§ 660. [Canons of Requirement]; Jury Must be Protected.⁶⁹ — It is the duty of the court to keep the jury from being misled,⁷⁰ under the zeal or unscrupulousness of counsel or their own inaptitude for the work in hand.⁷¹ Where the proof offered is that relating to a constituent or *res gestae* fact or to the circumstantial evidence necessary to establish these⁷² it may well be the right of the proponent to insist that the evidence should be received whatever may be its incidental effect upon the emotionalism of the jury. Where the stage of *res gestae* proof has been passed, it is clearly not only within the power but part of the administrative duty of the court to reject any evidence of optional admissibility which should directly tend to induce the jury to employ emotion rather than reason in reaching their decision. Thus, evidence should be rejected which tends to prejudice the objecting party by exciting hostile feelings on the part of the jury against him,⁷³ or where the effect of the evi-

60. Louisville, etc., R. Co. v. Orr, 121 Ala. 489, 26 So. 35 (1898).

61. People v. Soap, 127 Cal. 408, 59 Pac. 771 (1899).

62. Chatfield v. Bunnell, 69 Conn. 511, 37 Atl. 1074 (1897).

63. State v. Flanders, 38 N. H. 324 (1859); State v. Wilson, 9 Wash. 16, 36 Pac. 967 (1894).

64. Borrett v. Petry, 148 Ill. App. 622 (1909); Weaver v. Richards, 156 Mich. 320, 120 N. W. 818 (1909); Patten v. Lynett, 118 N. Y. Supp. 185, 133 App. Div. 746 (1909); Winkler v. Bower & Mining Machinery Co., 141 Wis. 244, 124 N. W. 273 (1910); 3 Chamb., Ev., § 1743, n. 10.

65. *Supra*, §§ 149, 157; 1 Chamb., Ev., §§ 334 et seq., 358.

66. Names v. Union Ins. Co., 104 Iowa

612, 74 N. W. 14 (1898); Moore v. U. S., 150 U. S. 57, 14 S. Ct. 26, 37 L. ed. 996 (1893); 3 Chamb., Ev., § 1744, n. 2.

67. Home F. Ins. Co. v. Kuhlman, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. Ill. (1899); Amoskeag Mfg. Co. v. Head, 59 N. H. 332 (1879); 3 Chamb., Ev., § 1744, n. 3.

68. Long v. Travellers' Ins. Co., 113 Iowa 259, 85 N. W. 24 (1901); 3 Chamb., Ev., § 1744, n. 4.

69. 3 Chamberlayne, Evidence, § 1745.

70. *Supra*, § 180; 1 Chamb., Ev., § 386.

71. Cunningham v. Smith, 70 Pa. 450 (1872).

72. People v. Farrell, 137 Mich. 127, 100 N. W. 264 (1904); Pease v. Smith, 61 N. Y. 477 (1875); 3 Chamb., Ev., § 1745, n. 4.

73. Swan v. Thompson, 124 Cal. 193, 56 Pac. 878 (1899); Stearns v. Reidy, 135 Ill.

dence offered would be to arouse the emotion of sympathy or other favorable feeling on behalf of the proponent.⁷⁴ The judge may exclude a secondary grade of evidence where primary proof to the same effect is already in the case.⁷⁵

§ 661. [Canons of Requirement]; Fact Must Not be Remote.⁷⁶—Evidence is frequently and very properly rejected upon the ground that it is too remote.⁷⁷ As has been elsewhere indicated,⁷⁸ facts will not, as a rule, be admitted in evidence when so remote from the *res gestae* fact as to fail to possess any appreciable probative effect.

§ 662. [Canons of Requirement]; Time.⁷⁹—What facts possessing logical relevancy to the existence of one in the *res gestae* will be rejected by the court on the ground of remoteness in point of time will be found to be a function of a number of variables. Much will depend in any instance upon the state of the case,⁸⁰ and how necessary the evidence offered may be to the contention of the proponent. Should the evidence offered be too remote in point of time to be relevant at all it will of course be rejected.⁸¹ The same result follows

119, 25 N. E. 762 (1890); *Hoag v. Wright*, 54 N. Y. Supp. 658, 34 App. Div. 260 (1898); 3 Chamb., Ev., § 1745, n. 5.

74. *Hutchins v. Hutchins*, 98 N. Y. 56 (1885); 3 Chamb., Ev., § 1745, n. 6.

75. *Steltemeier v. Barrett* (Mo. App. 1900), 122 S. W. 1095.

76. 3 Chamberlayne, Evidence, § 1746.

77. *Com. v. Parsons*, 195 Mass. 560, 81 N. E. 291 (1907); *State v. Newcomb*, 220 Mo. 54, 119 S. W. 405 (1909); *Carhart v. State*, 100 N. Y. Supp. 499, 115 App. Div. 1 (1906); 3 Chamb., Ev., § 1746, n. 1.

78. *Supra*, § 157; 1 Chamb., Ev., § 358. Of defective places before and after accident. See note, Bender Ed., 122 N. Y. 408. Of subsequent conditions when negligence claimed. See note, Bender Ed., 109 N. Y. 243. Correction of defect after accident may not be shown. See note, Bender Ed., 118 N. Y. 425. Improper to show subsequent repairs of defects in personal injury case. See note, Bender Ed., 127 N. Y. 639. Change in situation after accident as evidence of. See note, Bender Ed., 73 N. Y. 468. Evidence of suspicion of felony may be given to mitigate the damages in an action for false imprisonment, as where a father has the plaintiff arrested for seduction after she has told him that the defendant had seduced her; *Rogers v. Toliver*, 139 Ga. 281, 77 S. E. 28, 45 L. R. A. (N. S.) 64 (1913).

Evidence of negligence.—On the issue of negligence evidence that the party was intoxicated is always admissible not as con-

clusively establishing that he was negligent but as having an obvious bearing on the matter. *McIntosh v. Standard Oil Co.*, 89 Kan. 289, 131 Pac. 151, 47 L. R. A. (N. S.) 730 (1913). The fact that at the time of an accident a street car was being operated in violation of an ordinance giving mail wagons the right of way may be shown as evidence of negligence. *Bain v. Fort Smith Light & Traction Co.*, — Ark. —, 172 S. W. 843, L. R. A. 1915 D 1021 (1915).

Evidence of defendant's wealth is only admissible in cases where punitive damages are recoverable and not in an action for alienation of affections. *Phillips v. Thomas*, 70 Wash. 533, 127 Pac. 97, 42 L. R. A. (N. S.) 582 (1912).

In estimating damages for land not taken by a railroad the damage from dust and noise and danger from fire may be considered. *Lewisburg & N. R. Co. v. Hinds*, 134 Tenn. 293, 183 S. W. 985, L. R. A. 1916 E 430 (1916).

79. 3 Chamberlayne, Evidence, § 1747.

80. *Supra*, § 654; 3 Chamb., Ev., § 1742. *Davis v. City of Adrian*, 147 Mich. 300, 110 N. W. 1084 (1907); *Nelson v. Young*, 87 N. Y. Supp. 69, 91 App. Div. 457 (1904); *McQuiggan v. Ladd*, 79 Vt. 90, 64 Atl. 503 (1906); 3 Chamb., Ev., § 1747, n. 1.

81. *Goodwin v. State*, 96 Ind. 550 (1884); *Reed v. Manhattan Deposit & Trust Co.*, 198 Mass. 306, 84 N. E. 469 (1908); *New Era Mfg. Co. v. O'Reilly*, 197 Mo. 466, 95 S. W. 322 (1906); *Gibson v. American Mut. L. Ins.*

where it is of little practical value. *A continuing fact, cannot, however, be said to be too remote for relevancy so long as the logical inference of continuance*⁸² tends to show that the condition or other fact still existed at the time rendered important in the case.⁸³

§ 663. [Canons of Requirement]; Proving the *Res Gestae*.⁸⁴—The right of a party to prove the *res gestae* of his case is undoubted.⁸⁵ The term “material facts” would seem to include the *res gestae* facts which are constituent⁸⁶ and all probative ones which must be proved if such constituent facts are to be established.⁸⁷ The latter are received almost as a matter of course.⁸⁸

Action of Appellate Courts.—Even where the higher court feels that error has been committed in admitting certain evidence, it will not, as a rule, find prejudice where the evidence admitted was entirely irrelevant, i. e., *immaterial*. Sound practice would seem to allow the action of the trial judge to stand,⁸⁹ unless prejudice should arise from other causes, for example, where the evidence is affirmatively shown to have confused⁹⁰ or misled⁹¹ the jury.⁹²

§ 664. [Canons of Requirement]; Optional Admissibility.—Facts of optional admissibility may fall under any of the broad lines of administrative requirements above enumerated. Reason is the only guide in view of the rights of the litigants and the social objectives which judicial administration proposes to itself.⁹³

Antecedent or Subsequent Facts; Antecedent.—Facts are to be regarded as antecedent or subsequent according to their relation to the point of time covered by the occurrence of the *res gestae*. The relevancy of such facts is, as a rule,

Co., 37 N. Y. 580 (1868); 3 Chamb., Ev., § 1747, n. 5.

82. *Supra*, § 416; 2 Chamb., Ev., § 1030.

83. *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70 (1899); *State Bank v. Southern Nat. Bank*, 170 N. Y. 1, 62 N. E. 677 (1902); 3 Chamb., Ev., § 1747, n. 7.

84. 3 Chamberlayne, Evidence, § 1748.

85. *Supra*, § 157; 1 Chamb., Ev., § 358.

86. *Supra*, §§ 31, 32; 1 Chamb., Ev., §§ 47, 49.

87. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410 (1909); *American Process Co. v. Pennauken Brick Co.*, 78 N. J. L. 658, 75 Atl. 976 (1910); 3 Chamb., Ev., 1748, n. 4.

88. *Stuart v. Noble Ditch Co.*, 9 Ida. 765, 76 Pac. 255 (1904); *Hildebrand v. United Artisans*, 50 Or. 159, 91 Pac. 542. *Immaterial facts*, on the other hand, are to be excluded. *Czarnecki v. Derecktor*, 81 Conn. 338; 71 Atl. 354 (1908); *First Nat. Bank v. Miller*, 235 Ill. 185, 85 N. E. 312 (1908); 3 Chamb., Ev., § 1748, n. 5. Proof of physi-

cal condition in personal injury case. See note, Bender Ed., 35 N. Y. 487. Proof must follow allegations of pleadings. See note, Bender Ed., 104 N. Y. 170, 133 N. Y. 437. What may be shown under general denial. See note, Bender Ed., 111 N. Y. 270, 142 N. Y. 135. Variance from complaint. See note, Bender Ed., 160 N. Y. 191.

89. *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195 (1897); *Kellogg v. Kimball*, 122 Mass. 163 (1877); *Lake Shore, etc., R. Co. v. Erie County*, 41 Hun (N. Y.) 637; 2 St. Rep. 317 (1886); 3 Chamb., Ev., § 1749, n. 2.

90. *Lucas v. Brooks*, 18 Wall. (U. S.) 436, 21 L. ed. 779 (1873).

91. *Hunter v. Harris*, 131 Ill. 482, 23 N. E. 626 (1890); *Gregg v. Northern R. Co.*, 67 N. H. 452, 41 Atl. 271 (1893); 3 Chamb., Ev., § 1749, n. 4.

92. Where there is no jury, the inference of prejudice from such a ruling fails to arise. *Andrews v. Johnston*, 7 Colo. App. 551, 44 Pac. 73 (1896).

causal or explanatory; they tend to give plausibility and connectedness to the hypothesis of the proponent.⁹⁴ The facts constituting the *res gestae* of the case derive clearness and coherence of outline when taken in connection with the causes and conditions which have created the situation.⁹⁵ Some causal connection between the antecedent fact and one in the *res gestae* must be shown. Otherwise, no ground is furnished for admitting a prior fact.⁹⁶

Subsequent.—The relevancy of subsequent facts is much the same. The result is frequently to reinforce the correctness of the inferences relating to the actual nature of the *res gestae* by showing that the subsequent effects were such as might naturally have been expected had the *res gestae* actually been as they are now claimed to be. In other words, causation⁹⁷ as it were, throws light forward from antecedent facts upon the zone of the *res gestae*. It casts light backward upon the same zone from the subsequent transactions.

§ 665. [Canons of Requirement]; Consistent and Inconsistent Facts.⁹⁸—Among probative facts collaterally relevant are those whose existence is inconsistent with that of some *res gestae* or directly evidentiary fact. Conduct inconsistent with a present claim may at all times be shown by the adverse interest.⁹⁹ Generally speaking, collateral facts whose existence is merely *consistent* with probative or *res gestae* ones possess no marked evidentiary value. Some relation, more directly causal in its nature must be established for such a result.¹ Situations may arise where it may be necessary to use mere consistency in an

93. 3 Chamberlayne, Evidence, § 1750.

94. *Supra*, § 37; 1 Chamb., Ev., § 55. Chicago Consol. Traction Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868 (1907); Witmer v. Buffalo & N. F. Electric Light & Power Co., 187 N. E. 572, 80 N. E. 1122 (1907); United Power Co. v. Matheny, 81 Ohio St. 204, 90 N. E. 154 (1909); 3 Chamb., Ev., § 1751, n. 1.

95. Goldschmidt v. Mutual Life Ins. Co. of New York, 119 N. Y. Supp. 233, 134 App. Div. 475 (1909).

96. Casey v. J. W. Reedy Elevator Mfg. Co., 142 Ill. App. 126 (1908); Shadowski v. Pittsburg Ry. Co., 226 Pa. 537, 75 Atl. 730 (1910); 3 Chamb., Ev., § 1751, n. 4.

97. *Supra*, §§ 36; 1 Chamb., Ev., §§ 55, 58; *Infra*, § 671; 3 Chamb., Ev., § 1784. Avery Mfg. Co. v. Mooney, 137 Ill. App. 551 (1907); People v. Colmey, 102 N. Y. Supp. 714, 117 App. Div. 462 (1907); 3 Chamb., Ev., § 1751, n. 2. Damages in a libel suit may be proved by showing the effect the libel had upon persons who heard or read it. Van Lonkhuyzen v. Daily News Co., 195 Mich. 283, 161 N. W. 979, L. R. A. 1917 D 855 (1917). Drunkenness may be shown by evidence of loud talking on the street and pro-

fanity and inability to enunciate words distinctly and inability to stand steadily. State v. Baughn, 162 Iowa 308, 143 N. W. 1100, 50 L. R. A. (N. S.) 912 (1913). In an action for breach of warranty that a fertilizer contained certain ingredients, evidence is admissible that the results of using them were poor where the kind of soil, manner of cultivation accidents of season and other pertinent facts are shown as this tends to show that they did not have these ingredients. Hampton Guano Co. v. Hill Live-Stock Co., 168 N. C. 442, 84 S. E. 774, L. R. A. 1915 D 875 (1915).

98. 3 Chamberlayne, Evidence, §§ 1752-1754.

99. Thus, where it is contended, in an action for personal injuries that the latter were being simulated, evidence is competent to show that the party setting up this claim has acted in a manner incompatible with any *bona fide* belief in it. Williams v. Spokane Falls & N. Ry. Co., 42 Wash. 597, 84 Pac. 1129 (1906); 3 Chamb., Ev., § 1752.

1. Hawkins v. James, 69 Miss. 274, 13 So. 813 (1901).

evidentiary capacity. Thus, it may be shown that certain things happened as they might have been expected to happen if one contention or the other before the court were true.² The admissibility of any evidence as to the existence of merely consistent facts may fairly be deemed matter of administration, as is commonly said, of "discretion."³ On the other hand, the right of a litigant to prove a fact inconsistent with one directly probative or material in the *res gestæ* seems preeminently a matter of right, *ex debito justitiæ*.⁴

§ 666. [Canons of Requirement]; Explanatory or Supplementary Facts.⁵—Prominent among facts admitted as indirectly relevant, e.g., from which a deliberative or collateral inference may be drawn are those which may properly be denominated explanatory.⁶ Facts of an explanatory or supplementary nature may even be used to give force and cogency to those in the direct line of proof.⁷ The effect of evidence of this nature is not, however, in all cases affirmative. An explanation may equally well be intended and calculated to diminish the force of the evidence produced by one's adversary.⁸

§ 667. [Canons of Requirement]; Negative Facts.⁹—This distinction between the probative effect of consistent and that of inconsistent facts, always of importance, may be noted in operation where the form of the evidence is, as it well may be, negative.¹⁰

Absence of Entry, Record, Etc.—The circumstance that there is found to be no entry in a certain book,¹¹ that no memorandum or other written insertion has been made on a given record,¹² where it naturally would have been placed had the fact existed, may furnish some evidence that the fact is not as alleged. The probative force of the inference from non-entry varies with the extent to which regularity in the recording of business transactions may rationally be

2. *Alpena Tp. v. Mainville*, 153 Mich. 732, 117 N. W. 338, 15 Detroit Leg. N. 605 (1908); *Gallegos v. State*, (Tex. Cr. App. 1905), 90 S. W. 492; 3 Chamb., Ev., § 1753.

3. *Cook v. Malone*, 128 Ala. 662, 29 So. 653 (1900); *Blaisdell v. Davis*, 72 Vt. 295, 48 Atl. 14 (1898); 3 Chamb., Ev., § 1754, n. 1.

4. 3 Chamb., Ev., § 1754.

5. 3 Chamberlayne, Evidence, § 1755.

6. *Atlantic Coast Line R. Co. v. Taylor*, 125 Ga. 454, 54 S. E. 622 (1906); *Hayward v. Scott*, 114 Ill. App. 531 (1904); *Jones v. Cooley Lake Club*, 122 Mo. App. 113, 98 S. W. 82 (1906); 3 Chamb., Ev., § 1755, n. 2.

7. *Buckeye Mfg. Co. v. Woolley Foundry, etc., Works*, 26 Ind. App. 7, 58 N. E. 1069 (1900); *Hughes v. Gross*, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 875, 32 L. R. A. 620 (1906); *Tracy v. Mellanus*, 58 N. Y. 257 (1874); *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102 (1895); 3 Chamb., Ev., § 1755, n. 5.

8. *People v. Philbon*, 138 Cal. 530, 71 Pac. 650 (1903); *Woodrick v. Woodrick*, 141 N. Y. 457, 36 N. E. 395 (1894); *Burley v. German-American Bank*, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406 (1883); 3 Chamb., Ev., § 1755, n. 6.

9. 3 Chamberlayne, Evidence, §§ 1756-1759.

10. *Treat v. Merchants' L. Assoc.* 198 Ill. 431, 64 N. E. 992 (1902); *Shannon v. Castner*, 21 Pa. Super. Ct. 294 (1902); 3 Chamb., Ev., § 1756.

11. *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524 (1893); *Woods v. Hamilton*, 39 Kan. 69, 17 Pac. 335 (1888); 3 Chamb., Ev., § 1757, n. 1.

12. *Knapp v. Day*, 4 Colo. App. 21, 34 Pac. 1008 (1893); *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298 (1880); *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. 614 (1885); 3 Chamb., Ev., § 1757, n. 2.

inferred from experience.¹³ The systematic habit of entering transactions must, therefore, be affirmatively shown. This rule, so far as it relates to entries on books of account, is qualified. It has been held that the fact that a set of books shows no receipt of goods,¹⁴ no entry of the receipt of money,¹⁵ or of the assumption of a risk,¹⁶ affords no inference that the goods were not delivered, or that such payment was not received or contract made. In general, the mere self-serving absence of an entry on books of account is not evidence that there was no ground for making one.¹⁷

Failure to See, Hear, Etc.—In the same way a witness may properly testify that he did not see a given sight,¹⁸ hear a particular sound,¹⁹ in general, did not notice a fact. Such evidence is of no value if at the time of the alleged occurrence of these events the witness was so situated that they well might have occurred and he neither have seen nor heard them. Should the witness, however, have been so located that they could not have occurred without his having seen or heard them, then his failure to see or hear them makes the inference that they did not happen a legitimate one.²⁰ Under certain circumstances, failure by one in the position to do so to hear any report, rumor, or other form of private or popular expression on a given subject may be independently relevant to the existence of a psychological fact, mental state or moral quality.²¹

Ignorance of Alleged Fact.—In much the same way, ignorance of a given fact of such nature or notoriety²² that the witness would probably have known of it had it existed, furnishes some evidence that such is not the case.²³ The necessary inference is that, had the fact existed, the person in question *must* have known it.²⁴

13. *Corner v. Pendleton*, 8 Md. 337 (1855); *Roe v. Nichols*, 38 N. Y. Supp. 1100, 5 App. Div. 472 (1896); 3 *Chamb., Ev.*, § 1757, n. 4.

14. *Keim v. Rush*, 5 Watts & S. (Pa.) 377 (1843).

15. *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557 (1901).

16. *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419 (1860).

17. *Schwarze v. Roessler*, 40 Ill. App. 474 (1891); *Morse v. Potter*, 4 Gray (Mass.) 392 (1855); 3 *Chamb., Ev.*, § 1757, n. 8.

18. *Whittaker v. New York, etc., R. Co.*, 51 N. Y. Super. Ct. 287 (1885); *Galveston, etc., Ry. Co. v. Udalle* (Tex. Civ. App. 1905), 91 S. W. 330; 3 *Chamb., Ev.*, § 1758, n. 1.

19. *West Chicago St. R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996 (1897); *Hannefin v. Blake*, 102 Mass. 297 (1869); *Greany v. Long Island R. Co.*, 101 N. Y. 419, 5 N. E. 425 (1886); 3 *Chamb., Ev.*, § 1758, n. 2.

20. *East Tennessee, etc., R. Co. v. Carlross*, 77 Ala. 443 (1884); *Chambers v. Hill*, 34 Mich. 523 (1876); 3 *Chamb., Ev.*, § 1758, n. 3.

21. Thus, that a member of a given community has at no time heard anything said with regard to the reputation or character of a given individual may be a relevant fact. *Corrigan v. Wilkes-Barre & W. V. Traction Co.*, 225 Pa. 560, 74 Atl. 420 (1909). A witness qualified to do so may state that he never heard that the railroad company had at any time objected to the crossing by the public of one of their bridges. *Lamb v. Southern Ry. Co.*, 86 S. C. 106, 67 S. E. 958 (1910). A date for the happening of a given event may be fixed in the same way, e.g., that a particular witness heard nothing of it prior to a certain time. *Lincoln v. Hemenway*, 80 Vt. 530, 69 Atl. 153 (1908).

22. *Dawson v. State*, 38 Tex. Cr. 50, 41 S. W. 599 (1897). That a given person "has money" is not a fact of this nature. *Killen v. Tide*, 65 Ala. 505 (1880).

23. *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442 (1853); 3 *Chamb., Ev.*, § 1759, n. 2.

24. *Netherlands Fire Ins. Co. v. Barry*, 3 N. Y. Supp. 164, 103 App. Div. 581 (1905).

§ 668. [Canons of Requirement]; Preliminary Facts.²⁵—Antecedent facts²⁶ are carefully to be distinguished from facts which are logically necessary to the admissibility of any piece of evidence offered, facts as to which the court will require to be reasonably satisfied before permitting the evidence to go to the jury.²⁷ Instances where preliminary proof is required or its future production tacitly assumed are very numerous in connection with the trial of causes. A plan, cause of action²⁸ or other thing must, in many instances, be identified in some suitable way as a condition of its being received as evidence. Such facts are merely conditioning circumstances whose existence is essential to the relevancy of certain others. Such facts are designated as preliminary.²⁹ In like manner, the authority of an attorney³⁰ or other agent to bind his principal, or of a given individual to bind a corporation as one of its officers, should, in strictness, be proved as a fact preliminary to receiving evidence of statements or other facts. It must be affirmatively shown that bloodhounds used in tracking criminals were capable, by reason of previous experience, of doing the work required.³¹

§ 669. Probative Relevancy; Objective and Subjective.—In endeavoring to apply the reasoning faculty to the simplest probative statement by a witness a double question at once presents itself; (1) Is the declaration such that, as a matter of objective reality, a tribunal would be reasonably justified in acting on it? (2) Is the witness free from controlling motive to misrepresent and possessed of such adequate knowledge as to give reasonable ground for believing that he knows the truth and will truly state it? Should the first of these questions be answered in the affirmative, the fact stated is objectively relevant to a proposition in the case. Should the second be similarly answered, the declaration of the witness is subjectively so. Both these elements must unite to insure complete relevancy.³²

Court and Jury.—All objective inferences are, in the first instance, passed upon, previously, by the Court, ultimately by the jury. Where the statement

25. 3 Chamberlayne, Evidence, § 1760.

26. *Supra*, § 664; 3 Chamb., Ev., § 1751.

27. Thus, in order that a witness should be permitted to testify it must be proved to the satisfaction of the court, or the presiding judge must feel justified in assuming that he is possessed of adequate knowledge regarding the subject as to which he proposes to speak. *Supra*, § 36; 1 Chamb., Ev., § 56: *Comeau v. Hurley*, 24 S. D. 275, 123 N. W. 715 (1909); 3 Chamb., Ev., § 1760, n. 3. In the same way, before a photograph can be admitted into evidence, proof must be offered that it is accurate. *Miller v. Louisville, etc., R. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416 (1900); 3 Chamb., Ev., § 1760, n. 4. That books of account should be regarded as evi-

dence of the facts asserted in them, the court must be satisfied, in some way, that they were accurately kept. *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231 (1889).

28. *Harris v. Miner*, 28 Ill. 135 (1862); *Dupuis v. Interior Constr., etc., Co.*, 88 Mich. 103, 50 N. W. 103 (1891).

29. 3 Chamberlayne, Evidence, § 1760, n. 7.

30. *American Process Co. v. Pensauken Brick Co.*, 78 N. J. L. 658, 75 Atl. 976 (1910).

31. *State v. Freeman*, 146 N. C. 615, 60 S. E. 986 (1908); *State v. Dickerson*, 77 Ohio St. 34, 82 N. E. 969, 13 L. R. A. (N. S.) 341 (1907); 3 Chamb., Ev., § 1760, nn. 10, 11, 12. See *post*, § 797.

32. 3 Chamberlayne, Evidence, § 1761.

of a witness is objectively relevant, the court is extremely apt to regard the question as to whether it is *subjectively* so, as one of *fact* for the jury, a necessary incident, as it were, in determining the *weight* of the evidence.³³

Ignorance and Other Subjective Impairment.— In general, where the statement of a witness or the declarations of a document are objectively relevant, the court will decline to intervene on account of the bias, interest, or other subjective condition of the declarant. Where the proposed declarant has no suitable knowledge as to the subject-matter of his statement, the judge intervenes to reject his testimony. The practice of the courts, in thus making a distinction between the impairment of subjective relevancy due to lack of adequate knowledge and that arising from other subjective conditions on the part of a witness, is comparatively a modern one.³⁴

Independent Sufficiency Not Required.— No statement or other fact is admissible which is not relevant to some material proposition submitted for judicial determination in the case. Any statement,³⁵ or other fact relevant to some material³⁶ proposition so submitted, is admissible. It is not important that any individual fact, classed as relevant should, taken in and of itself, be sufficient to sustain the proponent's contention on the point covered by it.³⁷ If in connection with other facts, the one in question has a logical bearing upon the truth of a proposition in issue,³⁸ it is admissible.

§ 670. [Probative Relevancy]; Objective; Ancillary Facts.³⁹— A fact may be relevant even where the only use is to condition other facts in themselves not relevant. This may happen where a circumstance intrinsically irrelevant is used to establish a date⁴⁰ or determine the fact of identity.⁴¹ In the same logical position, stands any fact which merely completes one which is itself intrinsically relevant.⁴² To facts of this class, the term ancillary seems properly applied.

33. 3 Chamberlayne, Evidence, § 1762.

34. 3 Chamberlayne, Evidence, § 1763.

35. That the statement is made in an answer irresponsive to the question asked, does not render it an irrelevant fact. *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905 (1897).

36. Where the proposition to which the evidence is directed is an immaterial one the fact itself may well be excluded. *Fry v. Provident Sav. L. Assur. Soc.* (Tenn. Ch. App. 1896), 38 S. W. 116. Should such evidence, however, be admitted, even over objection, the ruling cannot be deemed, in the absence of special circumstances tending to show injury, to constitute prejudice. *Smay v. Etnire*, 99 Iowa 149, 68 N. W. 597 (1896).

37. *Heffernan v. Ball*, 109 Ill. App. 231 (1903); *Glassberg v. Olson*, 89 Minn. 195, 94 N. W. 554 (1903); *People v. Gonzalez*,

35 N. Y. 49 (1866); *Schock v. Solar Gas Light Co.*, 222 Pa. 271, 71 Atl. 94 (1908); 3 Chamb., Ev., § 1764, n. 4.

38. *Com. v. Williams*, 171 Mass. 461, 50 N. E. 1035 (1898); *Passmore v. Passmore*, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62 (1883); *De Arman v. Taggart*, 65 Mo. App. 82 (1895); 3 Chamb., Ev., § 1764, n. 5.

39. 3 Chamberlayne, Evidence, §§ 1764–1773.

40. *McDonald v. Savoy*, 110 Mass. 49 (1872); *Levels v. St. Louis & H. Ry. Co.*, 196 Mo. 606, 94 S. W. 275 (1906); *Artcher v. McDuffie*, 5 Barb. (N. Y.) 147 (1849); 3 Chamb., § 1765, n. 1.

41. *Supra*, § 653; 3 Chamb., Ev., § 1741c.

42. This may occur where a fact has been incorporated by reference. *Krech v. Pacific R. Co.*, 64 Mo. 172 (1876).

Burden on Proponent.— Objective relevancy being thus an essential condition to the admissibility of any fact as evidence, the burden of showing its existence whenever in dispute or not apparent, rests on the proponent, the party offering the evidence.⁴³

Effect of Substantive Law.— The substantive law frequently interferes with the adjective law of evidence by prescribing what evidence shall be received or forbidding any evidence whatever on certain subjects⁴⁴ or that a certain number of witnesses or amount of proof shall be required for certain matters.

Corroboration and Impairment.— It is frequently necessary to test the evidence of the proponent by proving incidental facts which tend to impair its probative force.

Furthermore it may be corroborated in either of two ways, (1) By cumulative corroboration which adds merely to the number of witnesses or confirmatory facts to a given effect but with little tendency to establish a correlation between several inferences: (2) By corroboration to a given effect but with little tendency to establish an inference of itself by welding together the individual strength of the separate inferences into one whose cogency is far in excess of the aggregate in proving power of the separate inferences themselves.

Corroboration of a witness should be offered through some evidence independent of the witness himself.⁴⁵

§ 671. [**Probative Relevancy**]; **Subjective.**⁴⁶— Many inferences from experience are uniformly admissible which though possibly objective to the tribunal may, it would seem, be properly classed, from the standpoint of the witness or other declarant, as subjective. Shortly stated, subjective relevancy is such a relation between the mental equipment of a witness, writer of a document or other declarant, and the statement made by him as rationally leads to an inference that the declaration asserts the truth. It is not a matter of consequence, in this connection, whether the statement be judicial or extra-judicial, sworn or unsworn. Subjective inferences relate to the state of mind of the witness, writer or other declarant whose assertion goes before the tribunal, as to his interest, bias, motive to misrepresent, opportunities for observation, means of knowledge, etc. The point to be determined by these inferences is: As a mat-

43. *Williams v. Case*, 78 Ill. 356 (1875); *Gibson v. Burlington, etc., R. Co.*, 107 Iowa 596, 78 N. W. 190 (1899); *Ehrehart v. Wood*, 71 Hun 609, 25 N. Y. Supp. 31 (1893); *Hutchinson v. Canal Bank*, 3 Ohio St. 490 (1854); 3 Chamb., Ev., § 1766, n. 1. For a full discussion and consideration of Objective and Subjective Relevancy, Corroboration and Impairment, see 3 Chamb., Ev., 1767-1778. As to Probative Relevancy of Deliberative Inferences, Objective and Subjective, see also discussion thereof, 3 Chamb., Ev., §§ 1779-1790

44. As in case of State secrets or privileged communications. See post §.

45. Under the rule that in a prosecution for seduction there must be some corroborative evidence letters and post-cards identified only by the prosecutrix are insufficient. *Rogers v. State*, 101 Ark. 45, 141 S. W. 491, 49 L. R. A. (N. S.) 1198 (1911). In a prosecution for rape the complaint of the prosecution to the police does not constitute corroboration. *People v. Carey*, 223 N. Y. 519, 119 N. E. 83 (1918).

ter of experience, is a mind like that of the witness, with such a content subject to the influence of such feelings and emotions, one through which truth is so apt to come to the tribunal as reasonably to justify the latter in relying upon it? This is the question psychology presents to every court in the case of every witness. The fact that the witness has acted from habit or routine as in case of shop-book entries may also be shown. The oath required of the witness is a survival of the ancient ordeal by oath imposed to ensure truth.

The attention and memory of the witness and the power of suggestion exercised on him must also be considered as well as the capacity of the witness. The testimony of the witness may be corroborated or impaired by these considerations.

46. 3 Chamberlayne, Evidence, § 1774.

CHAPTER XXVI.

REASONING BY WITNESSES.

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§ 672. **"Matters of Opinion;" An Ambiguous Phrase.**¹—A familiar rule of exclusion is to the effect that witnesses are to state facts and not "matters of opinion."² Facts, physical or psychological, being the subject-matter of evidence, this exclusion of the "opinion" of witnesses applies to the use of the reasoning faculty concerning them. "Matter of opinion," thus related to facts, is, as has been seen,³ separated from the general class of facts for the purpose of indicating, usually marking thereby for exclusion from evidence, an act of reasoning or a fact in which the element of inference is unnecessarily prominent. The same phrase, "matter of opinion," may be so used as to indicate also propositions of belief, incapable of verification, religious views, political prin-

1. 3 Chamberlayne, Evidence, §§ 1791, 1792.

2. Saxton v. Perry, 47 Colo 263, 107 Pac. 281 (1910); West Skokie Drainage Dist. v. Dawson, 243 Ill. 175, 90 N. E. 377 (1909); Barrie v. Quimby, 206 Mass. 259, 92 N. E. 451 (1910); People v. Barber, 115 N. Y.

475, 22 N. E. 182 (1889); Pugh Printing Co. v. Yeatman, 22 Ohio Cir. Ct. 584, 12 Ohio Cir. Dec. 477 (1901); Chicago, etc., Ry. Co. v. Hale, 176 Fed. 71, 99 C. C. A. 379 (1910); 3 Chamb., Ev., § 1791, n. 1.

3. *Supra*, § 25; 1 Chamb., Ev., § 42.

ciples and the like, as to which certainty is practically impossible. All such facts are excluded, it would seem, under the rule in question.⁴

§ 673. [Matters of Opinion]; Irrelevancy as True Ground for Rejection.⁵—The rule which undertakes to reject "opinion" may be a mere assignment, as it were, of irrelevancy. The statement which the witness makes is lacking in subjective relevancy.⁶ He has no adequate knowledge on the subject. His declaration, therefore, is so said to be rejected as "opinion."⁷ Such an announcement evidently fails to assign the primary ground for exclusion. Illustrations of the method by which irrelevant testimony, e. g., that given without adequate knowledge, is solemnly rejected as if taken out of the class of "evidence," to which it never really belonged, by virtue of the rule excluding "opinion" are extremely numerous. The witness may use various forms of expressing himself. Thus, he may make an offer of an "approximation."⁸ He may state his "belief,"⁹ or give what he "considers" to be true.¹⁰ He may tender to the court his "expectation,"¹¹ "guess"¹² or "impression,"¹³ his "judgment,"¹⁴ or a "supposition."¹⁵ In all such cases, the evidence is to be rejected on account of the lack of subjective qualifications on the part of the witness. He is not entitled to testify as to what he "thought,"¹⁶ if thinking on the matter is all that he has done.¹⁷ But, that a witness uses language in giving his testimony which would be appropriate to the statement of an inference or to indicate lack of adequate knowledge should by no means be regarded as fatal to the reception of his evidence. The true test is whether he actually knows enough to make his testimony such that the jury might reasonably act upon it. If he does, it will be received although he couches his

4. *Whited v. Cavin*, 55 Or. 98, 105 Pac. 396 (1909); 3 Chamb., Ev., § 1792.

5. 3 Chamberlayne, Evidence, §§ 1793-1796.

6. *Supra*, § 36; 1 Chamb., Ev., § 56.

7. *Reid v. Ladue*, 66 Mich. 22, 32 N. W. 916, 11 Am. St. Rep. 462 (1887); *Cook v. Brockway*, 21 Barb. (N. Y.) 331 (1856); *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 4 N. E. 398, 58 Am. Rep. 785 (1886); 3 Chamb., Ev., 1793, n. 2.

8. *Hopper v. Beck*, 83 Md. 647, 34 Atl. 474 (1896).

9. *Hodges v. Hodges*, 2 Cush. (Mass.) 455 (1848); *Berg v. Parsons*, 90 Hun 267, 35 N. Y. Supp. 780 (1895); 3 Chamb., Ev., § 1794, n. 3.

10. *Yanke v. State*, 51 Wis. 464, 8 N. W. 276 (1881).

11. *Hager v. Nat. German-American Bank*, 105 Ga. 116, 31 S. E. 141 (1897).

12. *Johnson v. Hovey*, 98 Mich. 343, 57 N. W. 172 (1894).

13. *Lovejoy v. Howe*, 55 Minn. 353, 57 N. W. 57 (1893); *Crowell v. Western Reserve Bank*, 3 Ohio St. 406 (1854); *Plymouth Coal Co. v. Kommiskey*, 116 Pa. 365, 9 Atl. 646 (1887); 3 Chamb., Ev., § 1794, n. 7.

14. *Huntsville Belt Line, etc., R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295 (1892).

15. *Meniffee v. Higgins*, 57 Ill. 50 (1870); *State v. King*, 22 Iowa 1, 96 N. W. 712 (1903); *Weber v. Kingsland*, 8 Bosw. (N. Y.) 415 (1861); 3 Chamb., Ev., § 1794, n. 9.

16. *State v. Nolan*, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486 (1892); *Lund v. Tyngsborough*, 9 Cush. (Mass.) 361 (1851); *Barre v. Reading City Pass. R. Co.*, 155 Pa. 170, 26 Atl. 99 (1893); 3 Chamb., Ev., § 1794, n. 10.

17. A witness may enforce the credibility of what he says by some assertion as to the positiveness of his belief in the truth of what he says. *State v. Duncan*, 116 Mo. 288, 22 S. W. 699 (1893).

utterance in the precise language which has just been seen¹⁸ to warrant its rejection.¹⁹ Thus, a witness may properly testify as to what he "believes,"²⁰ as to that which is the "best of his judgment,"²¹ or what he "considers" to be true.²² His evidence may be none the less valuable because he is willing to tell only what he "expects,"²³ "guesses"²⁴ or "has an impression"²⁵ that such is the fact. It may be sufficient for all judicial purposes if the witness testifies that he "has an opinion,"²⁶ or "judges"²⁷ the fact to be as he states it. A cautious witness may be credited although his only statement is that he "should say"²⁸ certain things are true. A person may be permitted to testify although he merely "supposes,"²⁹ "thinks"³⁰ or "understands"³¹ that his testimony represents the truth. He may be received to testify although he is unwilling to swear positively to the actual truth of what he says.³² His "best recollection" may be all-sufficient.³³ As stated elsewhere,³⁴ the real administrative consideration to which the power of the court is directed in dealing with so called "matters of opinion" is the necessity for preserving to the parties the substantive right to a jury trial.³⁵ The positive law, in a very emphatic and sweeping way, has established the inviolable right to such a trial.³⁶

§ 674. *Inference by Witnesses; Use of Reason a Matter of Right.*³⁷—The proponent of an act of reasoning by a witness has, as a litigant, not only the substantive right to prove his case³⁸ but also a substantive right to the use of reason.³⁹ Combining these two rights, a litigant is justly entitled to insist that he should be able to place the facts of his contention before a tribunal fitted to

18. See last preceding section.

19. *Stone v. Com.*, 181 Mass. 438, 63 N. E. 1074 (1902); *Hallahan v. New York, etc., R. Co.*, 102 N. Y. 194, 6 N. E. 287 (1886); 3 *Chamb., Ev.*, § 1795, n. 2.

20. *Griffin v. Brown*, 2 Pick. (Mass.) 304 (1824); *State v. Freeman*, 72 N. C. 521 (1875); 3 *Chamb., Ev.*, § 1795, n. 3.

21. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65 (1890).

22. *Richards v. Knight*, 78 Iowa 69, 42 N. W. 584, 4 L. R. A. 453 (1889); *De Graw v. Emory*, 113 Mich. 672, 72 N. W. 4 (1897); 3 *Chamb., Ev.*, § 1795, n. 5.

23. *Hunter v. Helsley*, 98 Mo. App. 616, 73 S. W. 719 (1903).

24. *Hunter v. Helsley*, *supra*.

25. *Harris v. Fitzgerald*, 75 Conn. 72, 52 Atl. 315 (1902).

26. *Hallahan v. New York, etc., R. Co.*, *supra*.

27. *People v. Eastwood*, 14 N. Y. 562 (1856); 3 *Chamb., Ev.*, § 1795, n. 10.

28. *White v. Van Horn*, 159 U. S. 3, 15 S. Ct. 1027, 40 L. ed. 55 (1894).

29. *State v. Porter*, 34 Iowa 131 (1871).

30. *Harris v. Fitzgerald*, *supra*; *Kirscher v. Kirsher*, 120 Iowa 337, 94 N. W. 846 (1903); *Voisin v. Commercial Mut. Ins. Co.*, 70 N. Y. Supp. 147, 60 App. Div. 139 (1901); 3 *Chamb., Ev.*, § 1795, n. 13.

31. *Lockett v. Mims*, 27 Ga. 207 (1858). CONTRA: *Henderson v. Brunson*, 141 Ala. 674, 37 So. 549 (1904).

32. *Lewis v. Freeman*, 17 Me. 260 (1840).

33. *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625 (1883).

34. *Infra*, § 676; 3 *Chamb., Ev.*, § 1807.

35. *Supra*, § 206; 1 *Chamb., Ev.*, § 412. *Hames v. Brownlee*, 63 Ala. 277 (1879); *Robertson v. Stark*, 15 N. H. 109 (1844); 3 *Chamb., Ev.*, § 1796, n. 2.

36. *State v. Hull*, 43 W. Va. 767, 32 S. E. 240 (1899).

37. 3 *Chamberlayne, Evidence*, §§ 1797-1800.

38. *Supra*, §§ 149 *et seq.*; 1 *Chamb., Ev.*, §§ 334 *et seq.*

39. *Supra*, §§ 179 *et seq.*; 1 *Chamb., Ev.*, §§ 385 *et seq.*

reason about them in a rational manner. If the tribunal selected by the law, the jury, are unable to reason concerning the facts in their primary form,⁴⁰ one of two things must be done in order to protect the proponent in his rights.

(1) The jury may be so taught upon the subject-matter involved in the inquiry as to enable them to dispose of it in a rational manner at the end of the instruction.⁴¹ Practically, this is what the law undertakes to do for the purpose of enabling the jury to apply the rule of law to the constituent facts of a case.

(2) The proponent may prepare the facts for the reasoning faculty of the jury in a secondary form, viz., the *effect* which they have produced upon the mind capable, by training or experience, of reaching a rational conclusion with regard to them. Almost of necessity, the second expedient, the reasoning of witnesses with regard to the facts, is adopted in most cases.⁴² The normal position of a witness is that portrayed in the Year Books. He must be *oyant et voyant*, he who hears and sees.⁴³ His function is, *par excellence*, that of *observation*. The tribunal is to hear through his ears, see through his eyes. He may merely state the facts and let the jury draw the conclusion.⁴⁴

§ 675. **Entire Elimination of Inference Impossible.**⁴⁵—The impression which first arises to the mind is a conviction of the impossibility for any one to satisfy such requirements. If insisted upon, no one could testify. The statement of the simplest fact embodies an element of inference. The most instant intuitive recognition of a familiar object necessarily connotes an act of reasoning. Observation, undoubtedly, presents to the mind certain sense-impressions by the aid of the faculty analogous to but conveniently distinguished from that of inference or reasoning, viz., intuition. So instantly and intuitively that the mind is seldom conscious of the process these sense-impressions are seized by the reasoning powers and the mind becomes aware of the concept rather than a mere perception.⁴⁶

§ 676. **Involution of Reasoning.**⁴⁷—It would seem convenient to divide the acts of reasoning by witnesses as they come before the tribunal according to the proportion which reasoning bears to observation. So regarded, these

40. The rule that facts themselves are primary and that the reasoning of witnesses about them is a secondary grade of evidence applies not only where a jury is employed but, equally well, in cases where the judge acts for the determination of matters of fact. Thus, it is operative at the stage of *voir dire*. *Shepard v. Pratt*, 16 Kan. 209 (1876). Where the judge is sitting as a jury the rule is the same. *Lazarus v. Metropolitan El. R. Co.*, 69 Hun 190, 23 N. Y. Supp. 515 (1893).

41. *Infra*, § 670; 3 Chamb., Ev., 1816.

42. 3 Chamb., Ev., §§ 1797, 1798, 1799.

43. *Supra*, § 242; 1 Chamb., Ev., § 186.

44. *Parkin v. Grayson-Owen Co.*, 157 Cal. 41, 106 Pac. 210 (1909); *Atlantic Coast Line R. Co. v. Caple's Adm'x*, 110 Va. 514, 66 S. E. 855 (1910); 3 Chamb., Ev., § 1800, n. 2.

45. 3 Chamberlayne, Evidence, § 1801.

46. *People v. Nunley*, 142 Cal. 105, 441, 75 Pac. 676 (1904); *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405 (1908); *Moyers v. Fogarty*, 140 Iowa 701, 119 N. W. 159 (1909); 3 Chamb., Ev., § 1801.

47. 3 Chamberlayne, Evidence, §§ 1802-1807.

mental acts or processes may be treated as consisting of (1) Inference, (2) Conclusion, and, (3) Judgment.⁴⁸

(1) *Inference*.—In Inference, the element of observation is at its maximum. The witness is an observer and his inference attaches to the effect of the impressions which have come to his consciousness from what he has seen or otherwise perceived. Speaking generally, the observation will be spoken of as ordinary⁴⁹ where it is in relation to the every-day affairs of life, common knowledge⁵⁰ which every one may have, and skilled⁵¹ when made within the domain of an art, science or trade by one proficient in it. According as the element of inference or reasoning is in greater or less proportion the inference is spoken of as *intuitive* or *reasoned*.⁵²

(2) *Conclusion*.—As in Inference, both observation and reasoning are present. The proportion, however, of the two, is reversed. In Inference, we have observation with incidental reasoning. In Conclusion, is to be found reasoning with incidental observation. In any case, direct specific observation of the phenomena is blended with much else, the results of past observation, general knowledge, information furnished by others, and the like. Instant recognition of a book, dog, one's house, familiar friend, etc., would be, under such a definition, an intuitive inference. That A., a neighboring tradesman, was in failing health or on the verge of bankruptcy, might properly be treated as a Conclusion. Much of the result of past observation may have been lost from memory.⁵³

(3) *Judgment*.—In Judgment, the element of observation entirely disappears. Nothing remains but an act of pure reasoning. Facts, assumed to be true, are placed before the intellect of a suitably equipped witness and the results given to the jury. The assumption of fact upon the basis of which the witness reaches his mental result is styled a hypothetical question.⁵⁴ The mind resultant at which he arrives is referred to as his Judgment. The witness himself is termed an "expert." As spoken of in the present treatise an expert may be defined as a witness who gives his reasoning and the result at which he arrives upon the basis of hypothetically stated facts.⁵⁵ Should the act of judgment in any particular case be a *necessary* one, a mere summary of facts

48. 3 Chamberlayne, Evidence, § 1802.

49. *Infra*, § 688; 3 Chamb., Ev., § 1837.

50. *Supra*, §§ 345 et seq.; 1 Chamb., Ev., §§ 691 et seq.

51. *Infra*, §§ 713 et seq.; 3 Chamb., Ev., §§ 1947 et seq.

52. 3 Chamberlayne, Evidence, § 1802.

53. 3 Chamberlayne, Evidence, § 1803. nn. 1, 2.

54. *Infra*, Hypothetical Questions, §§ 816 et seq.; 3 Chamb., Ev., §§ 2451 et seq.; *Wichita v. Coggs*, 3 Kan. App. 540, 43 Pac. 842 (1890); *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246 (1896).

55. Best evidence required. *Russell v. State*, 53 Miss 367 (1876).

Common Knowledge.—The court is not required to admit the opinion of an expert contrary to common knowledge. *Goodwin v. State*, 96 Ind. 550 (1884); *Com. v. Marzynski*, 149 Mass. 68, 21 N. E. 228 (1889).

Judicial Knowledge.—*A fortiori*, a judge is not called upon to hear expert testimony as to a rule of law concerning which he has judicial knowledge. *Supra*, §§ 315 et seq.; 1 Chamb., Ev., §§ 570 et seq.; *Merchants', etc., Sav. Bank v. Cross*, 65 Minn. 154, 67 N. W. 1147 (1896).

proved in evidence, no administrative objection would seem to exist to receiving it and no prejudice caused by its reception, in the absence of special circumstances.⁵⁶

Ambiguity of the Term Expert.—A confessedly arbitrary use is made in the present treatise of the term "expert," as limited to a skilled witness testifying in response to a hypothetical question. The object of such an effort is simply to emphasize the unusual position of one who thus testifies without the use of observation. From the administrative point of view his position is unique. He should, accordingly, it would seem, receive separate administrative treatment, as is done in respect to the form of question which may properly be addressed to him.⁵⁷ The ambiguity of the term is obvious. The witness who testifies to a fact of special knowledge,⁵⁸ is commonly spoken of in current parlance as an expert. A skilled observer, familiar with a science, diagnosing the complicated phenomena presented to his attention is an expert. The man of science or other technical skill who is asked to give his opinion on the basis of the truth of a hypothetically stated set of facts observed by others is also an expert. Of these several uses, the third alone is adopted in the present work.⁵⁹

Credibility of Intuition.—Modern judicial administration recognizes that the spontaneous intuitive action of the mind, approaching, as it does, the uniformity of nature,⁶⁰ is far more trustworthy than an act of volitional reasoning, subject to the variations in operation which attend moral uniformity.⁶¹ Intuitive observations, like spontaneous statements, are presumably true. The reason in both cases is the same.

Canons of Administration.—Each litigant has a right to insist that the reasoning of a jury should be applied to the facts of his case, but, in an administrative point of view, the party's highest right is the right to insist upon being given a reasonable opportunity to prove his case.⁶² Should a conflict arise between the party's right to prove his case to a reasonable extent by the best evidence in his power and the opposing party's right to insist upon having the reasoning of the jury applied to the facts of the case or the normal operation

Number.—The marked administrative power of the judge in dealing with this class of witnesses is further marked by the readiness with which he may limit their number. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882 (1879); *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559 (1891).

Other Definitions.—See *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204 (1910); *Fowlie's Adm'x v. McDonald, Cutler & Co.*, 82 Vt. 230, 72 Atl. 989 (1909); 3 Chamb., Ev., § 1804, n. 2. As to the marked general administrative control which the court has of expert witnesses, see cases cited in 3 Chamb., Ev., § 1804, n. 2.

56. *Williams v. Anniston Electric & Gas Co.*, 164 Ala. 34, 51 So. 385 (1909).

57. *Infra*, §§ 816 et seq.; 3 Chamb., Ev., §§ 2451 et seq.

58. *Supra*, §§ 375 et seq.; 1 Chamb., Ev., §§ 870 et seq.; *Green v. Kansas City Southern Ry. Co.*, 142 Mo. App. 67, 125 S. W. 865 (1910).

59. 3 Chamberlayne, Evidence, § 1805.

60. *Infra*, § 996; 4 Chamb., Ev., § 3150.

61. *Infra*, §§ 1008 et seq.; 4 Chamb., Ev., §§ 3207 et seq.; 3 Chamb., Ev., § 1806.

62. *Supra*, §§ 149 et seq.; 1 Chamb., Ev., §§ 334 et seq.

of any other administrative principle, the latter must yield to the extent of its inconsistency with the former. The substantive right to prove one's case is paramount.⁶³

§ 677. [Involution of Reasoning]; Conditions of Admissibility.⁶⁴—The phenomena observed by the witness being the primary evidence to be presented to the tribunal wherever possible, and the inferences, conclusions and judgments of witnesses being a secondary species of evidence, the conditions for the admissibility of this class are determined by the ordinary administrative principles governing the reception of other kinds of secondary evidence.⁶⁵ There are two elements of admissibility, Necessity, and Relevancy.

Necessity.—Should it appear that inferences are essential to protect the proponent in his paramount right to prove his case⁶⁶ they will be admitted. As indicated above,⁶⁷ the necessity for receiving the reasoning of witnesses arises when that of the jury must necessarily be defective. Where no adequate necessity for receiving the secondary evidence has been shown it is to be rejected.⁶⁸ Where, for example, the existence of a fact has been⁶⁹ or may be⁷⁰ verified beyond question through a simple act of sense-perception⁷¹ or by the exhibition of a plan⁷² or photograph,⁷³ no statement as to the inferences of a witness with regard to it can be received. Documentary evidence, e.g., letters,⁷⁴ stands in much the same position.

§ 678. [Involution of Reasoning]; Necessity; Inability of Witness to State Precise Mental Effect of Observation.⁷⁵—The fact or set of facts which a witness has observed may be so numerous, complicated, minute, or interblending as to elude effective individual expression by the witness.⁷⁶ The individual

63. 3 Chamberlayne, Evidence, § 1807.

64. 3 Chamberlayne, Evidence, § 1808.

65. *Supra*, §§ 150 *et seq.*; 1 Chamb., Ev., §§ 339 *et seq.*; 3 Chamb., Ev., § 1808. Opinion evidence, proper subjects for—specific cases, see note, Bender ed., 97 N. Y. 507, 520. Proper subjects of opinion, see note, Bender ed., 39 N. Y. 49, 64. Admissibility of opinion, what are admissible, and what are not—specific instances, see note, Bender ed., 27 N. Y. 244. To show belt fasteners defective, see note, Bender ed., 113 N. Y. 600.

66. *Supra*, §§ 149 *et seq.*; 1 Chamb., Ev., §§ 334 *et seq.*; Weiss v. Kohlhausen, 58 Or. 144, 113 Pac. 46 (1911).

67. *Supra*, § 674; 3 Chamb., Ev., § 1799.

68. Barker v. Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366 (1900); 3 Chamb., Ev., § 1809.

69. Southern Kansas R. Co. v. Robbins, 43 Kan. 145, 23 Pac. 113 (1890); Smith v. Mutual Ben. L. Ins. Co., 173 Mo. 329, 72 S. W. 935 (1903); 3 Chamb., Ev., § 1809, n. 6.

70. Stephens v. Gradner Creamery Co., 9 Kan. App. 183, 57 Pac. 1058 (1899).

71. Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401 (1875); Cole v. Lake Shore, etc., R. Co., 95 Mich. 77, 54 N. W. 638 (1893); 3 Chamb., Ev., § 1809, n. 8.

72. Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643 (1902).

73. Closser v. Washington Tp., 11 Pa. Super. Ct. 112 (1899).

74. Kellogg v. Frazier, 40 Iowa 502 (1875). The action of a trial judge in this respect will not be reversed unless manifestly unreasonable. Barker v. Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366 (1900). See discussion generally of Inferences, Conclusions and Judgments of witnesses, 3 Chamb., Ev., §§ 1810, 1811.

75. 3 Chamberlayne, Evidence, §§ 1812, 1813.

76. Savage v. Haves, 142 Ill. App. 316 (1908); Clark v. Baird, 9 N. Y. 183 (1853); 3 Chamb., Ev., 1812, n. 2.

phenomena presented to the sense-perception of a witness may be so disposed among themselves that they can be placed before the mind of a tribunal only through a statement as to their combined effect upon that of an observer. This limitation upon the power of a witness to describe a complicated set of phenomena only by their secondary effect connotes and involves, as a matter of course, the forensic necessity on the part of a proponent of offering to the jury these phenomena in the only form which is available to him. The canon of administration which admits such evidence is applied in numerous instances.⁷⁷ Where all the constituent phenomena can be fully placed before the jury, however, the mental summary of the observer is rejected.⁷⁸

Detailed Statement of Salient Facts.—That the right of a litigant to the judgment of the jury should be invaded only to the extent that the necessity of the proponent requires, the observing witness will be called upon to state, for the benefit of the jury, such portions of the component or constituent facts as admit of separate statement. Having stood successfully the tests which this preliminary detail applies to his evidence, he is then permitted to state the entire set of phenomena observed by him as they have been collected into the secondary form of a single concept or act of reasoning, e.g., a compound fact or expression of fact. Thus, in some degree, is the precision of his reasoning brought to light. More subjective feelings, bias, interest, and the like, occasionally stand revealed. In assisting the work of the jury, this preliminary detail of constituting facts is of considerable importance. Its effect in testing the memory is of no slight consequence.⁷⁹ It follows, as a necessary corollary, that where all the constituting facts can be placed before the jury no reason exists for receiving the inference,⁸⁰ provided the jury are able to coordinate the facts presented into a reasonable deduction.

§ 679. [Involution of Reasoning]; Inability of Jury to Coordinate the Sense Impressions of the Observers.⁸¹—From similar causes inherent in the fact that verbal description is necessarily ill-adapted for the presentation of reciprocally interacting phenomena,⁸² it is probable that even should the witness succeed in giving to the jury an exact representation of many commingling phenomena,

77. *Taylor v. State*, 135 Ga. 622, 70 S. E. 237 (1911); *Kolp v. Decatur Ry. & Light Co.*, 145 Ill. App. 645 (1908); 3 Chamb., Ev., § 1812, n. 3.

78. *Springfield & N. E. Traction Co. v. Warrick*, 249 Ill. 470, 94 N. E. 933 (1911); *Hufnagle v. Delaware & H. Co.*, 227 Pa. 476, 76 Atl. 205 (1910); 3 Chamb., Ev., § 1812, n. 4.

79. *Abingdon Mills v. Grogan*, 167 Ala. 146, 52 So. 596 (1910).

A general requirement.—The requirement of a preliminary detail of observed phe-

nomena is one very generally made. *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022 (1909); *Landrum v. Swann*, 8 Ga. App. 209, 68 S. E. 862 (1910); 3 Chamb., Ev., 1813, n. 3.

80. *Keefe v. Sullivan County R. R. Co.*, 75 N. H. 116, 71 Atl. 379 (1908); *Pearson v. Alaska Pac. S. S. Co.*, 51 Wash. 560, 99 Pac. 753 (1909); 3 Chamb., Ev., § 1813, n. 4.

81. 3 Chamberlayne, Evidence, §§ 1814-1819.

82. 3 Chamberlayne, Evidence, §§ 1814, 1815.

the tribunal would still fail to receive an accurate impression of the situation as a whole.⁸³

Instructing the Jury.—To avoid the administrative difficulty of the jury's lack of knowledge, such instruction, by way of preparation for their act of judgment, as will render it an exercise of sound reasoning, occasionally can be satisfactorily afforded them.⁸⁴ Such instruction may be afforded to the jury by the witnesses who appear on the stand. On the other hand, this evidence may be rejected when tendered.⁸⁵

Jury's Lack of Knowledge.—The necessity for receiving the secondary evidence of an act of inference, conclusion or judgment may arise not so much from difficulty in understanding the probative or evidentiary fact, as from lack of the special experience which alone can form a satisfactory inference or conclusion.⁸⁶ Where the experience of the jury does not enable them to understand and reason intelligently with regard to a matter of science, or as to the affairs of a trade or calling, skilled witnesses will be allowed to state facts of special knowledge.⁸⁷ The evidence of these witnesses is admissible where the facts are such that those who testify may well be supposed from their experience and study to have peculiar knowledge on the subject which jurors generally do not possess.⁸⁸

Common Knowledge.—Conversely, it follows that where the matter is one of common knowledge,⁸⁹ i.e., where the general proposition of experience is one within the knowledge of the average jurymen, no ground for admitting the reasoning of witnesses is furnished.⁹⁰ The secondary evidence is, therefore, rejected under the rule excluding the reasoning of witnesses.⁹¹ "A witness

83. *Missouri, etc., Telephone Co. v. Vandevort*, 67 Kan. 269, 72 Pac. 771 (1903). See *Sequences and Coexistences*, 3 Chamb., Ev., § 1815, and notes.

84. *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63 (1871); *Read v. Valley Land, etc., Co.*, 66 Neb. 423, 92 N. W. 622 (1902); *Roberts v. New York El. R. Co.*, 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499 (1891); 3 Chamb., Ev., § 1816, n. 1.

85. *Middlebury Bank v. Rutland*, 33 Vt. 414 (1860).

86. *Louisville, etc., R. Co. v. Malone*, 109 Ala. 509, 20 So. 33 (1895); *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319 (1851).

87. *McClendon v. State*, 7 Ga. App. 784, 68 S. E. 331 (1910); 3 Chamb., Ev., § 1817, n. 3. Conclusions of expert witnesses may only be given in evidence where the conclusions as well as knowledge of the facts from which they are drawn depend upon professional or scientific information or skill, not within the range of ordinary training or in-

telligence. *Ferdon v. New York, O. & W. Ry. Co.*, 115 N. Y. Supp. 352, 131 App. Div. 380 (1909).

88. *Buis v. Northern Pac. Ry. Co.*, 42 Mont. 471, 113 Pac. 472 (1911); *Horst v. Lewis*, 71 Neb. 365, 103 N. W. 460 (1905).

89. *Supra*, §§ 345 *et seq.*; 1 Chamb., Ev., §§ 691 *et seq.*

90. *New England Glass Co. v. Lovell*, *supra*.

91. *Swift & Co. v. Miller*, 139 Ill. App. 192 (1908); *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498 (1902); *Welch v. New York, etc., R. Co.*, 176 Mass. 393, 57 N. E. 668 (1900); *Lee v. Knapp*, 155 Mo. 610, 56 S. W. 458 (1899); *Harrison v. New York Cent. & H. R. Co.*, 195 N. Y. 86, 87 N. E. 892 (1909); *Ohio, etc., Torpedo Co. v. Fishburn*, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437 (1900); *Seifred v. Pennsylvania R. Co.*, 206 Pa. 399, 55 Atl. 1061 (1903); *Selleck v. Janesville City*, 104 Wis. 570, 80 N. W. 644, 76 Am. St. Rep. 892, 47 L. R. A. 691 (1899); 3 Chamb., Ev., § 1818, n. 3. "The governing

testifying merely as to matters with which the jury may well be supposed to be as conversant as himself, and as capable of drawing a correct conclusion, is not allowed to give an opinion.”⁹² “The jury should not be influenced by the opinion of anyone who is not more competent to form one than themselves.”⁹³ For example, as the rules which experience has established for *reasonable conduct*,⁹⁴ whether certain acts are safe or dangerous,⁹⁵ capable of being performed without unusual exertion⁹⁶ or within the limits of human endurance⁹⁷ are parts of common knowledge, the reasoning of witnesses with regard to them will not be admitted. In like manner, no evidence will be received as to the reasoning of witnesses with regard to the *operation of well known laws of nature*.⁹⁸ For instance, the inference of a witness as to the results of applying force in a well known way cannot be received.⁹⁹ Inferences based upon familiar instances of the uniformity of nature¹ and therefore known to every one, and facts which anybody may understandingly observe for himself.² are not proper subjects for the reasoning of skilled witnesses. The general rule, in other words, is that whenever the question to be determined is to be inferred from particular facts which can be readily produced before the jury, and the inference to be deduced therefrom is within the common experience of men in general, requiring no special knowledge, skill or training, the inference is to be drawn by the jury, and not by the witness.³ Expert testimony is inadmissible on a question which court and jury can themselves decide on the facts, or where

rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill or one of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it.” *Schwander v. Birge*, 46 Hun (N. Y.) 66 (1887). To the same effect, see *Georgia R., etc., Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613 (1894), and other cases, 3 Chamb., Ev., § 1818, n. 3.

92. *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374 (1887).

93. *Veerhusen v. Chicago, etc., R. Co.*, 53 Wis. 689, 11 N. W. 433 (1882).

94. *Stone v. Denny*, 4 Metc. (Mass.) 151 (1842).

95. *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447 (1898).

96. *Clay County v. Redifer*, 32 Ind. App. 93, 69 N. E. 305 (1903).

97. *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90 (1897).

98. *Johnson v. Louisville, etc., R. Co.*, 104

Ala. 241, 16 So. 75, 53 Am. St. Rep. 39 (1893); *Cooper v. Mills County*, 69 Iowa 350, 28 N. W. 633 (1886).

99. *Chicago, etc., R. Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497 (1901); *Passmore v. Passmore*, 60 Mich. 463, 27 N. W. 601 (1886); *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280 (1863); 3 Chamb., Ev., § 1818, n. 13.

1. *Knoll v. State*, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704 (1882).

2. *Hovey v. Sawyer*, 5 Allen (Mass.) 554 (1863); *New Jersey Traction Co. v. Brabban*, 57 N. J. L. 691, 32 Atl. 217 (1895); *McCall v. Moschcowitz*, 10 N. Y. Civ. Proc. 107 (1886); 3 Chamb., Ev., § 1818, n. 15.

3. *Smith v. Stevens*, 33 Colo. 427, 81 Pac. 35 (1905); *Riley v. American Steel & Wire Co.*, 129 Ill. App. 123 (1906); *Wise v. Sugar Apparatus Mfg. Co.*, 84 Kan. 86, 113 Pac. 403 (1911); *Com. v. Spiropoulos*, 208 Mass. 71, 94 N. E. 451 (1911); *State v. Heffernan*, 28 R. I. 20, 65 Atl. 284 (1906); *Stanch v. Fire Ass'n of Philadelphia*, 111 N. Y. Supp. 540, 127 App. Div. 350 (1908); *Lincoln Vermont Ry. Co.*, 82 Vt. 187, 72 Atl. 821 (1909); 3 Chamb., Ev., § 1818, n. 16.

the relation of facts and their probable results can be determined without special skill.⁴

Special Knowledge.—It is not essential that the subject matter should be one of science; if it be such that a special habit of mind or specific information not usually possessed by common men is essential for its complete understanding, a court is warranted in admitting the reasoning of a skilled witness with regard to it.⁵ The mere fact, however, that the witness belongs to a particular trade is not ground for receiving the evidence of his inferences. The latter must embody technical knowledge.⁶ The inferences of those especially familiar with animals are not necessary to state facts regarding which the average man has adequate knowledge, e.g., what is likely to frighten⁷ or otherwise injure⁸ them. The matter, however, is largely one of administration.⁹ Where no special training is required for learning a business, facts as to the method in which it is done will not be received.¹⁰ "No rule, however, can be made so precise as to include all cases, and each question as it arises must be determined by the application of general principles to the particular inquiry involved in the case before the court."¹¹ In this connection, the conflicts are numerous for the decided cases "may be said not only to have become legion, but legion against legion."¹²

§ 680. [Involution of Reasoning]; Functions of the Judge.¹³—As is elsewhere suggested, a particularly strong forensic necessity for admitting the inference, conclusion or judgment of a witness must be shown where the act of reasoning relates to the existence of a controverted fact upon which the jury will be required to pass. The inertia of the court against admitting such evidence will naturally be found to be great.¹⁴ The establishment by the proponent of the fact that such proof is fairly necessary to enable him to bring out his case will alone suffice to warrant the judge in sanctioning so great a violation of

4. *Consol. Gas, etc., Co. v. State*, 100 Md. 186, 72 Atl. 651 (1909).

5. *Wight Fire-Proofing Co. v. Poczekai*, 130 Ill. 139, 22 N. E. 543 (1889); *People v. Barber*, 115 N. Y. 473, 22 N. E. 182 (1889); 3 Chamb., Ev., § 1819, n. 1.

6. *Georgia R., etc., Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613 (1894).

7. *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676 (1895); 3 Chamb., Ev., § 1819, n. 4. What an animal will deem it safe to approach is also a matter of common knowledge. *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156, 39 N. E. 787 (1895).

8. *Brewster v. Weir*, 93 Ill. App. 588 (1900).

9. *Barber v. Manchester*, 72 Conn. 675, 45 Atl. 1014 (1900).

10. *Illinois Cent. R. Co. v. People*, 143 Ill.

434, 33 N. E. 173, 19 L. R. A. 119 (1892); *Flynn v. Boston Electric Light Co.*, 171 Mass. 305, 50 N. E. 937 (1898); *Rawls v. American Mut. L. Ins. Co.*, *supra*: 3 Chamb., Ev., § 1819, n. 7.

11. *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179 (1890).

12. *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293 (1891).

Social customs.—The existence and nature of social customs is not a matter of special knowledge. *Compton v. Bates*, 10 Ill. App. 78 (1881); 3 Chamb., Ev., § 1819, n. 10.

13. 3 Chamberlayne Evidence, § 1820.

14. *People v. Wright*, 93 Cal. 564, 29 Pac. 240 (1892); *Webb v. State*, 6 Ga. App. 353, 64 S. E. 1001 (1909); *Sokol v. People*, 212 Ill. 233, 72 N. E. 382 (1904); 3 Chamb., Ev., § 1820, n. 2.

the right to a jury trial.¹⁵ Much of the same attitude is taken by the presiding judge toward the tender of an inference, conclusion or judgment of a witness as to the existence of a fact highly material to the truth of the proposition in issue.¹⁶ The credibility of a material witness,¹⁷ the existence of any cause for which liability is claimed in the action¹⁸ or questions as to the extent of a proper recovery for damages¹⁹ may stand, and are frequently treated as standing, in the same administrative position. In like manner, the possibility of doing certain crucial acts may be so highly material to the issue as to exclude the reasoning of witnesses.²⁰ The province of the jury is equally protected from the reasoning of witnesses whether the essential fact is physical or psychological, e.g., as to the intent or intention with which a given act is done.²¹ In proportion as the fact covered by the act of reasoning approaches, as it were, the heart of the jury's province, the more pressing must be the necessity which the proponent is called upon to show if he is to succeed in securing its reception.²²

15. *Evans v. Elwood*, 123 Iowa 92, 98 N. W. 584 (1904); *Furbush v. Maryland Casualty Co.*, 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605 (1902); *Blum v. Manhattan R. Co.*, 20 N. Y. Supp. 722, 1 Misc. 119 (1892); *Ohio Oil Co. v. McCrory*, 14 Ohio Cir. Ct. 304, 7 Ohio Cir. Dec. 344 (1896); *Saunders v. Northern Pac. Co.*, 15 Utah 334, 49 Pac. 646 (1897); 3 *Chamb., Ev.*, § 1820, n. 3.

16. *Chicago, etc., R. Co. v. Kuchkuch*, 197 Ill. 304, 64 N. E. 358 (1902); *Dammann v. St. Louis*, 152 Mo. 186, 53 S. W. 932 (1899); *People v. Smith*, 172 N. Y. 210, 6 N. E. 814 (1902); *Seville v. State*, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516 (1892); *Reiter v. McJunkin*, 194 Pa. 301, 45 Atl. 46 (1900); 3 *Chamb., Ev.*, § 1820, n. 4.

17. *Lovell v. Hammond Co.*, 66 Conn. 500, 34 Atl. 511 (1895); *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501 (1896); *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254 (1891); 3 *Chamb., Ev.*, § 1820, n. 5.

18. *Chicago, etc., R. Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451 (1899); *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329, 96 N. W. 789 (1903); *Winters v. Naughton*, 86 N. Y. Supp. 439, 91 App. Div. 80 (1904); 3 *Chamb., Ev.*, § 1820, n. 6.

19. **Illustrative instances.**—Thus, a witness may be forbidden giving his inference as to the amount of damages caused by the injuries arising from some specific defect on which the cause of action is based.

Alley.—*Musick v. Latrobe*, 184 Pa. 375, 39 Atl. 226 (1898).

Bridge.—*Bliss v. Wilbraham*, 8 Allen

(Mass.) 564 (1864); *McDonald v. State*, 127 N. Y. 18, 27 N. E. 358 (1891).

Car.—*Dooner v. Delaware, etc., Canal Co.*, 164 Pa. 17, 30 Atl. 269 (1894).

Dock.—*Marcy v. Sun Mut. Ins. Co.*, 11 La. Ann. 748 (1856).

Highway.—*Edwards v. Worcester*, 172 Mass. 104, 15 N. E. 447 (1898); *White v. Cazenovia*, 76 N. Y. Supp. 985, 77 App. Div. 547 (1902); *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520 (1875); 3 *Chamb., Ev.*, § 1820, n. 7.

Railroad track.—*Roberts v. Chicago, etc., R. Co.*, 78 Ill. App. 526 (1898).

Sidewalk.—*Barnes v. Newton*, 46 Iowa 567 (1877); *Bradley v. Spickardsville*, 90 Mo. App. 416 (1901); 3 *Chamb., Ev.*, § 1820, n. 7.

Street.—*Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583 (1885).

20. *Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 302 (1900); *Graney v. St. Louis, etc., R. Co.*, 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153 (1900); *Dittman v. Edison Elec. Illuminating Co.*, 83 N. Y. Supp. 1078, 87 App. Div. 68 (1903); 3 *Chamb., Ev.*, § 1820, n. 8. **Rape.**—A skilled witness will not be permitted to testify whether it is possible to commit rape upon a mature female. *People v. Benc*, 130 Cal. 159, 62 Pac. 404 (1900).

21. *Tait v. Hall*, 71 Cal. 149, 12 Pac. 391 (1886); *Carey v. Moore*, 119 Ga. 92, 45 S. E. 998 (1903); *Dwight v. Badgley*, 60 Hun 144, 14 N. Y. Supp. 498 (1891); *Devore v. Territory*, 2 Okl. 562, 37 Pac. 1092 (1894); 3 *Chamb., Ev.*, § 1820, n. 9.

22. "It is the very question to be passed upon by the jury." *Hamrick v. State*, 134 Ind. 324, 34 N. E. 3 (1893)

Proving this, however, evidence of the reasoning of a witness in the form of a conclusion²³ or judgment may be received even as to the truth of the *precise proposition* regarding which the parties are at issue.²⁴ This may be done either in civil²⁵ or criminal²⁶ cases. But one condition is imposed. The proponent must show that he cannot enjoy a reasonable opportunity to establish his position unless this concession be made. Should the proof, however, fail in this all-important matter, if the forensic necessity which he establishes is not such as rationally to warrant such an invasion of the adversary's rights as he requires should be made, the inference, conclusion or judgment upon the precise point in issue should be rejected.²⁷

§ 681. [Involution of Reasoning]; Relevancy; Objective and Subjective.²⁸— Relevancy in the fact offered in evidence is a necessary condition of its admissibility.²⁹ Not only should it be objectively relevant, but the declarant should possess such qualities of mind as to make his statement subjectively relevant.³⁰ The essential elements or conditions of subjective relevancy are two, adequate knowledge and absence of controlling motive to misrepresent. So subtle may be the influence of interest as to affect the testimony of a witness to an extent of which he himself is ignorant. The more potent, however, the operation of such a motive may be, the less will be the probative force which attaches to the reasoning so affected.³¹

§ 682. [Involution of Reasoning]; Adequate Knowledge.³²— The presiding

23. *National Gas Light, etc., Co. v. Miethke*, 35 Ill. App. 629 (1890); *Summerlin v. Carolina, etc., R. Co.*, 133 N. C. 550, 45 S. E. 898 (1903); 3 Chamb., Ev., § 1820, n. 11.

24. *Leslie v. Granite R. Co.*, 172 Mass. 468, 52 N. E. 542 (1899); *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810 (1899); *Daly v. Milwaukee*, 103 Wis. 588, 79 N. W. 752 (1899); 3 Chamb., Ev., § 1820, n. 12. Should the fact stated in the act of reasoning be *probatively*, rather than *constituently*, relevant, the probability of its being admitted is greatly increased. *Ohio, etc., Torpedo Co. v. Fishburn*, 61 Ohio St. 608, 56 N. E. 457 (1900). Where proof of the *res gestæ* is by the use of circumstantial evidence it will, in general, be assumed by the court that the jury are capable of drawing all necessary inferences. *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203, 24 Ky. L. Rep. 2454 (1903).

25. *Western Union Tel. Co. v. Peagler*, 163 Ala. 38, 50 So. 913 (1909); *Johnson v. Wilmington City Ry. Co.*, 7 Pen. (Del.) 5, 76 Atl. 96 (1905); 3 Chamb., Ev., § 1820, n. 15.

26. *People v. Monat*, 200 N. Y. 308, 93 N. E. 982 (1911); *State v. Bridgham*, 51 Wash.

18, 97 Pac. 1096; 3 Chamb., Ev., § 1820, n. 16. CONTRA: *State v. Hyde*, 234 Mo. 200, 136 S. W. 316 (1911); *Lemons v. State* (Tex. Cr. App. 1910), 128 S. W. 416.

27. *Sampson v. Hughes*, 147 Cal. 62, 81 Pac. 292 (1905); *City of Chicago v. France*, 124 Ill. App. 648 (1906); *City of Grand Rapids v. Coit*, 149 Mich. 668, 113 N. W. 362, 14 Detroit Leg. N. 555 (1907); *Winn v. Modern Woodmen of America*, 138 Mo. App. 701, 119 S. W. 536 (1909); *Zide v. Scheinberg*, 114 N. Y. Supp. 41 (1909); *Schultz v. Union Ry. Co.*, 181 N. Y. 33, 73 N. E. 491 (1905); *Fowler v. Delaplain*, 79 Ohio St. 279, 87 N. E. 260 (1909); 3 Chamb., Ev., § 1820, n. 17.

28. 3 Chamberlayne, Evidence, §§ 1821, 1822

29. *Manayunk Fifth Mut. Bldg. Soc. v. Holt*, 184 Pa. 572, 39 Atl. 293 (1898); *Hankwitz v. Barrett*, 143 Wis. 639, 128 N. W. 430 (1910); 3 Chamb., Ev., § 1821, n. 1.

30. *Supra*, § 671; 3 Chamb., Ev., § 1774.

31. *Patrick v. Howard*, 47 Mich. 40, 10 N. W. 71 (1881); 3 Chamb., Ev., § 1822.

32. 3 Chamberlayne, Evidence, §§ 1823-1825.

judge will require that it be proved to his satisfaction³³ either by means of the statements of witnesses testifying in open court or by the relevant assertions contained in documents, i.e., directly³⁴ or else by probative facts,³⁵ that the proposed witness possesses sufficient knowledge to make his act of reasoning, inference, conclusion or judgment, helpful to the jury.³⁶ The mental qualifications of the witness must relate to the precise point as to which his inference is asked. Adequate knowledge upon other heads is immaterial.³⁷ This proof of a qualification is usually made in connection with the examination-in-chief.³⁸ The burden of showing knowledge rests upon the proponent.³⁹

Observation and Inference.—Merely showing adequate opportunities for observation is no longer sufficient.⁴⁰ Mental capacity to coordinate these observations into a resultant helpful to the jury must also be shown.⁴¹ Even association with a given trade or calling is not adequate to enable an observer to aid the jury as to the more technical aspects of a special pursuit.⁴² A fairly satisfactory test as to the probative value of any inference from observation is furnished by requiring the proposed witness to state, so far as he can, the separate phenomena observed by him and used as constituting, in part at least, the basis of his inference.⁴³

Position of the Witness.—The court may recognize in the *claim* of the proposed witness to the possession of suitable knowledge *prima facie* proof⁴⁴

33. Metropolitan West Side El. R. Co. v. Dickenson, 161 Ill. 22, 43 N. E. 706 (1896); Bowen v. Boston, etc., R. Co., 179 Mass. 524, 61 N. E. 141 (1901); Brunnemer v. Cook, etc., Co., 85 N. Y. Supp. 954, 89 App. Div. 406 (1903); Allen's Appeal, 99 Pa. 196, 44 Am. Rep. 101 (1881); 3 Chamb., Ev., § 1823, n. 1.

34. Chicago City R. Co. v. Handy, 208 Ill. 81, 69 N. E. 917 (1904); Leopold v. Van Kirk, 29 Wis. 548 (1872); 3 Chamb., Ev., § 1823, n. 2.

35. Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89 (1889); Wright v. Schnaier, 70 N. Y. Supp. 128, 35 Misc. 37 (1901); 3 Chamb., Ev., § 1823, n. 3.

36. San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 25 Pac. 977 (1891); Zinn v. Rice, 161 Mass. 571, 37 N. E. 747 (1894); Dooner v. Delaware, etc., Canal Co., 164 Pa. 17, 30 Atl. 269 (1894); 3 Chamb., Ev., § 1823, n. 4.

37. Dore v. Babcock, 72 Conn. 408, 44 Atl. 736 (1899).

38. Reed v. Drais, 67 Cal. 491, 8 Pac. 20 (1885); Campbell v. Russell, 139 Mass. 278, 1 N. E. 345 (1885); Haslam v. Adams Express Co., 6 Bosw. (N. Y.) 235 (1860); 3 Chamb., Ev., § 1823, n. 6.

39. Denver, etc., R. Co. v. Smock, 23 Colo. 456, 48 Pac. 681 (1897); Pennsylvania Co.

v. Swan, 37 Ill. App. 83 (1890); 3 Chamb., Ev., § 1823, n. 7.

40. Lincoln v. Barre, 5 Cush. (Mass.) 590 (1850); Page v. Parker, 40 N. H. 47 (1860); State v. Barrett, 33 Or. 194, 54 Pac. 807 (1898); 3 Chamb., Ev., 1824, n. 3.

41. Kirkpatrick v. Snyder, 33 Ind. 169 (1870); Webster v. White, 8 S. D. 479, 66 N. W. 1145 (1896); 3 Chamb., Ev., § 1824, n. 4.

42. Koccis v. State, 56 N. J. L. 44, 27 Atl. 800 (1893). Thus, a worker in soapstone is not, necessarily, enabled to speak authoritatively as to the art of mining it or as to the probable results of given operations. Page v. Parker, 40 N. H. 47 (1860).

43. Chicago, etc., R. Co. v. Kern, 9 Ind. App. 505, 36 N. E. 381 (1893); Sexton v. North Bridgewater, 116 Mass. 200 (1874); Rochester, etc., R. Co. v. Budlong, 6 How. Pr. (N. Y.) 467 (1851); 3 Chamb., Ev., § 1824, n. 8.

44. Scandell v. Columbia Constr. Co., 64 N. Y. Supp. 232, 50 App. Div. 512 (1900); State v. Wilcox, 132 N. C. 1120, 44 S. E. 625 (1903). A witness is not necessarily qualified because he asserts the fact. Staats v. Hausling, 50 N. Y. Supp. 222, 22 Misc. 526 (1898). One who disclaims qualification does

of qualifications,⁴⁵ permitting the adverse party, if so disposed, to cross-examine on the point.⁴⁶ In any case, the judge, in order to admit the result of a mental operation, must be able to assume that it was made by one who possessed adequate data upon which to make it and had the requisite mental faculties to enable him to reach a sound conclusion.⁴⁷ The question is whether the witness has shown so intimate an acquaintance with the subject-matter as to enable him to make an inference which would be helpful to the jury.⁴⁸ "Courts cannot establish a standard by which to measure expert witnesses. If they show that they have practical skill or scientific knowledge or experience as to matters under investigation, they are competent to testify."⁴⁹

§ 683. [Involution of Reasoning]; Ordinary Observer.⁵⁰— In case of the ordinary observer, all that need to be shown is that the proposed witness has had suitable opportunities for observing the facts which he proposes to state⁵¹ and has mentality sufficient to enable him to coordinate his impressions into a simple act of direct inference in a rational way.⁵² A mere guess will not be received.⁵³ If the jury might reasonably act upon the inference which the witness states and the "state of the case"⁵⁴ does not require some other course the testimony will be received.⁵⁵ All that is necessary is opportunity to observe and a fair average intelligence.⁵⁶ But such a witness will not be per-

not necessarily fail to qualify. *Walker v. Scott*, 10 Kan. App. 413, 61 Pac. 1091 (1900); *Com. v. Williams*, 105 Mass. 62 (1870); 3 Chamb., Ev., § 1825, n. 1.

45. *Minnesota Belt Line R., etc., Co., v. Gluck*, 45 Minn. 463, 48 N. W. 194 (1891); *Sale v. Eichberg*, 105 Tenn. 333, 59 S. W. 1020 (1900); 3 Chamb., Ev., § 1825, n. 2.

46. *Goodwine v. Evans*, 134 Ind. 262, 33 N. E. 1031 (1892); *Pennsylvania, etc., Canal Co. v. Roberts*, 2 Walk. (Pa.) 482 (1881). It is a matter of administration. *Finch v. Chicago, etc., R. Co.*, 46 Minn. 250, 48 N. W. 915 (1891). The rule apparently is otherwise in New York. *Walter v. Hangen*, 75 N. Y. Supp. 683, 71 App. Div. 40 (1902). It would seem to be a matter of right. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760 (1871); *Jaekel v. David*, 69 N. Y. Supp. 998, 34 Misc. 791 (1901). 3 Chamb., Ev., § 1825, n. 3.

47. *Campbell v. Cayey*, 69 N. Y. Supp. 859, 59 App. Div. 621 (1901).

The province of an expert being that of pure reasoning, his possession of the faculty of description would not be deemed important. *Smith v. Brooklyn*, 52 N. Y. Supp. 983, 32 App. Div. 257 (1898).

48. *Lee v. Clute*, 10 Nev. 149 (1875).

49. *Sioux City, etc., R. Co. v. Finlayson*, 16

Neb. 578, 20 N. W. 860, 49 Am. Rep. 724 (1884). Whether the jury will credit the testimony is for them to say. *Com. v. Williams*, 105 Mass. 62 (1870); *Gleckler v. Slavens*, 5 S. D. 364, 59 N. W. 323 (1894). The matter of probative force is entirely with them. *Jones v. Erie, etc., R. Co.*, 151 Pa. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758 (1892).

50. 3 Chamberlayne. Evidence, § 1826.

51. *May v. Bradlee*, 127 Mass. 414 (1879); *People v. Kinney*, 124 Mich. 486, 83 N. W. 147 (1900); *State v. Williamson*, 106 Mo. 162, 17 S. W. 172 (1891); *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 14 N. E. 802 (1888); 3 Chamb., Ev., § 1826, n. 1.

52. *Grand Lodge B. of R. T. v. Randolph*, 186 Ill. 89, 57 N. E. 882 (1900); *Gilmore v. Mittineague Paper Co.*, 169 Mass. 471, 48 N. E. 623 (1897); *Conrad v. Swanke*, 80 Minn. 438, 83 N. W. 383 (1900); *Teerpenning v. Corn Exch. Ins. Co.*, 43 N. Y. 279 (1871); 3 Chamb., Ev., § 1826, n. 2.

53. *Illinois Cent. R. Co. v. Behrens*, 106 Ill. App. 471 (1902).

54. *Supra*, § 654; 3 Chamb., Ev., § 1742.

55. *Goodwin v. State*, 96 Ind. 550 (1884).

56. *Chicago, etc., R. Co. v. Ingersoll*, 65 Ill. 399 (1872).

mitted to testify as an expert;⁵⁷ nor can hearsay properly be used as constituting part of the basis upon which the witness purposes to testify.⁵⁸ The court is not called upon to pass upon the qualifications of an ordinary observer. The question is one of fact and embodies no issue as to technical or scientific training.⁵⁹ The practice, however, is to do so, should the fact to be stated contain a large proportion of the element of volitional reasoning.⁶⁰

Special Facilities for Observation.—Residence in a given community or some other circumstance of a similar nature may confer special opportunities for observation denied to observers not so situated.⁶¹ Such reasoning is seldom entirely specific to the facts of a particular case and more completely resembles a conclusion.⁶² Thus, one who lives on a stream may be able to state that a dam across it has been raised to a height beyond the capacity of the water course.⁶³ He knows, as a result of observation and experience, what the probable effect of a series of dry seasons would be;⁶⁴ in what way use may properly be made of its water for floating logs;⁶⁵ whether a given freshet is greater, in any respect, than those which have come in former times;⁶⁶ what channel a stream in his neighborhood would take if permitted to do so.⁶⁷ He may be competent to state the probability of being able to locate a given object, e.g.: a human body,⁶⁸ within its waters; to state that the construction of a railroad embankment⁶⁹ or other impediment to the free flow of the stream had caused its waters to set back; to state the capacity of a certain structure to pass on the waters of a particular stream when in a given condition, as that of freshet.⁷⁰ Of a particular dam, he may have knowledge enough to be able to say that it is or is not properly constructed,⁷¹ or as to how far back it will cover land by the waters which it controls.⁷²

§ 684. [Involution of Reasoning]; Skilled Witness.⁷³—One familiar with the facts or lines of thought known to those engaged in a particular science, trade

57. *Cook v. Fuson*, 66 Ind. 521 (1879); *Zachary v. Swanger*, 1 Or. 92 (1853).

58. *Scull v. Wallace*, 15 Serg. & R. (Pa.) 231 (1826); *Lester v. Pittsford*, 7 Vt. 158 (1835).

59. *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494 (1892).

60. *People v. Young*, 151 N. Y. 210, 45 N. E. 460 (1896).

61. *Cottrill v. Myrick*, 12 Me. 222 (1835); *Pettibone v. Smith*, 37 Mich. 579 (1877); *Lincoln, etc., R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859 (1895); 3 Chamb., Ev., § 1826a, n. 1.

62. *Infra*, §§ 702; 3 Chamb., Ev., §§ 2201 *et seq.*

63. *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 249 (1845).

64. *Pettibone v. Smith*, *supra*.

65. *Dean v. McLean*, 48 Vt. 412, 21 Am.

Rep. 130 (1875); *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557 (1909).

66. *Galveston, etc., R. Co. v. Daniels*, 9 Tex. Civ. App. 253, 28 S. W. 548, 711 (1894).

67. *Winter v. Fulstone*, 20 Nev. 260, 21 Pac. 201, 687 (1889).

68. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18 (1890).

69. *Central R., etc., Co. v. ...*, 4 Ga. 351, 10 S. E. 965 (1890); 3 Chamb., Ev., § 1826a, n. 9.

70. *McPherson v. St. Louis, etc., R. Co.*, 97 Mo. 253, 10 S. W. 846 (1889).

71. *Porter v. Pequonnoc Mfg. Co.*, *supra*.

72. *Walker v. Davis*, 83 Mo. App. 374 (1900); 3 Chamb., Ev., § 1826a, n. 12.

73. 3. Chamberlayne, Evidence, §§ 1827-1829.

or calling not within the scope of common knowledge may well be termed a skilled witness.⁷⁴ He may testify equally well, under proper conditions, to an inference, conclusion, or judgment. The skilled witness is allowed to draw technical and scientific deductions or conclusions from the existence of a state of phenomena in which a question of science or art is presented. When thus acting, he is spoken of as a Skilled Observer.⁷⁵ That which he contributes to the cause of justice may be an act of pure reasoning, passing upon facts assumed to be true and submitted to the intelligence of the witness in the form of a so called hypothetical question.⁷⁶ Under these circumstances, the skilled witness becomes an *Expert*.⁷⁷

Who are Skilled Witnesses.— If the inquiry relate to any form of human activity which embodies a knowledge denied to other men, not shared by men in general, or creates special powers, the topic is one for the reasoning of the skilled witness.⁷⁸ A little experience, in a casual way, may not suffice to entitle a witness to be heard as one who possesses skill on the subject.⁷⁹ In the same way, a witness may be rejected if he shows ignorance of some fact material to giving helpful testimony.⁸⁰ In practical questions, experience which implies time, is indispensable.⁸¹ The extent of qualification required in a skilled witness must be commensurate to the specialized nature of the inference which the witness offers to state. With the commonly known facts of any particular form of human activity, the special knowledge⁸² of the craft, it may practically be assumed that any member of it is familiar.⁸³ No rule requires that the witness should be a member of the special trade or calling to which his reasoning relates.⁸⁴ Nor can any assumption fairly be made that a witness is skilled or experienced in a particular trade or calling merely because the one in which he is actually engaged is so connected with the former that knowledge and experience acquired in it would be helpful to him in his own business.⁸⁵ It is for the presiding judge to decide as to whether a wit-

74. *People v. Temperle*, 94 Cal. 45, 29 Pac. 709 (1892); *Boswell v. State*, 114 Ga. 40, 39 S. E. 897 (1901); *Siebert v. People*, 143 Ill. 571, 32 N. E. 431 (1892); *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621 (1863); *Piehl v. Albany R. Co.*, 162 N. Y. 617, 57 N. E. 1122 (1900); *Koons v. State*, 36 Ohio St. 195 (1880); *Fraim v. Nat. F. Ins. Co.*, 170 Pa. 151, 32 Atl. 613, 50 Am. St. Rep. 753 (1895); 3 Chamb., Ev., § 1827, n. 1.

75. *Infra*, §§ 713 et seq.; 3 Chamb., Ev., §§ 1947 et seq.

76. *Infra*, §§ 816 et seq.; 3 Chamb., Ev., §§ 2451 et seq.

77. Only skilled witnesses may testify as experts.

78. *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40 (1902); *Childs v. O'Leary*, 174 Mass.

111, 54 N. E. 490 (1899); *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150 (1897); 3 Chamb., Ev., § 1828, n. 3.

79. *Broquet v. Tripp*, 36 Kan. 700, 14 Pac. 227 (1887).

80. *Stevens v. Minneapolis*, 42 Minn. 136, 43 N. W. 842 (1889).

81. *Otey v. Hoyt*, 47 N. C. 70 (1854).

82. *Supra*, §§ 375 et seq.; 1 Chamb., Ev., §§ 870 et seq.

83. *Siebert v. People*, *supra*; *Hardiman v. Brown*, 162 Mass. 585, 39 N. E. 192 (1894); *Lowe v. State*, 118 Wis. 641, 96 N. W. 417 (1903); 3 Chamb., Ev., § 1828, n. 10.

84. *Christman v. Pearson*, 100 Iowa 634, 69 N. W. 1055 (1897); *Van Deusen v. Young*, 2 Barb. (N. Y.) 9 (1858); 3 Chamb., Ev., § 1828, n. 11.

85. *People v. Millard*, 53 Mich. 63, 18 N.

ness who undertakes to state special knowledge shall be regarded as qualified to do so.⁸⁶

§ 685. [Involution of Reasoning]; Conclusions and Judgment of Skilled Witness.⁸⁷—A skilled witness should be able so understandingly to observe the phenomena in all relevant relations and so possessed of mental training and experience as to enable him to coordinate these phenomena into a result which the jury may reasonably adopt as their own.⁸⁸ The court is warranted in insisting, so far as consistent with a reasonable opportunity to prove one's case, that the skilled witness who undertakes to testify as an expert should be affirmatively shown to be one whose reasoning, coupled with technical experience, may guide that of a jury to a sound conclusion.⁸⁹ "The value of the expert testimony . . . depends largely on the extent of the experience or study of the witness. The greater the experience or knowledge, the greater is the value of the opinion resting upon it."⁹⁰ The real question is, as has been said, as to whether the training, experience, reading or other qualifications of the witness are sufficient in the opinion of the court to make his inference, conclusion or judgment, helpful to the jury in respect to the subject-matter as to which he proposes to testify.⁹¹ To render the opinion of a non-expert admissible, the facts upon which the witness is called upon to express his opinion must be such as men in general are capable of understanding.⁹² Nothing could well be better settled than that a skilled witness may be competent to testify as an expert although his knowledge on the subject is based entirely upon his reading.⁹³ Such a course assumes that the reading is digested and harmonized into the general experience of the witness and that the latter has found nothing to oppose to the propositions gained by his reading.⁹⁴ It must have enabled him to form a reasonable conclusion for himself.⁹⁵

§ 686. [Involution of Reasoning]; Judge as Tribunal of Fact.⁹⁶—The administration of the court is greatly modified when the judge himself sits for the

W. 562 (1884); *Piehl v. Albany R. Co.*, *supra*; 3 *Chamb., Ev.*, § 1828, n. 12.

86. *Osborne v. Troup*, 60 Conn. 485, 23 Atl. 157 (1891); *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307, 80 N. W. 644 (1899).

87. 3 *Chamberlayne*, Evidence, §§ 1830-1832.

88. *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747 (1894); *Evans v. People*, 12 Mich. 27 (1863); *Pfau v. Alteria*, 52 N. Y. Supp. 88, 23 Misc. 693 (1898); 3 *Chamb., Ev.*, § 1829, n. 3.

89. *National Gas Light, etc., Co. v. Miethke*, 35 Ill. App. 629 (1890); *Boston, etc., R. Corp. v. Old Colony, etc., R. Corp.*, 3 Allen (Mass.) 142 (1861); *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544 (1884); 3 *Chamb., Ev.*, § 1830, n. 2.

90. *Wells v. Leek*, 151 Pa. 431, 25 Atl. 101 (1892).

91. *O'Rourke v. Sproul*, 147 Ill. App. 609 (1909); *Spino v. Butler Bros.*, 113 Minn. 326, 129 N. W. 590 (1911); *State v. Bell*, 212 Mo. 111, 111 S. W. 24 (1908); 3 *Chamb., Ev.*, § 1831, n. 5.

92. *Combs v. Lake*, 91 Ark. 128, 120 S. W. 977 (1909); 3 *Chamb., Ev.*, § 1831, n. 6.

93. *Jackson v. Boone*, 9 Ga. 662, 20 S. E. 46 (1894); *Brown v. Marshall*, 47 Mich. 576, 11 N. W. 392 (1882); 3 *Chamb., Ev.*, § 1832, n. 1.

94. *Carter v. State*, 2 Ind. 617 (1851); *State v. Hinkle*, 6 Iowa 380 (1858).

95. *People v. Thacker*, 108 Mich. 652, 66 N. W. 562 (1896).

trial of questions of fact, where, as in case of maritime or admiralty causes, the court is usually, in a greater or less degree, skilled in the subject-matter under consideration.⁹⁷ Wide latitude will be accordingly conceded him both in regard to accepting or rejecting witnesses of this class. It has even been held that the ruling of a trial judge upon the matter of qualification of a skilled witness is not open to review.⁹⁸ This, however, is not generally conceded.⁹⁹

§ 687. [Involution of Reasoning]; Action of Appellate Courts.¹—An appellate court will not, as a rule, reverse the action of the judge presiding at the trial in respect to the admission of opinion evidence, provided that he has acted reasonably.² That the appellate tribunal itself would have acted to a different effect furnishes no ground for reversing the original ruling.³ Action which is clearly unreasonable will, as a matter of course, be reversed.⁴ In several states, to secure reversal, prejudice, as well as error, must be affirmatively shown.⁵

96. 3 Chamberlayne, Evidence, § 1833.

97. The Attila, 5 Quebec 340 (1879); Barnum v. Bridges, 81 Cal. 604, 22 Pac. 924 (1889); Hunt v. Trusts and Guarantee Co., 41 Can. L. J. 653 (1905).

98. Dole v. Johnson, 50 N. H. 452 (1870); State v. Murray, 11 Or. 413, 5 Pac. 55 (1884); 3 Chamb., Ev., § 1833, n. 3.

99. Wiggins v. Wallace, 19 Barb. (N. Y.) 338 (1855).

1. 3 Chamberlayne, Evidence, § 1834.

2. People v. McCarthy, 115 Cal. 256, 48 Pac. 1073 (1896); Buckeye Mfg. Co. v. Woolley Foundry, etc., Works, 26 Ind. App. 7, 58

N. E. 1069 (1900); Perkins v. Stickney, 132 Mass. 217 (1882); Woodworth v. Brooklyn EL R. Co., 48 N. Y. Supp. 80, 22 App. Div. 501 (1897); Citizens' Electric Ry., etc., Co. v. Bell, 26 Ohio Cir. Ct. R. 691 (1903); 3 Chamb., Ev., § 1834, n. 1.

3. People v. Goldaworthy, 130 Cal. 600, 62 Pac. 1074 (1900).

4. Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741 (1885); Hawks v. Charlemont, 110 Mass. 110 (1872); 3 Chamb., Ev., § 1834, n. 4.

5. Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559 (1891).

CHAPTER XXVII.

INFERENCE FROM SENSATION; ORDINARY OBSERVER.

Inference from sensation; ordinary observer; familiar physical objects, 688.

Negative inferences, 689.

Instinctive inferences, 690.

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§ 688. **Inference From Sensation; Ordinary Observer; Familiar Physical Objects.**¹—Every act of observation carries a certain degree of inference. instantly fusing, as it were, a series of sense impressions into a mental concept of an observed object. In no other way can any fact, however simple, be perceived. The result in evidence is simply the statement of a fact.² As facts become more complex, more compound,³ the proportion of reasoning, almost of necessity, grows greater. So intimate, in many cases, is the blending, that

1. 3 Chamberlayne, Evidence, §§ 1836–1839.

3. *Supra*, §§ 28, 32; 1 Chamb., Ev., §§ 44, 49.

2. 3 Chamb., Ev., § 1836, and notes.

the court is compelled to accept or reject the whole, despairing of success in separation.⁴ Such is the perception by the ordinary observer of a commonplace object familiar to him. In all cases where the positive perception of a familiar object is in full accordance with human experience the statement is readily received as one of fact.⁵ The mere act of naming implies a certain amount of inference, an explanation, a theory, of the actual sense impressions,⁶ which is, as it were, simply drawing upon the common stock of knowledge.⁷ The familiar object recognized or named by the witness may be a solid⁸ or in the form of a liquid,⁹ and may equally well constitute the subject of an intuitive inference.

§ 689. **Negative Inferences.**¹⁰—Should it be established to the satisfaction of the presiding judge, either by direct¹¹ or circumstantial evidence,¹² that a witness had such opportunities of observation that, had a certain fact occurred, he could not have failed to observe it, he may be permitted to state that it did *not* occur.¹³ Such a witness may testify, in his own behalf, as to the probability¹⁴ that a given scene was presented and he have failed to see it;¹⁵ or that the particular sound should have been made and he not have heard it.¹⁶ Where the facts attending the nonobservation of the witness can be fully and adequately placed before the jury, a presiding judge is well warranted in rejecting the inference,¹⁷ either in civil¹⁸ or on criminal¹⁹ proceedings.

4. *Auberle v. McKeesport*, 179 Pa. 321, 36 Atl. 212 (1897); 3 Chamb., Ev., § 1837, n. 2.

5. *Hanna v. Barker*, 6 Colo. 303 (1882); *Graham v. Pennsylvania Co.*, 139 Pa. 140, 21 Atl. 151, 12 L. R. A. 293 (1891); 3 Chamb., Ev., § 1838, n. 1.

6. *Morris v. State*, 124 Ala. 44, 27 So. 336 (1900).

7. *Turner v. State*, 114 Ga. 421, 40 S. E. 308 (1901); *Robinson v. Fitchburg, etc., R. Co.*, 7 Gray (Mass.) 92 (1856); *Shepard v. Metropolitan El. R. Co.*, 62 N. Y. Supp. 977, 48 App. Div. 452 (1900), *aff'd* 169 N. Y. 160, 62 N. E. 151 (1901); 3 Chamb., Ev., § 1838, n. 3.

8. *Com. v. Dorsey*, 103 Mass. 412 (1869) (hair); *Currier v. Boston, etc., R. Co.*, 34 N. H. 498 (1857) (hard-pan).

9. Thus, an observer may state that a given article perceived by his senses was *alcohol*, *Sebastion v. State*, 44 Tex. Cr. 508, 72 S. W. 849 (1903); *blood*, *People v. Louis Tung*, 90 Cal. 377, 27 Pac. 295 (1891); *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401 (1875); *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889 (1897); 3 Chamb., Ev., § 1839, n. 2; *chloroform*, *Miller v. State* (Tex. Cr. App.), 50 S. W. 704 (1899); *gin*, *Com. v. Timothy*, 8

Gray (Mass.) 480 (1857); *lager beer*, *Com. v. Moinehan*, 140 Mass. 463, 5 N. E. 259 (1886); *whiskey*, *Marschall v. Laughran*, 47 Ill. App. 29 (1893); *People v. Marx*, 112 N. Y. Supp. 1011, 128 App. Div. 828 (1908); or other intoxicating liquor.

10. 3 Chamberlayne, Evidence, § 690.

11. *Com. v. Cooley*, 6 Gray (Mass.) 350 (1856).

12. *State v. Kidd*, 89 Iowa 54, 56 N. W. 263 (1893).

13. *Maynard v. People*, 135 Ill. 416, 25 N. E. 740 (1890); *E. T. & H. K. Ide v. Boston & M. R. R.*, 83 Vt. 66, 74 Atl. 401 (1909); 3 Chamb., Ev., § 1842, n. 4.

14. *Pittsburgh, etc., R. Co. v. Story*, 104 Ill. App. 132 (1902).

15. *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293 (1888); 3 Chamb., Ev., § 1842, n. 6.

16. *Crane v. Michigan Cent. R. Co.*, 107 Mich. 511, 65 N. W. 527 (1895); *Casey v. New York Cent., etc., R. Co.*, 6 Abb. N. Cas. (N. Y.) 104 (1879); 3 Chamb., Ev., § 1842, n. 7.

17. *Com. v. Cooley*, *supra*.

18. *Marcott v. Marquette, etc., R. Co.*, 49 Mich. 99, 13 N. W. 374 (1882); *Lunansky v. Hamburg-American Packet Co.*, 94 N. Y. Supp.

§ 690. *Instinctive Inferences.*²⁰—Where the facts are few and simple and the mental result deduced from their existence one as to which men could not reasonably differ, the inference will be received, almost as a matter of course. Though a line between the two, intuitive inferences and necessary conclusions, is frequently confused, and though at times it is confessedly difficult to trace it, in the results arrived at administration has confidence.²¹ So long as the content of reasoning is still comparatively slight the statement of a witness as to the result of his observation may continue practically one of fact, although, perhaps, somewhat complicated.²² Should a new fact be evolved, entirely distinct from its constituting facts, by means of an act of reasoning, e.g., where one who has examined a complicated set of books of account reaches a certain mental result from their perusal,²³ a different administrative situation is presented. Where a number of component details of observation are apprehended by a single act of consciousness, and immediately reduced by the intuitive action of the mind to a familiar designation, such a result is termed a "collective fact," and, as a rule, is admitted.²⁴ Where the statement of an inference is not a shorthand method of summarizing collective facts it may be rejected.²⁵ Conduct may be summarized as well as other natural phenomena, and a statement of the conclusions reached will be received as a fact.²⁶ Where the element of inference assumes considerable proportion,²⁷ or the statement

557 (1905). *But see* City of Chicago v. Murdoch, 212 Ill. 9, 72 N. E. 46 (1904); Renshaw v. Dignan, 128 Iowa 722, 105 N. W. 209 (1905); 3 Chamb., Ev., § 1842, n. 9.

19. Bolling v. State, 54 Ark. 588, 16 S. W. 658 (1891).

20. 3 Chamberlayne, Evidence, §§ 1840, 1841.

21. Aurora, E. & C. Ry. Co. v. Gary, 123 Ill. App. 163 (1905); Stone v. Stone, 191 Mass. 371, 77 N. E. 845 (1906); People v. Woodbury, 123 N. Y. Supp. 592, 67 Misc. 481 (1910); 3 Chamb., Ev., § 1840, n. 7. Witness may be asked whether hold of deceased and prisoner was friendly or unfriendly. See note, Bender ed., 14 N. Y. 561.

22. Southern Cotton Oil Co. v. Wallace (Tex. Civ. App. 1899), 54 S. W. 638; Bird v. St. Mark's Church, 62 Iowa 567, 17 N. W. 747 (1883); Evans v. People, 12 Mich. 27 (1863); see also, 3 Chamb., Ev., § 1841, nn. 5, 6, 7, 8.

23. *Voluminous records.*—Should the books of account, papers, or other documents submitted to a jury be too voluminous to admit of separate presentation, abstracts, calculations or summaries prepared in advance may be submitted, together with the originals, to

the tribunal. Frick v. Kabaker, 116 Iowa 494, 90 N. W. 498 (1902); State v. Clements, 82 Minn. 434, 85 N. W. 229 (1901); Howard v. McDonough, 77 N. Y. 592 (1879); 3 Chamb., Ev., § 1841, n. 9.

24. Louisville & N. R. Co. v. Elliott, 166 Ala. 419, 52 So. 28 (1910); Winslow v. Glendale Light & Power Co., 12 Cal. App. 530, 107 Pac. 1020 (1910); Gagnon v. Sperry & Hutchinson Co., 206 Mass. 547, 92 N. E. 761 (1910); Sturgis v. Fifth Avenue Coach Co., 107 N. Y. Supp. 270, 122 App. Div. 658 (1907); 3 Chamb., Ev., § 1841, n. 11.

25. Gress Lumber Co. v. Georgia Pine Shingle Co., 120 Ga. 751, 48 S. E. 115 (1904); United Press v. A. S. Abell Co., 178 N. Y. 578, 70 N. E. 1110 (1904); 3 Chamb., Ev., § 1841, n. 12.

26. Thus, that a given person operated a poolroom, Bailey v. State, 160 Ala. 119, 49 So. 754 (1909); "was managing a place," Green v. State, 56 Tex. Cr. 191, 120 S. W. 425 (1909); or the like, Crowell v. State, 56 Tex. Cr. 480, 126 S. W. 897 (1909), is merely a syncopated or shorthand method of summarizing a number of obvious subsidiary facts.

27. Williams v. State (Tex. Cr. App. 1908), 114 S. W. 802.

relates to the existence of a fact material in the case;²⁸ or is an irrelevant one,²⁹ the evidence may be excluded.

§ 691. **Reasoned Inferences.**³⁰—Reasoned inferences are a rather undefined and perhaps undefinable species of mental act in which the proportion of inference is low as compared to that of observation and which stretches from intuitive inferences on the one hand to conclusions³¹ on the other. Thus, a witness may go beyond the intuitive mental reaction implied in naming an object and may describe its form.³² He may give its color,³³ freshness,³⁴ location³⁵ and the like.³⁶ He may, in like manner, state the strength³⁷ and other salient qualities of the material objects as these are presented by sense perception.³⁸ A witness will be permitted to give simple inferences as to the state of his own consciousness, i.e., to state subjective conditions. Thus, a witness may declare as to his own physical health³⁹ or mental state.⁴⁰ The existence of a relevant state of mind may even be a proper subject for cross-examination.⁴¹ A witness may declare as to his financial condition.⁴² One who is in pain may state its existence.⁴³ He may properly assert the symptoms which his injury produces,⁴⁴ and the results observed by him in his own person flowing from certain injuries,⁴⁵ and the result upon his health of a particular cause.⁴⁶ He may declare whether he has been permanently injured,⁴⁷ so far as this is a matter of fact. One who has had reasonably adequate opportunities for observation may be allowed to state the inference which he has formed from

28. *People v. Meert*, 157 Mich. 93, 121 N. W. 318 (1909); 3 Chamb., Ev., 1841a, n. 5.

29. *State v. Churchill*, 52 Wash. 210, 100 Pac. 309 (1909).

30. 3 Chamberlayne, Evidence, §§ 1843, 1844.

31. *Infra*, §§ 792 *et seq.*; 3 Chamb., Ev., §§ 2291 *et seq.*

32. *Morisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102 (1904).

33. *State v. Buchler*, 103 Mo. 203, 15 S. W. 331 (1891).

34. *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 294 (1891); 3 Chamb., Ev., § 1843, n. 4.

35. *Carter v. Clark*, 93 Me. 225, 42 Atl. 398 (1898).

36. *Currier v. Boston, etc., R. Co.*, 34 N. H. 498 (1857).

37. *Gerbig v. New York, etc., R. Co.*, 27 N. Y. Supp. 594 (1894).

38. *Marschall v. Laughran*, 47 Ill. App. 29 (1892).

39. *Roche v. Redington*, 125 Cal. 174, 57 Pac. 890 (1899); *Lindley v. Detroit*, 131 Mich. 8, 90 N. W. 665 (1902); *Cass v. Third Ave. R. Co.*, 47 N. Y. Supp. 356, 20 App. Div. 591 (1897); 3 Chamb., Ev., § 1843, n. 9.

40. *Casey v. Chicago City Ry. Co.*, 237 Ill. 140, 86 N. E. 606 (1908); *Bayliss v. Cockroft*, 81 N. Y. 363 (1880); *Grever v. Taylor*, 53 Ohio St. 621, 42 N. E. 829 (1895); *Frame v. William Penn Coal Co.*, 97 Pa. 309 (1881); 3 Chamb., Ev., § 1843, n. 10.

41. *Carey v. Moore*, 119 Ga. 92, 45 S. E. 998 (1903); *Boyd v. New York Security, etc., Co.*, 176 N. Y. 556, 618, 68 N. E. 1014 (1903); *Holtz v. State*, 76 Wis. 99, 44 N. W. 1107 (1890); 3 Chamb., Ev., § 1843, n. 11.

42. *Chenault v. Walker*, 14 Ala. 151 (1848).

43. *North Chicago St. R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958 (1893).

44. *Chicago, etc., R. Co. v. Lambert*, 119 Ill. 255, 10 N. E. 219 (1887).

45. *Lombard, etc., Pass. R. Co. v. Christian*, 124 Pa. 114, 16 Atl. 628 (1889).

46. *Monongahela Water Co. v. Stewartson*, 96 Pa. 436 (1880).

47. *Baltimore, etc., Turnpike Co. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175 (1887); *Pfau v. Alteria*, 52 N. Y. Supp. 88, 23 Misc. 693 (1898); 3 Chamb., Ev., § 1843, n. 19.

the appearances presented by a given individual as to his financial condition,⁴⁸ as that he appears to him to be destitute,⁴⁹ in need of assistance,⁵⁰ or insolvent,⁵¹ or, on the other hand, solvent.⁵² He may be permitted to state, from personal knowledge,⁵³ his estimate as to the amount of income enjoyed by a man whom he mentions.⁵⁴ A witness who shall have shown qualities fitting him to do so may state the moral or æsthetic aspect of the phenomena as the latter affect his mind. He may declare whether a certain appearance observed by him is pleasing,⁵⁵ goodlooking, or the reverse.

§ 692. Conditions of Admissibility of Inferences from Observation.⁵⁶—When the impressions which the mind of an observer accepts at a glance are so many,⁵⁷ mutually interacting or evasive⁵⁸ as to prevent effective individual statement of the primary phenomena, the observer will usually be permitted to state them in the secondary form of the *effect* which they have produced on his mind.⁵⁹ *E converso*, where the constituting phenomena on which the proposed inference is based can be placed before the jury with satisfactory clearness and completeness⁶⁰ and coordinated by them into a reasonable result,⁶¹ no administrative ground is furnished for receiving the mental act of the witness.⁶² Accordingly, it is rejected. It will usually be required, for rea-

48. *Iselin v. Peck*, 2 Rob. (N. Y.) 629 (1864); *Hard v. Brown*, 18 Vt. 87 (1846); 3 Chamb., Ev., § 1843a, n. 1.

49. *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072 (1895).

50. *Sloan v. New York Cent. R. Co.*, 45 N. Y. 125 (1871).

51. *Riggins v. Brown*, 12 Ga. 271 (1852); *Thompson v. Hall*, 45 Barb. (N. Y.) 214 (1866); *Richardson v. Hitchcock*, 28 Vt. 757 (1856); 3 Chamb., Ev., § 1843a, n. 4.

52. *Watterson v. Fuellhart*, 169 Pa. 612, 32 Atl. 597 (1895).

53. *Stix v. Keith*, 85 Ala. 465, 5 So. 184 (1888); *Iselin v. Peck*, *supra*.

54. *State v. Cecil County Com'rs*, 54 Md. 426 (1880).

55. *Gahagan v. Boston, etc., R. Co.*, 1 Allen (Mass.) 187, 79 Am. Dec. 724 (1861); *McKillop v. Duluth St. R. Co.*, 53 Minn. 532, 55 N. W. 739 (1893); *Castner v. Sliker*, 33 N. J. L. 95 (1868); *Felska v. New York Cent., etc., R. Co.*, 152 N. Y. 339, 46 N. E. 613 (1897); 3 Chamb., Ev., § 1844, n. 1. In what way, however, these phenomena may affect the more distinctly moral sense may not be asserted by an ordinary observer *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635 (1884).

56. 3 Chamberlayne, Evidence, § 1845.

57. *Denver, etc., R. Co. v. Pulaski Irr.*

Ditch Co., 19 Colo. 367, 35 Pac. 910 (1894); *Salem v. Webster*, 95 Ill. App. 120 (1900); *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770 (1897); 3 Chamb., Ev., § 1845, n. 8.

58. *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231 (1894).

59. *Carter v. Carter*, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 (1894); *Com. v. Mullen*, 150 Mass. 394, 23 N. E. 51 (1890); *Russell v. State*, 66 Neb. 497, 92 N. W. 751 (1902); *De Witt v. Barly*, 17 N. Y. 340 (1858); *Cleveland, etc., R. Co. v. Ullom*, 20 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 321 (1898); 3 Chamb., Ev., § 1845, n. 10.

60. *Sievers v. Peters Box, etc., Co.*, 151 Ind. 642, 50 N. E. 877, 52 N. E. 399 (1898); *Parker v. Boston, etc., Steamboat Co.*, 109 Mass. 449 (1872); *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179 (1890); *Musick v. Latrobe*, 184 Pa. 375, 39 Atl. 226 (1898); 3 Chamb., Ev., § 1845, n. 11.

61. *North Kankakee St. R. Co. v. Blatchford*, 81 Ill. App. 609 (1898); *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319 (1851); *State v. Mims*, 36 Or. 315, 61 Pac. 888 (1900); 3 Chamb., Ev., § 1845, n. 12.

62. *Korcis v. State*, 56 N. J. L. 44, 27 Atl. 800 (1893); *Lund v. Masonic L. Assoc.*, 81 Hun 287, 30 N. Y. Supp. 775 (1894); 3 Chamb., Ev., § 1845, n. 13.

sions elsewhere stated,⁶³ that the witness whose inference from observation is to be received should precede⁶⁴ or accompany⁶⁵ his testimony as to mental result with the detail of such of the constituent particulars observed by him as admit of effective individual statement. This may be done at the stage of cross-examination.⁶⁶ Should the observer be unable to state facts sufficient to cause the court to feel that the jury may reasonably be aided by the inference of the witness, his mental act may be rejected.⁶⁷ In addition to other excellent administrative results which may accrue from requiring the submission to the jury of this detail of alleged supporting facts,⁶⁸ it has somewhat the same useful relation to the inference of the observer that the hypothetical question, in its detail of assumed facts,⁶⁹ bears to the judgment of the expert.⁷⁰

§ 693. **Physical Inferences; Body.**⁷¹—The intuitive or reasoned inference concerns itself, in main, with physical objects. In general, a witness, after enumerating such of the constituent details as he can,⁷² may state the *appearance* of objects observed by him. When the court is satisfied that the witness has had suitable opportunities for observation,⁷³ that the fact observed is a relevant one,⁷⁴ and that the phenomena as a whole cannot adequately be placed before the jury,⁷⁵ the effect produced upon the mind may be stated, as a species of secondary proof of the primary appearances themselves. Prominent among physical objects the phenomena of which may be summarized into an inference are bodies. An observer may state, for example, the apparent physical condition of a man.⁷⁶ One qualified to do so may assert, as a mere

63. *Supra*, § 678; 3 Chamb., Ev., § 1813.

64. *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401 (1875); *People v. Greenfield*, 23 Hun (N. Y.) 454 (1881); 3 Chamb., Ev., § 1845, n. 15.

65. *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585, 36 Pac. 125 (1894); *Atlanta Consol. St. R. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191 (1899); *Hardenburgh v. Cockroft*, 5 Daly (N. Y.) 79 (1874); *People v. Hopt*, 4 Utah 247, 9 Pac. 407 (1886); 3 Chamb., Ev., § 1845, n. 16.

66. *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36 (1851); *People v. Driscoll*, 45 Hun 590, 9 N. Y. St. Rep. 820 (1887); 3 Chamb., Ev., § 1845, n. 17.

67. *People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902).

68. *Eaton v. Rice*, 8 N. H. 378 (1836); *Sloan v. Maxwell*, 3 N. J. Eq. 563 (1831); 3 Chamb., Ev., § 1845, nn 19, 20.

69. *Infra*, §§ 816 *et seq.*; 3 Chamb., Ev., §§ 2451 *et seq.*

70. **Not an expert.**—It follows from what has been said that the ordinary observer will not be permitted to state his inference upon a

basis of facts observed by others. *Pittard v. Foster*, 12 Ill. App. 132 (1882); *Paige v. Hazard*, 5 Hill (N. Y.) 603 (1843); *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879 (1900); 3 Chamb., Ev., § 1845, n. 22.

71. 3 Chamberlayne, Evidence, §§ 1846–1850.

72. *Cleveland, etc., R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675 (1897); *Thompson v. Hall*, 45 Barb. (N. Y.) 214 (1866); 3 Chamb., Ev., § 1846, n. 1.

73. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1 (1892).

74. *Spangler v. State*, 41 Tex. Cr. 424, 55 S. W. 326 (1900).

75. *Cleveland, etc., R. Co. v. Gray*, *supra*.

76. *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 477 (1897); *O'Neil v. Hanscom*, 175 Mass. 313, 56 N. E. 587 (1900); *Farrell v. Metropolitan St. R. Co.*, 64 N. Y. Supp. 709, 51 App. Div. 456 (1900); *Myers v. Lucas*, 16 Ohio Cir. Ct. 545, 8 Ohio Cir. Dec. 431 (1898); *Tenney v. Smith*, 63 Vt. 520, 22 Atl. 659 (1891); 3 Chamb., Ev., § 1846, n. 5.

fact, the physical development of a child; ⁷⁷ the indications of race ⁷⁸ or those of a fetus. ⁷⁹ He may declare the comparative appearance of two human persons in some material particular. ⁸⁰ He may properly testify as to the physical appearance of *animals*, for instance, the condition of cattle, ⁸¹ horses, ⁸² or other domestic animals. ⁸³ An observer may properly state, under appropriate circumstances, what is the appearance ⁸⁴ and visible result ⁸⁵ of a certain injury. ⁸⁶ Its real nature, probable permanence, ⁸⁷ obvious implications or the results to be anticipated, ⁸⁸ may, however, be subjects as to which the inference of a skilled witness is alone admissible. An unskilled observer fairly familiar with the use and effects of firearms may testify as to the general nature ⁸⁹ or location ⁹⁰ of wounds caused by the use of firearms. Only a skilled observer can state technical inference, ⁹¹ e.g., that a decedent had been shot ⁹² or as to the effect of an injury of this nature. ⁹³ A salient feature of physical appearances which a witness is permitted to state is that of apparent *health*. ⁹⁴ as visually perceived, or *sickness*. ⁹⁵ What, on the other hand, as a true matter of fact, may be the *actual* health of a given individual may be a technical

77. *Hubbard v. State*, 72 Ala. 164 (1882); *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247 (1891).

78. *Hare v. Board of Education*, 113 N. C. 9, 18 S. E. 55 (1893).

79. *Gray v. Brooklyn Heights R. Co.*, 76 N. Y. Supp. 20, 72 App. Div. 424 (1902).

80. *Brownell v. People*, 38 Mich. 732 (1878); *Hare v. Board of Education*, *supra*. See *Stephenson v. State*, 110 Ind. 358, 11 N. E. 360 (1886).

81. *Palmer & Son v. Cowie*, 27 Ohio Cir. Ct. R. 617 (1905); *Grayson v. Lynch*, 163 U. S. 468, 479, 16 S. Ct. 1064, 41 L. ed. 230 (1895); 3 Chamb., Ev., § 1847, n. 1.

82. *Rogers v. Ferris*, 107 Mich. 126, 64 N. W. 1048 (1895); *Harris v. Panama R. Co.*, 36 N. Y. Super Ct. 373 (1873); 3 Chamb., Ev., § 1847, n. 2.

83. *Rarden v. Cunningham*, 136 Ala. 263, 34 So. 26 (1902).

84. *Weber v. Creston*, 75 Iowa 16, 39 N. W. 126 (1888); *Craig v. Gerrish*, 58 N. H. 513 (1879); 3 Chamb., Ev., § 1848, n. 1.

85. *People v. Gibson*, 106 Cal. 458, 39 Pac. 864 (1895); *Goshen v. England*, 119 Ind. 368, 21 N. E. 977 (1889); *Doyle v. Manhattan R. Co.*, 13 N. Y. Supp. 536 (1891); 3 Chamb., Ev., § 1848, n. 2.

86. *Baltimore, etc., Co. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175 (1886); *Jerome v. United Rys. Co. of St. Louis*, 155 Mo. App. 202, 134 S. W. 107 (1911); 3 Chamb., Ev., § 1848, n. 3. Non-expert witnesses may testify that marks on the plain-

tiff's thumb were teeth marks. *Patterson v. Blatti*, 133 Minn. 23, 157 N. W. 717, L. R. A. 1916 E 896 (1916).

87. *Dean v. State*, 89 Ala. 46, 8 So. 38 (1890).

88. *Shawnee-town v. Mason*, 82 Ill. 337, 25 Am. Rep. 321 (1876).

89. *People v. Gibson*, *supra*.

90. *Balls v. State* (Tex. Cr. App. 1897), 40 S. W. 801.

91. *Mitchell v. State*, 38 Tex. Cr. 170, 41 S. W. 816 (1897).

92. *Monk v. State*, 27 Tex. App. 450, 11 S. W. 460 (1889).

93. *State v. Justus*, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470 (1883).

94. *Chicago City R. Co. v. Van Vleck*, 143 Ill. 480, 32 N. E. 262 (1892); *Cleveland, etc., Ry. Co. v. Hadley*, 40 Ind. App. 731, 82 N. E. 1025 (1907); *Parker v. Boston, etc., Steamboat Co.*, 109 Mass. 449 (1872); *Cannon v. Brooklyn City R. Co.*, 9 Misc. 282, 29 N. Y. Supp. 722 (1894); *Billings v. Metropolitan L. Ins. Co.*, 70 Vt. 477, 41 Atl. 516 (1898); 3 Chamb., Ev., § 1849, n. 1.

95. *Robinson v. San Francisco Exempt Fire Co.*, 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715 (1894); *State v. McKnight*, 119 Iowa 79, 93 N. W. 63 (1903); *Corbett v. Troy*, 53 Hun 228, 6 N. Y. Supp. 381 (1889); *Lake Shore, etc., R. Co. v. Gaffney*, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94 (1894); 3 Chamb., Ev., § 1849, n. 2. Admissibility on health and disease, see note, *Bender* ed. 109 N. Y. 313.

ing³⁰ and the like. He may decide whether a workman habitually uses mechanical skill.³¹ How necessary³² or proper³³ certain acts were the ordinary witness may occasionally state as a matter of fact. A competent observer may even apply a standard of safety to the acts observed by him,³⁴ stating to what extent, if any, the conduct was that of a prudent man.

As in the case of animals just considered, an observer may describe *human* conduct by stating the effect which it produced on his mind.³⁵ He may give the *manner* of it, the way in which it was done.³⁶ The inference may, however, involve too large an element of reasoning by the declarant to be received. Thus, where the witness is obviously applying his own mental standard rather than that of the community; e.g., in characterizing certain driving as careful, meaning that he himself so considers it;³⁷ or the speaker may be endeavoring to describe conduct according to a *subjective* moral standard.³⁸ Again, should the inference enter upon the distinctive field of the jury to an unnecessary extent the act of reasoning will be rejected.³⁹ Likewise, where there is ambiguity and lack of definiteness.⁴⁰ A witness may state what inference he has reached with regard to the mutual relation of two persons from observing their conduct.⁴¹ He may state his inference as to the *object* with which certain acts of conduct were undertaken.⁴² Where the proportion of reasoning is too large, characterization of conduct may be rejected as more nearly in the nature of a conclusion,⁴³ as where the witness seeks to state the motives or emotions from which given conduct has taken its rise,⁴⁴ or what influenced a person in a certain connection.⁴⁵ Admissibility, in any particular case, is conditional upon such a variety of circumstances that no hard and fast rule can well be stated.⁴⁶

§ 695. [Physical Inferences]; Identities and Correspondences.⁴⁷—A result

30. *Greville v. Chapman*, 5 Q. B. 731, 48 E. C. L. 731 (1844).

31. *Lewis v. Emery*, 108 Mich. 641, 66 N. W. 560 (1896); 3 Chamb., Ev., § 1855, n. 7.

32. *Storrie v. Grand Trunk Elevator Co.*, *supra*.

33. *Pittsburgh, etc., R. Co. v. Martin*, 157 Ind. 216, 61 N. E. 229 (1901).

34. *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809 (1890).

35. *Chicago, etc., R. Co. v. Martin*, 112 Ill. 16 (1884); *Com. v. Snell*, 189 Mass. 12, 75 N. E. 75 (1905); *Lewis v. Emery*, *supra*; 3 Chamb., Ev., § 1856, n. 2.

36. *Pittsburgh, etc., R. Co. v. Martin*, *supra*; *Blake v. People*, 73 N. Y. 586 (1878); *State v. Edwards*, 112 N. C. 901, 17 S. E. 521 (1903); *Northern Pac. R. Co. v. U'rlin*, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977 (1895); 3 Chamb., Ev., § 1856, n. 3.

37. *Morris v. East Haven*, 41 Conn. 252 (1874).

38. *Com. v. Mullen*, 150 Mass. 394, 23 N. E. 51 (1890).

39. *State v. Evans*, 122 Iowa 174, 97 N. W. 1008 (1904); *Messner v. People*, 45 N. Y. 1 (1871); 3 Chamb., Ev., § 1856, n. 6.

40. *Supra*, § 654; 3 Chamb., Ev., § 1743; *Baltimore Safe Deposit, etc., Co. v. Berry*, 93 Md. 560, 49 Atl. 401 (1901).

41. *State v. Marsh*, 70 Vt. 288, 40 Atl. 836 (1898).

42. *Gault v. Sickles*, 85 Iowa 266, 52 N. W. 206 (1892); *Com. v. Galavan*, 9 Allen (Mass.) 271 (1864); 3 Chamb., Ev., § 1858, n. 1.

43. *Houston & T. C. Ry. Co. v. Lee*, 104 Tex. 82, 133 S. W. 868 (1911).

44. *State v. Marsh*, *supra*; *Culver v. Dwight*, 6 Gray (Mass.) 444 (1856).

45. *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105 (1893); 3 Chamb., Ev., § 1859, n. 2.

46. *State v. Brown*, 86 Iowa 121, 53 N. W. 92 (1892); 3 Chamb., Ev., § 1860.

47. 3 Chamberlayne, Evidence, § 1861.

of observation frequently summarized by an ordinary witness into an act of reasoning is that of the identity of a human being, animal or any article of real or personal property, the ground for receiving which in evidence is that the primary phenomena of observation are too numerous and minute to be stated by the witness or coordinated by the jury.⁴⁸ To state the same proportion in a reverse form, where the witness is able to detail to the jury, with substantial fullness, the matters observed by him; and the jury, in turn, are as well able as the witness would be to draw all necessary inferences, the act of reasoning on the part of the witness is rejected.⁴⁹

§ 696. [Physical Inferences]; How far Reasoned Inference is Essential.⁵⁰—The inference of identity is a reasoned one. Wherever by constant association, or the familiarity created by intense attention, the recognition of a distinctive appearance arises in the consciousness, a single act of perception, apparently devoid of any large element of reasoning, may produce intuitively a mental result of identification. This is the mere apprehension of a *fact* and, as such, is admissible. Where, however, the element of observation is absent and all which is submitted to the court is an act of pure reasoning from relevant circumstances, it may be more properly rejected.⁵¹ Ordinary observers cannot, as would be proper in case of experts,⁵² state their judgment upon the facts observed by others. It has even been held that the mental result of the witness will not be received at all unless accompanied by a detailed statement of such constituent phenomena as will enable the court to perceive that the jury might reasonably act in accordance with his inference.⁵³ In many instances, this has been excused; in others, it would be impossible to furnish it. In certain cases, as has been intimated, identification is a *fact*, compounded, it is true, but still the result of a single act of perception.⁵⁴ In any event, adequate knowledge must be shown,⁵⁵ although a claim to its possession has been held to establish a *prima facie* qualification.⁵⁶ Direct and positive evidence of identification is not indispensable.⁵⁷ Where more forceful proof of identity is lacking, even so low a grade of evidence as that a

48. *Ogden v. People*, 134 Ill. 599, 25 N. E. 755 (1890); *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770 (1897); 3 Chamb., Ev., § 1861, n. 1.

49. *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999 (1893); *People v. Wilson*, 3 Park. Cr. (N. Y.) 199 (1856).

50. 3 Chamberlayne, Evidence, §§ 1862–1866.

51. *Rozlene v. Ball*, 51 Iowa 328, 1 N. W. 668 (1879); 3 Chamb., Ev., § 1862, n. 1.

52. *Infra*, §§ 816 *et seq.*; 3 Chamb., Ev., §§ 2451 *et seq.* Hearsay excluded. *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1128 (1905).

53. *Thornton v. State*, 113 Ala. 43, 21 So.

356 (1896); *Eastwood v. People*, 3 Park. Cr. (N. Y.) 25 (1855); *Sherlock v. Globe Ins. Co.*, 7 Ohio Dec. (Reprint) 17 (1868); 3 Chamb., Ev., § 1863, n. 2.

54. *Ogden v. People*, *supra*; *Com. v. Dorsey*, 103 Mass. 412 (1869).

55. *Roberson v. State*, 40 Fla. 509, 24 So. 474 (1898).

56. *Turner v. McFee*, 61 Ala. 468 (1878).

57. *Kent v. State*, 94 Ga. 703, 19 S. E. 885 (1894); *State v. Howard*, 118 Mo. 127, 24 S. W. 41 (1893); *People v. Whigham*, 1 Wheel. Cr. (N. Y.) 115 (1822); 3 Chamb., Ev., § 1864, n. 1.

given individual resembled defendant more than he did any one else known to the witness,⁵⁸ or that two things appear to be similar,⁵⁹ has been received. It is not, however, sufficient identification that the witness "thought" or was "impressed" to the effect that defendant was identical with the doer of a given act.⁶⁰ That a witness was "satisfied" with the identity of a defendant is not sufficient.⁶¹ The inference of one who has had sufficient opportunities for observation on the subject may be received as to the identity of one accused of crime with the perpetrator of the criminal offense.⁶² The judicial identification of animals,⁶³ may be based, in part, upon the correspondence observed between marks noticed on the animal and the salient points of its description. The testimony of witnesses that certain tracks were those of a horse, which tracks indicated his motion — whether walking, running or jumping — though in the nature of conclusions, is admissible.⁶⁴

§ 697. [Physical Inferences]; Circumstantial Evidence.⁶⁵— The inference of identity of a person, material object or the like, may be based upon circumstantial evidence, by the use of distinctive mental traits or physical peculiarities. In this way, a singular motion,⁶⁶ e.g., a walk,⁶⁷ distinctive odor⁶⁸ or well defined noise⁶⁹ may act as a mark of identification. The sound in question may well be that of a voice.⁷⁰ Any suitable circumstance may answer the purpose.⁷¹ For the purpose of establishing correspondences and identities, facts in the realm of objective nature⁷² or subjective facts⁷³ may be used. The inference of a witness may result in identifying a stock of goods⁷⁴ or other chattels. So of the great array of things in general,⁷⁵ personal property, movables, and the like. The evidence of the inference of a witness is admissible

58. *State v. Costner*, 127 N. C. 566, 37 S. E. 326 (1900).

59. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106 (1892).

60. *People v. Williams*, 1 N. Y. Cr. 336 (1883).

61. *Templeton v. Lockett*, 75 Fed. 254, 21 C. C. A. 325 (1896).

62. *Kent v. State*, *supra*; *Com. v. Kennedy*, *supra*; *State v. Powers*, 130 Mo. 475, 32 S. W. 984 (1895); *King v. New York Cent., etc., R. Co.*, 72 N. Y. 607 (1878); *State v. Harr*, 38 W. Va. 58, 17 S. E. 794 (1893); 3 Chamb., Ev., 1865, p. 1.

63. *Chrisman-Sawyer Banking Co. v. Strahorn-Hutton-Evans Commission Co.*, 80 Mo. App. 438 (1899).

64. *Craig v. Wabash R. Co.*, 121 Iowa 471, 96 N. W. 965 (1903). *Sound*.— It may be said that a certain noise was caused by a horse crossing a bridge on a lope. *Holder v. State*, 119 Tenn. 178, 104 S. W. 225 (1907).

65. 3 Chamberlayne, *Evidence*, §§ 1867-1878.

66. *State v. Hopkirk*, 84 Mo. 278 (1884).

67. *Beale v. Posey*, 72 Ala. 323 (1882).

68. *Walker v. State*, 58 Ala. 393 (1877).

69. *Com. v. Best*, 180 Mass. 492, 62 N. E. 748 (1902); 3 Chamb., Ev., § 1867, n. 4.

70. *Deal v. State*, 140 Ind. 354, 39 N. E. 930 (1895); *Com. v. Hayes*, 138 Mass. 185 (1884); *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303 (1861); 3 Chamb., Ev., § 1867, n. 5.

71. *Com. v. Kennedy*, *supra*; *Smith v. Northern Pac. R. Co.*, 3 N. D. 55, 58 N. W. 345 (1894).

72. 3 Chamb., Ev., § 1868, ns. 1, 2.

73. 3 Chamb., Ev., §§ 1869, 1870. See also *Circumstantial Evidence in case of Pedigree*, 4 Chamb., Ev., §§ 2967 *et seq.*

74. *Altman v. Young*, 38 Mich. 410 (1878).

75. *Askew v. People*, 23 Colo. 446, 48 Pac. 524 (1897); *Com. v. Best*, *supra*; *King v. New York Cent., etc., R. Co.*, *supra*; *Sherlock v. Globe Ins. Co.*, *supra*; 3 Chamb., Ev., § 1871, n. 2.

as to the indentities of articles of personal property which present inherent difficulties in the way of proof of identification,⁷⁶ such as ordinary coins, stamped out in large numbers by means of a die,⁷⁷ banknotes or pay checks.⁷⁸ Identification by the witness may extend to establishing the correspondences relating to wills⁷⁹ and other documents. An observer competent for the purpose may state whether certain offenses showing points of difference are, in reality, the same.⁸⁰

Footprints.—An observer may properly say whether a certain boot, shoe, or other specimen of footwear is capable of producing particular tracks.⁸¹ On the other hand, that certain marks were *actually* made by a given individual or even were the same as or similar to those made by him⁸² may not be shown. The inference that certain footprints “corresponded” has been received,⁸³ although there is a lack of unanimity on this point. Delay of careful inspection for a certain period, without material change in the situation, affects merely the weight of the evidence.⁸⁴ Measurements assumed to be accurate, taken by the witness, are received in such connection.⁸⁵ It is not essential that they should be exact.⁸⁶ The final inference from correspondences as to what were the actual *res gestæ* is to be reserved for the jury. Thus, whether a shoe would have made a certain track⁸⁷ or in reality did make it,⁸⁸ or whether two footprints corresponded,⁸⁹ is a matter for them.

Other Tracks.—An ordinary observer with sufficient opportunities for observation may be permitted to state his inference that certain tracks connected with the scene of the *res gestæ* corresponded with those made by the wheels of a wagon used by a given person⁹⁰ or with the grooves made by the runners of a sleigh owned by him,⁹¹ or that certain hoofprints might have been made by the defendant's horse.⁹² A witness cannot testify as to whether marks were those of a certain horse.⁹³

Other Correspondences.—Where the court is unable to obtain a personal

76. *State v. Clark*, 27 Utah 55, 74 Pac. 119 (1903).

77. *Gady v. State*, 83 Ala. 51, 3 So. 429 (1887); 3 Chamb., Ev., § 1872, n. 1.

78. *Gaines v. State* (Tex. Cr. App. 1903), 77 S. W. 10.

79. *Thompson v. Davitte*, 59 Ga. 472 (1877).

80. *Lamar-Rankin Drug Co. v. Copeland*, 7 Ga. App. 567, 67 S. E. 703 (1910); 3 Chamb., Ev., § 1873, n. 2.

81. *Com. v. Pope*, 103 Mass. 440 (1869); *State v. Sexton*, 147 Mo. 89, 48 S. W. 452 (1898); *State v. Langford*, 74 S. C. 460, 55 S. E. 120 (1906); 3 Chamb., Ev., § 1874, n. 1.

82. *Terry v. State*, 118 Ala. 79, 23 So. 776 (1897); *State v. Morris*, 84 N. C. 756 (1881).

CONTRA: *State v. Reitz*, 83 N. C. 634 (1880).

83. *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275 (1897); *Com. v. Pope*, *supra*; 3 Chamb., Ev., § 1874, n. 5.

84. *State v. Sexton*, *supra*.

85. *Thompson v. State* (Tex. Cr. App. 1903), 77 S. W. 449.

86. *Baines v. State*, 43 Tex. Cr. 490, 66 S. W. 847 (1902).

87. *Busby v. State*, 77 Ala. 66 (1884).

88. *Livingston v. State*, 105 Ala. 127, 16 So. 801 (1894); 3 Chamb., Ev., § 1876, n. 2.

89. *Id.*

90. *State v. Folwell*, 14 Kan. 105 (1874).

91. *State v. Ward*, 61 Vt. 153, 17 Atl. 483 (1888).

92. *Campbell v. State*, 23 Ala. 44 (1853); 3 Chamb., Ev., § 1877, n. 3.

93. *Russell v. State*, 62 Neb. 512, 87 N. W. 344 (1901); 3 Chamb., Ev., § 1877, n. 4.

inspection, it may be shown by an observer that two pieces of wood once formed part of the same stick or block,⁹⁴ or that a given metallic splinter came from a depression in a die.⁹⁵

§ 698. **Physical Inferences; Intoxication.**⁹⁶—The statement by an ordinary observer that a given individual was intoxicated amounts, in many instances, merely to the statement of a fact and, as such, it is usually received, as a matter of course.⁹⁷ A witness may properly state his inference that a given person was intoxicated⁹⁸ “or had been drinking,”⁹⁹ or was recovering from a state of drunkenness.¹ Drunkenness is “easy of detection and difficult of explanation.”² The convenient practice is followed of requiring that the observer should state such of the constituting facts as admit of separate enumeration.³ An ordinary observer will not be allowed to state that a person whom he had observed was too drunk to know what he was about.⁴ It must not, however, be overlooked that the marks of intoxication are by no means invariable. One man may be quite bereft of the faculty of reasoning without presenting marked physical manifestations of his condition;⁵ while another may present serious outward appearances without grave mental impairment. “Intoxication affects different men in different ways . . . much depends upon the kind of man and liquor.”⁶

§ 699. **[Physical Inferences]; Physical Condition of Inanimate Objects.**⁷—Where an attempt by a witness to describe the apparent condition of an inanimate object would require enumeration of a large number of constituent phenomena, he is permitted, having given such of the constituting observations as admit of being so treated, to submit, as a species of secondary evidence, the

94. *Com. v. Choate*, 105 Mass. 451 (1870).

95. *Hocking v. Windsor Spring Co.*, 131 Wis. 532, 111 N. W. 685 (1907). Similarity of hair. *State v. Whitbeck*, 145 Iowa 29, 123 N. W. 982 (1909).

96. 3 Chamberlayne, *Evidence*, §§ 1879–1881.

97. *People v. Monteith*, 73 Cal. 7, 14 Pac. 373 (1887); *Chicago City R. Co. v. Wall*, 93 Ill. App. 411 (1900); *State v. Bennett*, 143 Iowa 214, 121 N. W. 1021 (1909); *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447 (1898); *People v. Gaynor*, 33 App. Div. 98, 53 N. Y. Supp. 86 (1898); 3 Chamb., Ev., § 1879, n. 1.

98. *State v. Cather*, 121 Iowa 106, 96 N. W. 722 (1903).

99. *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495 (1897); *Chicago City R. Co. v. Wall*, *supra*.

1. *People v. Pakenham*, 115 N. Y. 200, 21 N. E. 1035 (1889).

2. *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231 (1894).

3. *Pierce v. State*, 53 Ga. 365 (1874); *Felska v. New York Cent., etc., R. Co.*, 152 N. Y. 339, 46 N. E. 613 (1897). This rule is not invariably applied. *State v. Cather*, *supra*.

4. *White v. State*, 103 Ala. 72, 16 So. 63 (1893). Whether a person was too drunk to walk or even to get out of bed, presents a question for the jury. *Colbert v. State*, 4 Okl. Cr. 500, 113 Pac. 558 (1910). The evidence, however, has been received. *State v. Dolan*, 17 Wash. 499, 50 Pac. 472 (1897); 3 Chamb., Ev., § 1880.

5. “Some men can drink twice as much as others without showing it.” *Com v. Cleary*, 135 Pa. 64, 86, 19 Atl. 1017 (1890).

6. *Texarkana, etc., R. Co. v. Frugia* (Tex. Civ. App. 1906), 95 S. W. 563, quoted in *Moore on Facts*, § 558; 3 Chamb., Ev., § 1881.

effect which the entire observation, taken as a whole, has produced upon his mind.⁸ He may declare whether the appearance was similar in certain other instances.⁹ He may declare an inference as to the existence of any *changes* which have occurred in that appearance between different times,¹⁰ or state the negative fact that there has been no change.¹¹ One may properly draw inferences from his observation as to the systemized or disordered arrangement of inanimate objects. Thus, one may state from the appearance of a room that burglars have been in it.¹² An ordinary observer may state the appearance of articles as being affected by fire,¹³ water¹⁴ or mud.¹⁵ A properly qualified observer may state his inference that the apparent condition of an inanimate object resulted from the application of *force* in some one of its many forms,¹⁶ or that *no* force has been applied.¹⁷ The nature, direction and other qualities of instrumentalities producing an impact upon an inanimate object may properly be stated by an ordinary observer who is suitably qualified.¹⁸ Thus, it may be shown that a certain mark in the snow was made by the runner of a sleigh,¹⁹ tracks may be made by footwear²⁰ of a particular

7. 3 Chamberlayne, Evidence, §§ 1882-1889.

8. Lucas v. State, 173 Ind. 302, 90 N. E. 305 (1910); Illinois Cent. R. Co. v. Behrens, 208 Ill. 20, 69 N. E. 796 (1904); Johnson v. State, 88 Neb. 565, 130 N. W. 282 (1911); Dubois v. Baker, 30 N. Y. 355 (1864); Cleveland & S. W. Traction Co. v. Ward, 27 Ohio Cir. Ct. R. 761 (1905); Williams v. Norton Bros., 81 Vt. 1, 69 Atl. 146 (1908);) Chamb., Ev., § 1882, n. 2. Whether a lot of land is vacant is simply a question of fact. Cary v. Given, 129 N. Y. Supp. 35 (1911).

9. Yeager v. Spirit Lake, 115 Iowa 593, 88 N. W. 1095 (1902). Relevancy of the fact to be proved, in some relation to the issue, is necessarily assumed as a preliminary to admissibility. Moffatt v. State, 35 Tex. Cr. 257, 33 S. W. 344 (1895).

10. Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114 (1863); 3 Chamb., Ev., § 1883, n. 1.

11. Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818 (1903); Pratt v. Mosetter, 9 N. Y. Civ. Proc. 351 (1886); 3 Chamb., Ev., § 1883, n. 2.

12. State v. Shuford, 152 N. C. 809, 67 S. E. 923 (1910). A witness who has observed the condition of a bed may, after stating that "the sheet was down at the foot and there was where two people had laid," declare his inference that it looked as if two persons had slept there and gotten out in a hurry. Copeland v. State, 58 Fla. 26, 50 So. 621 (1909).

13. James v. State, 104 Ala. 20, 16 So. 94 (1894); Union Pac. Co. v. Gilland, 4 Wyo. 395, 34 Pac. 953 (1893); 3 Chamb., Ev., § 1884, n. 1. Whether a witness who merely observed that a certain piece of paper was burned could testify that "it had the appearance of being wadding shot from a gun" has seemed to the New York court of appeals to state so much of a "border question" that they declined to reverse, in a capital case, the action of the lower court granting a new trial on account of its admission. People v. Manke, 78 N. Y. 611 (1879).

14. Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401 (1875).

15. State v. Marceaux, 50 La. Ann. 1137, 24 So. 611 (1898).

16. Fort v. State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163 (1889). Where several applications of force have been made in succession, an observer may state the particular order in which these were probably made. Id.

17. Dean v. New York, 45 App. Div. 605, 61 N. Y. Supp. 374 (1899).

18. People v. Mitchell, 94 Cal. 550, 29 Pac. 1106 (1892); People v. Fanshawe, 65 Hun 77, 19 N. Y. Supp. 865, 8 N. Y. Cr. 326 (1892); 3 Chamb., Ev., § 1885, n. 5.

19. State v. Ward, 61 Vt. 153, 17 Atl. 483 (1888).

20. James v. State, *supra*; Com. v. Pope, 103 Mass. 440 (1869).

size.²¹ One may infer that a given impact was made by a shoulder,²² the feet of animals,²³ or by a collision, e.g., with a locomotive,²⁴ or between two vessels.²⁵ He may infer from its appearance that it was made by one who was walking²⁶ or had stopped doing so;²⁷ by a man running, jumping,²⁸ or the like. He may be allowed to state his inference as to the position occupied by an object at the time when it was struck.²⁹

Safety of Public Places.—Where the constituent facts observed by the witness cannot fully be submitted to the jurors, the inference of the witness, from the observed appearance of inanimate objects, may be received as to their being either safe or dangerous, especially should the fact be a collateral one.³⁰ He will be permitted to apply, under the circumstances indicated, the standard of safety to his observation regarding the condition of any bridge,³¹ crossing,³² sidewalk³³ or other highway.³⁴ The inference, in some cases, may resemble a conclusion.³⁵ Such a witness may give his inference as to which of two places is the safer.³⁶ An ordinary observer may state, in terms of the effect which they produced upon his mind, the phenomena which made a boat landing,³⁷ railroad platform,³⁸ track³⁹ operated by a steam or trolley line, or any other structure⁴⁰ or place⁴¹ dangerous⁴² or safe.⁴³ The facts must be simple and the inference necessary. In actions for negligence of this sort, the competency of a workman may be established by the estimates or conclusions of those who have observed him.⁴⁴

21. *Littleton v. State*, 128 Ala. 31, 29 So. 390 (1900).

22. *Watkins v. State*, 89 Ala. 82, 8 So. 134 (1889).

23. *Craig v. Wabash R. Co.*, 121 Iowa 471, 90 N. W. 965 (1903).

24. *Seagel v. Chicago, etc., R. Co.*, 83 Iowa 380, 49 N. W. 990 (1891).

25. *Patrick v. The J. Q. Adams*, 19 Mo. 73 (1833).

26. *Smith v. State*, 137 Ala. 22, 34 So. 396 (1903).

27. *Chicago, etc., R. Co. v. Legg*, 32 Ill. App. 218 (1889).

28. *Craig v. Wabash R. Co.*, *supra*.

29. *Fanning v. Long Island R. Co.*, 2 Thomps. & C. (N. Y.) 585 (1874).

30. *Baltimore Fireman's Ins. Co. v. Mohlman Co.*, 91 Fed. 85, 33 C. C. A. 347 (1898).

31. *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309 (1893); 3 Chamb., Ev., § 1886, n. 2.

32. *Martin v. Baltimore, etc., R. Co.*, 2 Marv. (Del.) 123, 42 Atl. 442 (1895).

33. *Atherton v. Bancroft*, 114 Mich. 241, 72 N. W. 208 (1897); *McNerney v. Reading City*, 150 Pa. 611, 25 Atl. 57 (1892); 3 Chamb., Ev., § 1886, n. 4.

34. *Dean v. Sharon*, 72 Conn. 667, 45 Atl. 963 (1900); *Lund v. Tyngsborough*, 9 Cush.

(Mass.) 36 (1851); *Kitchen v. Union Tp.*, 171 Pa. 145, 33 Atl. 76 (1895); 3 Chamb., Ev., § 1886, n. 5.

35. *Perry v. State*, 110 Ga. 234, 36 S. E. 781 (1899).

36. *Cookson v. Pittsburgh, etc., R. Co.*, 179 Pa. 184, 36 Atl. 194 (1897).

37. *Louisville, etc., Mail Co. v. Mossberger*, 13 Ky. L. Rep. 927 (1892).

38. *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293 (1891).

39. *Louisville, etc., R. Co. v. Tegner*, 125 Ala. 593, 28 So. 510 (1899); 3 Chamb., Ev., § 1887, n. 3.

40. *McNerney v. Reading City*, *supra*; *Bridger v. Asheville, etc., R. Co.*, 25 S. C. 24 (1885).

41. *Kitchen v. Union Tp.*, *supra*.

42. *Ryan v. Bristol*, *supra*; *Lund v. Tyngsborough*, *supra*; *Kitchen v. Union Tp.*, *supra*; 3 Chamb., Ev., § 1887, n. 6.

43. *Dean v. Sharon*, *supra*; *Betts v. Chicago, etc., R. Co.*, 92 Iowa 343, 60 N. W. 623 (1894); *Baltimore, etc., R. Co. v. Cassell*, 66 Md. 419, 7 Atl. 805 (1886); 3 Chamb., Ev., § 1887, n. 7.

44. *Take St. Fl. R. Co. v. Fitzgerald*, 112 Ill. App. 312 (1904).

Soundness.—The witness may not only apply the standards of safety and utility but also that of soundness, stating that certain inanimate objects are sound⁴⁵ or unsound.⁴⁶ In any case, the time indicated by the inference must be such as to be relevant to the proposition put in issue in the action.⁴⁷

Suitability.—An ordinary observer may, under like conditions, be permitted to state his inference as to suitability for a given purpose, as whether a certain building was suitable for a particular purpose.⁴⁸ He may declare the mental impression held by him as to the adaptability, for its appropriate use, of any car,⁴⁹ piece of machinery⁵⁰ or any other form or combination of matter,⁵¹ the relevant appearances of which lie on the surface.

§ 700. Physiological Inferences.⁵²—Physiological inferences, the results of observation, are conveyed to the mind by the faculty of intuition, with, as a rule, but slight admixture of the element of reasoning. The result is regarded by judicial administration as a mere statement of a psychological fact and, as such, is received without objection.⁵³ Thus, a witness may be allowed to say that he has suffered internal injury,⁵⁴ or to state the effect on his health of certain acts,⁵⁵ or to declare the nature, location and other facts concerning any sensation of *pain* which he may have suffered⁵⁶ or be suffering.

§ 701. Psychological Inferences.⁵⁷—Psychological facts are entirely mental, conditions, phases, states of mind. As such, they are not subject to physical observation, although their manifestations undoubtedly are. The person whose mind is in question may, as has been seen,⁵⁸ testify directly to their existence.⁵⁹ The element of reasoning, of inference, is practically eliminated. Because of the difficulty of detailing observed phenomena into a

45. Illinois Cent. R. Co. v. Foulks, 191 Ill. 57, 60 N. E. 890 (1901); Brooks v. Sioux City, 114 Iowa 641, 87 N. W. 682 (1901); Merkle v. Bennington Tp., 68 Mich. 133, 35 N. W. 846 (1888); 3 Chamb., Ev., § 1888, n. 3.

46. Johnson v. Detroit, etc., R. Co., 135 Mich. 353, 97 N. W. 760 (1904); Reynolds v. Van Buren, 31 N. Y. Supp. 827, 10 Misc. 703 (1895).

47. Wolscheid v. Thome, 76 Mich. 265, 43 N. W. 12 (1889).

48. Rust v. Eckler, 41 N. Y. 488 (1869).

49. Petts v. Chicago, etc., R. Co., *supra*.

50. Sievers v. Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399 (1898); 3 Chamb., Ev., § 1889, n. 3.

51. Birmingham Paint & Roofing Co. v. Gillespie, 163 Ala. 408, 50 So. 1032 (1909).

52. 3 Chamberlayne, Evidence, § 1890.

53. Roche v. Redington, 125 Cal. 174, 57 Pac. 890 (1899); Wray v. Warner, 111 Iowa 64, 82 N. W. 455 (1900); Wise v. Wabash

R. Co., 135 Mo. App. 230, 115 S. W. 452 (1909); Cass v. Third Ave. R. Co., 20 App. Div. 591, 47 N. Y. Supp. 356 (1897); 3 Chamb., Ev., § 1890, n. 4.

54. Chicago & J. E. Ry. Co. v. Patton, 122 Ill. App. 174 (1905); Pfau v. Alteria, 52 N. Y. Supp. 88, 23 Misc. 693 (1898); Lombard, etc., Pass. R. Co. v. Christian, 124 Pa. 114, 16 Atl. 628 (1889); 3 Chamb., Ev., § 1890, n. 5.

55. McDonald v. City Electric Ry. Co., 144 Mich. 379, 108 N. W. 85 (1906).

56. North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958 (1893).

57. 3 Chamberlayne, Evidence, §§ 1891–1901.

58. *Supra*, §§ 653; 3 Chamb., Ev., §§ 1741d, 1741e.

59. Jeddrey v. Boston & N. St. Ry. Co., 198 Mass. 232, 84 N. E. 316 (1908); Providence Mach. Co. v. Browning, 72 S. C. 424, 52 S. E. 117 (1905); 3 Chamb., Ev., § 1891, n. 4.

reasonable presentation, the instances in which the secondary evidence of the inference of the observer as to the mental condition, weak or strong, sound or unsound, of a designated individual, is received are numerous.⁶⁰ An ordinary observer may, as a rule, state appearances observed by him regarding mental condition and also, where these are too numerous to be placed before the jury, his inferences from them.⁶¹ The witness is accordingly permitted to give his deduction as to the objective condition of the mind in question, that it was, on the one hand, bright and quick,⁶² judicious,⁶³ rational⁶⁴ and the like; or was, on the other hand, easily impressed,⁶⁵ fickle-minded,⁶⁶ simple-minded,⁶⁷ and so forth.⁶⁸ The condition of mind to which the inference relates must be relevant to the proposition in issue.⁶⁹ The time covered by the observation must not be too remote to be probative.⁷⁰ The witness, as a rule, should be required to state the ground for his opinion.⁷¹ The presiding judge must be satisfied that the witness has had such opportunities for observation that the jury might rationally act in accordance with the inference which he proposes to draw.⁷² Where it appears that the inference is based upon information furnished by others,⁷³ or that the facts disclosed by the preliminary detail are insufficient to warrant the jury in acting upon them,⁷⁴ the mental result reached by the witness will be excluded. Only a skilled witness will be permitted to testify to his inference that certain conduct was based upon a delusion or an irresistible impulse,⁷⁵ or that a given person was subject to a similar impair-

60. *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231 (1894); *Chicago Union Traction Co. v. Scanlon*, 136 Ill. App. 212 (1907); *Smith v. Hickenbottom*, 57 Iowa 733, 11 N. W. 664 (1882); *Jones v. Thomas*, 218 Mo. 508, 117 S. W. 1177 (1909); *De Witt v. Barly*, 17 N. Y. 340, 348 (1858); 3 Chamb., Ev., § 1892, n. 1.

61. *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702 (1907); *Mayville v. French*, 246 Ill. 434, 92 N. E. 919 (1910); *Hewitt v. Taunton St. R. Co.*, 167 Mass. 483, 46 N. E. 106 (1897); *Shelton v. Southern Ry. Co.*, 86 S. C. 98, 67 S. E. 899 (1910); 3 Chamb., Ev., § 1893, n. 1.

62. *Martin v. State*, 90 Ala. 602, 8 So. 858 (1891).

63. *St. Louis, etc., R. Co. v. Shifflet* (Tex. Civ. App. 1900), 56 S. W. 697.

64. *Holland v. Zollner*, *supra*; *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725 (1892); 3 Chamb., Ev., § 1893, n. 4.

65. *Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797 (1901); *Howell v. Howell*, 59 Ga. 145 (1877).

66. *People v. Worthington*, 105 Cal. 166, 38 Pac. 689 (1894); *Mills v. Winter*, 94 Ind. 329 (1883).

67. *Koppe v. Koppe* (Tex. Civ. App. 1909),

122 S. W. 68. On the other hand, that a person "acted foolish" has been rejected. *Wallace v. Whitman*, 201 Ill. 59, 66 N. E. 311 (1903).

68. *Burney v. Torry*, 100 Ala. 157, 14 So. 685 (1893); 3 Chamb., Ev., § 1893, n. 8.

69. *Com. v. Buccieri*, 153 Pa. 535, 26 Atl. 228 (1893).

70. *In re Hull*, 117 Iowa 738, 89 N. W. 979 (1902); *Ramadell v. Ramadell*, 128 Mich. 110, 87 N. W. 81 (1901); 3 Chamb., Ev., § 1894, n. 2.

71. *Graham v. Deuterman*, 244 Ill. 124, 91 N. E. 61 (1910); *Barker v. Comins*, 110 Mass. 477 (1872); *McConnell v. Woodworth*, 162 Mich. 683, 127 N. W. 808 (1910); 3 Chamb., Ev., § 1895, n. 1. See, however, *Mannatt v. Scott*, 106 Iowa 203, 76 N. W. 717 (1898).

72. *Dowell v. Dowell*, 152 Mich. 194, 115 N. W. 972 (1908); 3 Chamb., Ev., § 1895, n. 3.

73. *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022 (1909).

74. *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218 (1907).

75. *Patterson v. State*, 86 Ga. 70, 12 S. E. 174 (1890).

ment in mental condition.⁷⁶ A witness who has observed the mental condition of another at two periods may be permitted to state whether he has noticed a *change*,⁷⁷ for the worse,⁷⁸ or for the better.⁷⁹ He may declare his inference that there has been no change.⁸⁰ An ordinary observer who has enjoyed suitable opportunities for observation may state an inference as to whether a given individual was conscious⁸¹ or unconscious,⁸² the observed phenomena upon which he bases his inference being detailed to the court.⁸³ Among inferences which an observer of his own mental state may draw is that of consciousness.⁸⁴

Should the question be so drawn as to involve an inference on the precise point upon which the jury are to pass, e.g., mental capacity to understand the nature and character of an act,⁸⁵ it will, in general, be objectionable and so rejected.⁸⁶ Thus, a witness, however skilled in treating mental disorders, will not be allowed to state an inference as to whether A. had the mental capacity to draw a will,⁸⁷ execute a contract,⁸⁸ sign a deed,⁸⁹ or transact business generally.⁹⁰ Upon cross-examination such a question may be permitted;⁹¹ and it has occasionally been received even upon direct.⁹² The analogous inference of the witness as to whether the person observed has the mental capacity to be criminally responsible for his acts⁹³ has been deemed an invasion of the province of the jury. Such a witness is not properly to be regarded as an expert

76. *State v. Winter*, 72 Iowa 627, 34 N. W. 475 (1887); 3 Chamb., Ev., § 1896, n. 4.

77. *Weber v. Della Mountain Min. Co.*, 14 Ida. 404, 94 Pac. 441 (1908); *Chicago Union Traction Co. v. Lawrence*, 211 Ill. 373, 71 N. E. 1024 (1904).

78. *Manatt v. Scott*, *supra*; *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510 (1897); 3 Chamb., Ev., § 1897, n. 2.

79. *West Chicago St. Ry. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447 (1897); *Com. v. Brayman*, 136 Mass. 438 (1884); 3 Chamb., Ev., § 1897, n. 3.

80. *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689 (1901).

81. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860 (1891); *Galloway v. San Antonio, etc., R. Co.* (Tex. Civ. App. 1903), 78 S. W. 32.

82. *Chicago City R. Co. v. VanVleck*, 143 Ill. 480, 32 N. E. 262 (1892).

83. *Pennsylvania Co. v. Newmeyer*, *supra*.

84. "To the processes of his own mind he is undoubtedly the best witness." *Hat Sweat Mfg. Co. v. Warring*, 46 Fed. 106 (1891); 3 Chamb., Ev., § 1898.

85. *Green v. State*, 64 Ark. 523, 43 S. W. 973 (1898); *McGibbons v. McGibbons*, 119 Iowa 140, 93 N. W. 55 (1903). The prac-

tice is otherwise where the point to which the inference is directed is a collateral one. *Koppe v. Koppe* (Tex. Civ. App. 1909), 122 S. W. 68.

86. *Swick v. Sheridan*, 107 Minn. 130, 119 N. W. 791 (1909); *Chickering v. Brooks*, 61 Vt. 554, 18 Atl. 144 (1889).

87. *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410 (1903); *May v. Bradlee*, 127 Mass. 414 (1879); 3 Chamb., Ev., § 1899, n. 3.

88. *Smith v. Smith*, 157 Mass. 389, 32 N. E. 348 (1892).

89. *Langenbeck v. Louis*, 140 Cal. 406, 73 Pac. 1086 (1903).

90. *McGibbons v. McGibbons*, *supra*; *Smith v. Smith*, *supra*. Inference received. *Beard v. Southern Ry. Co.*, 143 N. C. 137, 55 S. E. 505 (1906).

91. *In re Daniels*, 140 Cal. 335, 73 Pac. 1053 (1903); *State v. Leehman*, 2 S. D. 171, 49 N. W. 3 (1891); 3 Chamb., Ev., § 1899, n. 7.

92. *Neely v. Sheppard*, 190 Ill. 637, 60 N. E. 922 (1901); *Pflueger v. State*, 46 Neb. 493, 64 N. W. 1094 (1895); 3 Chamb., Ev., § 1899, n. 8.

93. *People v. Lake*, 12 N. Y. 358 (1855). Compare *Pflueger v. State*, *supra*.

and should not be cross-examined as one.⁹⁴ A witness with adequate facilities for observation may give his inferences drawn from the appearances presented to him, from time to time, as to the mental characteristics of an individual who has come under his notice.⁹⁵ Thus he may state that a person of average intelligence⁹⁶ is absent minded⁹⁷ and so forth.

§ 702. [Psychological Inferences]; Insanity; Ordinary Observer Rejected; Massachusetts Rule.⁹⁸—The original and, for a time, controlling influence in favor of rejecting the inference of unskilled witnesses as to insanity was the supreme judicial court of Massachusetts.⁹⁹ It is, for example, distinctly held, in a late case on a will contest, that statements that testator's powers seemed to be complete and perfect, and that he was in possession of clear faculties and mental powers were conclusions and not responsive to questions calling for observation of testator's powers of comprehension, memory, etc., and that the direct inference of the witness as to testator's mental capacity was properly rejected.¹ The rule is spoken of as "well settled law."² Later Massachusetts rulings seem to largely discredit the doctrine. Where the direct inference of a witness as to insanity is offered, it will be excluded under the rule. Almost anything, short of this, he is permitted to give.³ The earlier law in Alabama,⁴ and New Hampshire,⁵ excluded the inference as to insanity of all but skilled witnesses, but the rule has since been changed and the inferences of ordinary observers are now received in evidence.⁶ Maine follows Massachusetts, in rejecting the inference of an ordinary, or, as he is frequently called, "non-expert" witness, as to the insanity of one who has come under his observation.⁷ The ruling, once adopted, has been maintained, although restricted to the narrowest practical limits.⁸

94. *People v. Silverman*, 181 N. Y. 285, 73 N. E. 980 (1905).

95. *State v. Wright*, 112 Iowa 436, 84 N. W. 541 (1900); *Hewitt v. Taunton St. R. Co.*, 167 Mass. 483, 46 N. E. 106 (1897); 3 *Chamb., Ev.*, § 1901, n. 1.

96. *Hewitt v. Taunton St. R. Co.*, *supra*.

97. *State v. Wright*, *supra*.

98. 3 *Chamberlayne*, *Evidence*, §§ 1902-1906.

99. *Gorham v. Moor*, 107 Mass. 522, 84 N. E. 436 (1908); *Ratigan v. Judge*, 181 Mass. 572, 64 N. E. 204 (1902); 3 *Chamb., Ev.*, § 1906, n. 1. Reasons assigned for rule. *May v. Bradley*, 127 Mass. 421 (1879).

1. *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358 (1904).

2. *Cowles v. Merchants*, 140 Mass. 377, 5 N. E. 288 (1886).

3. The details of appearance or conduct, for example, may be stated with the utmost fullness and even characterized by the wit-

ness. *Barker v. Comins*, 110 Mass. 477 (1872); *McCoy v. Jordan*, *supra*; 3 *Chamb., Ev.*, § 1906, n. 7. A witness may be asked "whether he had observed any fact which led him to infer that there was any derangement of the intellect." *Gorham v. Moor*, *supra*; 3 *Chamb., Ev.*, § 1906, n. 8. He may assert or deny that there has been any change in mental powers. *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510 (1897). Upon cross-examination, the direct inference of the ordinary observer may be elicited. *Hogan v. Roche*, 179 Mass. 510, 61 N. E. 57 (1901).

4. *Rembert v. Brown*, 14 Ala. 360 (1848); 3 *Chamb., Ev.*, § 1903, n. 3.

5. *State v. Archer*, 54 N. H. 465 (1874); 3 *Chamb., Ev.*, § 1903, n. 5.

6. *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441 (1875); *Ragland v. State*, 125 Ala. 12, 27 So. 983 (1899).

7. *Wyman v. Gould*, 47 Me. 159 (1859).

8. *Robinson v. Adams*, 62 Me. 369, 410, 16

§ 703. [Psychological Inferences]; Rule in New York.⁹—In New York, the inference of the ordinary observer was at first rejected,¹⁰ as under the present rule, but upon subsequent hearing of a case, was admitted.¹¹ The latter ruling, in complete uniformity with the general practice, was itself reversed in later cases¹² and in the state of New York, the inference of the ordinary observer as to insanity, in itself considered, continues to be excluded. The court stands upon stronger ground in ruling that an ordinary observer cannot testify as to an inference of sanity upon the basis of observations made by others.¹³ While the direct inference of the ordinary observer as to insanity, *eo nomine* is excluded, he may properly be asked whether the appearances which he observed or the acts which he noticed were “those of a rational or an irrational man.”¹⁴ With a difference largely of words, he may be asked as to how he was impressed by certain acts of the person in question in respect to their rational or irrational character.¹⁵ In general the ordinary observer may be asked as to what impression a given act or appearance produced in his mind,¹⁶ e.g., whether he noticed anything which seemed to him to indicate insanity.¹⁷ Violations of the strict letter of the rule are not regarded as prejudicial error.¹⁸ A witness will not be allowed to state his inference as to his own mental condition at a particular time in the past.¹⁹

§ 704. [Psychological Inferences] Insanity; Ordinary Observer Admitted.²⁰—In England and in the majority of the American states, the inference of the ordinary observer as to the mental condition of insanity has been received.²¹

Am. Rep. 473 (1870); *Fayette v. Chester-ville*, 77 Me. 28, 52 Am. Rep. 741 (1885).

Correct question to non-expert witness.—An attorney before he tries a will case should be sure that he knows just what questions he can ask a non-expert witness as to sanity and as the practice in each jurisdiction is different he must examine the decisions of his own state on the subject. The difficulty is that we are here really trying to get and getting the *opinion* of the non-expert but the courts realizing its value have in many states permitted these questions to be asked provided certain forms of language are used. For example in Massachusetts the witness may be asked “Whether you ever observed anything in A which led you to infer in your own mind that he was a crazy or cracked man?” See *May v. Bradlee*, 127 Mass. 414. This is a leading case on the subject and other forms of question embracing the same idea have been sanctioned by later cases.

In New York the question may be asked “Will you tell whether the acts which you have described, impressed you at the time as being rational or irrational?”

9. 3 Chamberlayne, Evidence, § 1907.

10. *Dewitt v. Barley*, 9 N. Y. 371 (1853).

11. *De Witt v. Barly*, 17 N. Y. 340 (1858).

12. *Wyse v. Wyse*, 155 N. Y. 367, 49 N. E. 942 (1898); *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730 (1897); 3 Chamb., Ev., § 1907, n. 3.

13. *Bell v. McMaster*, 29 Hun (N. Y.) 272 (1883).

14. *Johnson v. Cochrane*, 159 N. Y. 555, 54 N. E. 1002 (1899); 3 Chamb., Ev., § 1907, n. 5.

15. *White v. Davis*, 62 Hun 622, 17 N. Y. Supp. 548 (1891); 3 Chamb., Ev., § 1907, n. 6.

16. *People v. Youngs*, 151 N. Y. 210, 45 N. E. 460 (1896).

17. *People v. Krist*, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532 (1901); 3 Chamb., Ev., § 1907, n. 8.

18. *Wyse v. Wyse*, *supra*.

19. *O'Connell v. Beecher*, 21 App. Div. 298, 47 N. Y. Supp. 334 (1897).

20. 3 Chamberlayne, Evidence, §§ 1908–1910.

21. *Green v. State*, 64 Ark. 523, 43 S. W.

As in case of the more active form of insanity, an ordinary observer, with suitable opportunities for observation, may state his inference whether a given individual is a lunatic²² or weak minded. Such a witness will be required to give, as a preliminary matter, a statement of such of the constituting details upon which his inference is based as admit of individual enumeration.²³ A witness may be allowed to declare whether he noticed anything unusual, peculiar, unnatural²⁴ or tending to indicate insanity.²⁵ A competent observer may be asked as to past mental conditions, e.g., whether a given person has ever been crazy.²⁶ The inference or estimate of witnesses of this type must, however, be based upon *observation*. Mere opinions, characterizations, and conclusions of non-expert witnesses as to the insanity of a person not observed by them are in themselves incompetent.²⁷ The California code of civil procedure²⁸ limits the non-expert witnesses who are competent to testify as to an

973 (1898); *In re Keithley*, 134 Cal. 9, 66 Pac. 5 (1901); *Hayes v. Candee*, 75 Conn. 131, 52 Atl. 826 (1902); *Turner v. Amer. Security & Trust Co.*, 29 App. D. C. 460 (1907); *Fields v. State*, 46 Fla. 84, 35 So. 185 (1903); *Herndon v. State*, 111 Ga. 178, 36 S. E. 634 (1900); *State v. Shuff*, 9 Ida. 115, 72 Pac. 664 (1903); *Mayville v. French*, 246 Ill. 434, 92 N. E. 919 (1910); *Swygart v. Wilhard*, 166 Ind. 25, 76 N. E. 755 (1906); *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689 (1901); *State v. Rumble*, 81 Kan. 16, 105 Pac. 1 (1909); *Abbott v. Com.* 107 Ky. 624, 35 S. W. 196 (1900); *State v. Coleman*, 27 La. Ann. 691 (1875); *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984 (1910); *People v. Casey*, 124 Mich. 279, 82 N. W. 883 (1900); *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164 (1881); *Sheehan v. Kearney* (Miss.), 21 So. 41 (1896); *State v. Bronstine*, 147 Mo. 520, 49 S. W. 512 (1899); *Territory v. Roberts*, 9 Mont. 121, 22 Pac. 132 (1889); *Clarke v. Irwin*, 63 Neb. 539, 88 N. W. 783 (1902); *State v. Lewis*, 20 Nev. 333, 22 Pac. 241 (1889); *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47 (1894); *Genz v. State*, 58 N. J. L. 482, 34 Atl. 816 (1896); *Moffitt v. Smith*, 153 N. C. 292, 69 S. E. 224 (1910); *Nelson v. Thompson*, 16 N. D. 295, 112 N. W. 1058 (1907); *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481 (1843); *Queenan v. Territory*, 11 Okl. 261, 71 Pac. 218 (1901); *State v. Fiester*, 32 Or. 254, 50 Pac. 561 (1897); *Com. v. Gearhardt*, 205 Pa. 387, 54 Atl. 1029 (1903); *Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732 (1892); *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369 (1903); *Jones v. Galbraith* (Tenn. Ch. App. 1900), 87

S. W. 726; *Field v. Field* (Tex. Civ. App. Wis. 641, 96 N. W. 417 (1903); *Connecticut* 1905), 87 S. W. 726; *In re Christensen*, 17 Utah 412, 53 Pac. 1003 (1898); *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253 (1891); *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575 (1887); *State v. Craig*, 52 Wash. 66, 100 Pac. 167 (1909); *State v. Maier*, 36 W. Va. 757, 15 S. E. 991 (1892); *Lowe v. State*, 118 Mut. L. Ins. Co. v. Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536 (1883); 3 Chamb., Ev., § 1908, n. 1. Persons who have had business dealings with the testator and known him socially and talked with him on various subjects are competent to testify as to his mental soundness. *Re O'Connor*, 271 Ill. 395, 111 N. E. 272, L. R. A. 1916 D 179 (1915). Of lay persons on sanity. See note, *Bender Ed.*, 182 N. Y. 54. Opinion evidence on insanity. See note, *Bender, ed.*, 138 N. Y. 400, 410. Witness may characterize what he saw and heard as rational or irrational. See note, *Bender, ed.*, 17 N. Y. 340. Non-expert as to whether testator appeared rational. See note, *Bedner, ed.*, 104 N. Y. 79.

22. *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119 (1822).

23. 3 Chamb., Ev., § 1908, n. 3.

24. *Braham v. State*, 143 Ala. 28, 38 So. 919 (1905).

25. *State v. Lyons*, 113 La. 959, 37 So. 890 (1904); 3 Chamb., Ev., § 1908, n. 5.

26. *Bell v. State*, 140 Ala. 57, 37 So. 281 (1904).

27. *People v. Jones*, 115 N. Y. Supp. 800 (1909).

28. § 1870.

inference of insanity to "intimate acquaintances."²⁹ The presiding judge determines what witnesses are within this class.³⁰ The statutory restriction applies only to those witnesses who are asked to draw the precise inference whether an observed person is or is not insane.³¹ An observer qualified by opportunities may state the *negative* fact that he saw nothing in the person's conduct or demeanor to indicate insanity.³² An ordinary observer as to insanity is not a skilled witness and cannot testify as an expert. He will not be allowed to answer hypothetical questions based upon facts proved by others.³³ The rule is the same in *criminal cases*.³⁴ The rule in England³⁵ and Canada³⁶ is the same as in the great majority of American states.

§ 705. [Psychological Inferences]; Qualification of Ability to State Details of Phenomena.³⁷—The inference must be in connection with, subsequent to and based upon, the facts observed by the witness.³⁸ An important qualification for one who shall state a helpful inference as to insanity is an ability to give the salient details observed by him.³⁹ This will usually be required by the presiding judge.⁴⁰ The statement of certain facts, in this way, is not ground for rejecting or for failing to give due weight, in any proper respect, to the inference of insanity.⁴¹ The application of the rule is, however, not invariable,⁴² it being assumed, under certain circumstances, that one shown to have

²⁹. *People v. Clark*, 151 Cal. 200, 90 Pac. 549 (1907).

³⁰. *People v. Hill*, 116 Cal. 562, 48 Pac. 711 (1897).

³¹. *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112 (1898).

³². *Proctor v. Pointer*, 127 Ga. 134, 56 S. E. 111, (1906); *Com. v. Fencez*, 226 Pa. 114, 75 Atl. 19 (1910).

³³. *Spiers v. Hendershot*, 142 Iowa 446, 120 N. W. 1058 (1909).

³⁴. *Glover v. State*, 129 Ga. 717, 59 S. E. 816 (1907); *State v. Rumble*, 81 Kan. 16, 105 Pac. 1 (1909); *State v. Banner*, 149 N. C. 519, 63 S. E. 84 (1908); *Clark v. State*, 12 Ohio 487 (1843); 3 Chamb., Ev., § 1908, n. 21.

³⁵. 3 Chamb., Ev., § 1909, nn 2, 3.

³⁶. *Re Estate John A. P. McLellan*, 28 Nova Scotia Rep. 226 (1896); *R. v. Waters*, 10 Ont. App. 85 (1884). As to Reasons for admitting the Inference, see 3 Chamb., Ev., § 1910 and notes thereto.

³⁷. 3 Chamberlayne, Evidence, § 1911.

³⁸. *American Bible Soc. v. Price*, 115 Ill. 623, 5 N. E. 126 (1886).

³⁹. *Yarbrough v. State*, 105 Ala. 43, 16 So. 758 (1894); *Grant v. Thompson*, 4 Conn. 203,

10 Am. Dec. 119 (1822); 3 Chamb., Ev., § 1911, n. 2.

⁴⁰. *Ragland v. State*, 125 Ala. 12, 27 So. 983 (1899); *Shaeffer v. State*, 61 Ark. 241, 32 S. W. 679 (1895); *In re Keegan*, 139 Cal. 123, 72 Pac. 828 (1903); *Lodge v. Lodge*, 2 Houst. (Del.) 418 (1862); *Raub v. Carpenter*, 17 App. Cas. (D. C.) 505 (1901); *Armstrong v. State*, 30 Fla. 170, 11 So. 618 (1892); *State v. Hurst* (Ida.), 39 Pac. 554 (1895); *Blume v. State*, 154 Ind. 343, 56 N. E. 771 (1900); *Zirkle v. Leonard*, 61 Kan. 636, 60 Pac. 318 (1900); *State v. Smith*, 106 La. 33, 30 So. 248 (1901); *Brashers v. Orme*, 93 Md. 442, 49 Atl. 620 (1901); *Dickinson v. Barber*, 9 Mass. 225, 6 Am. Dec. 58 (1812); *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894 (1886); *People v. O'Donnell*, 51 App. Div. 115, 64 N. Y. Supp. 256 (1900); *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1888); *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489 (1902); *Crawford v. Christian*, 102 Wis. 51, 78 N. W. 406 (1899); 3 Chamb., Ev., § 1911, n. 3. See also cases cited in note 2 to § 704, *supra*.

⁴¹. *State v. Rumble*, 81 Kan. 16, 105 Pac. 1 (1909).

⁴². *Caddell v. State*, 129 Ala. 57, 30 So. 76 (1900).

had opportunities for observation properly utilized them.⁴³ Should the witness be able to give only so meagre a list of facts as fails, in the opinion of the presiding judge,⁴⁴ to make his inference of rational assistance to the jury,⁴⁵ it will be rejected;⁴⁶ or, if received, be accorded but little weight.⁴⁷ Part of the basis for the inference of the ordinary observer as to insanity may properly be the statements of the person in question, viewed in their independently relevant capacity. No administrative objection exists to their reception.⁴⁸ Hearsay statements of others or previous knowledge of the individual in question are not to be regarded, in this connection, as a dependable foundation for an inference as to insanity.⁴⁹

§ 706. [Psychological Inferences]; Qualification of Suitable Opportunities for Observation.⁵⁰—The proponent of an inference must, in this connection, show to the court that the inferring witness has had sufficient opportunities for observation to make his inference helpful to the jury.⁵¹ Should these be lacking, the evidence is incompetent⁵² and will, as a rule, be excluded.⁵³ In other words, unless suitable opportunities for observation are shown, the evidence of an inference as to insanity will be rejected.⁵⁴ What shall be deemed to constitute a sufficient opportunity for observation has been thus stated: "It is . . . agreed by the authorities that if the witness shows an acquaintance with the accused, that he has had conversation with him, or that he has had business dealings or social intercourse with him, he may, having stated the facts, express an opinion."⁵⁵ Necessarily, the matter is mainly one of administration.⁵⁶

43. *Neely v. Shephard*, 190 Ill. 637, 60 N. E. 922 (1901); *State v. Winter*, 72 Iowa 627, 34 N. W. 475 (1887); 3 Chamb., Ev., § 1911, n. 7.

44. *Collins v. People*, 194 Ill. 506, 62 N. E. 90 (1902); *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105 (1893); *Com v Buccieri*, 153 Pa. 535, 26 Atl. 228 (1893); 3 Chamb., Ev., § 1911, n. 8.

45. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685 (1903); *Alvord v. Alvord*, 109 Iowa 113, 80 N. W. 306 (1899); *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887 (1898); 3 Chamb., Ev., § 1911, n. 9.

46. *Ryder v. State*, 100 Ga. 528, 28 S. E. 246 (1897); *Baltimore Safe-Deposit, etc., Co. v. Berry*, 93 Md. 560, 49 Atl. 401 (1901); *Com. v. Wireback*, 190 Pa. 138, 42 Atl. 542 (1899); 3 Chamb., Ev., § 1911, n. 10.

47. *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732 (1831); *Turner v. Cheesman*, 15 N. J. Eq. 243 (1857); 3 Chamb., Ev., § 1911, n. 11.

48. *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315 (1895); *People v. Nino*, 149 N. Y.

317, 43 N. E. 853 (1896); 3 Chamb., Ev., § 1911a, n. 2.

49. *Caswell v. State*, 5 Ga. App. 483, 63 S. E. 566 (1909); 3 Chamb., Ev., § 1911a, n. 7.

50. 3 Chamberlayne, Evidence, § 1912.

51. *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59 (1897); *O'Connor v. Madison*, *supra*; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219 (1888); 3 Chamb., Ev., § 1912, n. 3.

52. *Sutherland v. Hankins*, 56 Ind. 343 (1877); *Buyss v. Buyss*, 99 Mich. 354, 58 N. W. 331 (1894); 3 Chamb., Ev., § 1912, n. 4.

53. *Kimberly's Appeal*, 68 Conn. 428, 36 Atl. 847 (1896); *Stumph v. Miller*, 142 Ind. 442, 41 N. E. 812 (1895); *Moors v. Sanford*, 2 Kan. App. 243, 41 Pac. 1064 (1895); 3 Chamb., Ev., § 1912, n. 5.

54. *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69 (1894); 3 Chamb., Ev., 1912, n. 6.

55. *Goodwin v. State*, 96 Ind. 550 (1884).

56. *Montana R. Co. v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681 (1890).

§ 707. [Psychological Inferences]; Qualification of Ability to Coordinate Phenomena.⁵⁷— Of primary importance, among qualifications for the giving of a reasonable inference with regard to insanity, is a power of mental coordination. In this connection, not only are the habits and powers of observation of the witness to be considered, but also the subjective conditions under which his sense-perceptions are made.⁵⁸ Probably it is this requirement that the witness should be able to coordinate his sense-impressions into a reasonable mental inference which is indicated by the statement of certain courts that observers must be “people of good common sense.”⁵⁹

§ 708. [Psychological Inferences]; Judicial Estimates as to Probative Force.⁶⁰— The precise reason why the ordinary observer is allowed to state his inference is because he cannot fully detail the phenomena upon which he bases it.⁶¹ How, then, can the true state of the case well be laid, with any greater precision, before an alienist testifying as an expert?⁶² This is practically the view adopted in England⁶³ and in the great majority of American states.⁶⁴ *On the other hand*, it has been said that the inference of ordinary observers as to the presence of insanity is of “little or no weight.”⁶⁵ The courts of Maine,⁶⁶ Massachusetts,⁶⁷ and New York⁶⁸ adopt a view that such evidence is to be rejected in favor of the reasoning of the skilled witness.

§ 709. [Psychological Inferences]; Skilled Observer.⁶⁹— Under circumstances which would warrant the court in admitting the inference of an ordinary observer, that of a skilled witness, e.g., a physician,⁷⁰ may undoubtedly be received. He may state whether one accused of crime is legally capable of committing it, i.e., is aware of the nature and consequences of his act.⁷¹ In such instances, the inference should, as a rule, be a necessary one.⁷² As seen

57. 3 Chamberlayne, Evidence, §§ 1913-1915.

58. Emery v. Hoyt, 46 Ill. 258 (1867); 3 Chamb., Ev., § 1913.

59. New York, etc., R. Co. v. Luebeck, 157 Ill. 595, 41 N. E. 897 (1895).

60. 3 Chamberlayne, Evidence, §§ 1916-1920. Comparative value of qualifications demanded by judicial administration. See 3 Chamb., Ev., § 1914. Direct and Indirect Inferences. See 3 Chamb., Ev., § 1915.

61. Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741 (1885).

62. Schlenker v. State, 9 Neb. 241, 1, N. W. 857 (1879); Clark v. State, 12 Ohio 483, 40 Am. Dec. 481 (1843); 3 Chamb., Ev., § 1916.

63. *Supra*, § 704; 3 Chamb., Ev., § 1909.

64. *Supra*, § 704; 3 Chamb., Ev., § 1908.

65. Eloi v. Eloi, 36 La. Ann. 563 (1884).

66. *Supra*, § 702; 3 Chamb., Ev., § 1905.

67. *Supra*, § 702; 3 Chamb., Ev., § 1906.

68. *Supra*, § 703; 3 Chamb., Ev., § 1907.

Function of the Judge. See 3 Chamb., Ev., § 1917 and notes. *Action of Appellate Courts.* See 3 Chamb., Ev., § 1918 and notes. *Province of the Jury.* See 3 Chamb., Ev., § 1919 and notes. *Weight of the Evidence.* See 3 Chamb., Ev., § 1920, and notes.

69. 3 Chamberlayne, Evidence, §§ 1921, 1922.

70. Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433 (1899); 3 Chamb., Ev., § 1921, n. 1.

71. State v. Roselair, 57 Or. 8, 109 Pac. 865 (1910).

72. Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908).

in another place,⁷³ the ordinary observer might well be forbidden to state his deduction from the same appearances.⁷⁴

Inferences of Sanity.—Sanity being the normal mental state, and its existence, therefore, being assumed,⁷⁵ while an ordinary observer may not give his inference as to insanity without stating the constituent phenomena upon which it is based,⁷⁶ he may declare his opinion in favor of sanity without doing so.⁷⁷ He may be permitted to testify to an inference that a given person is sane,⁷⁸ but he may not be permitted to testify as an expert.⁷⁹ In criminal cases, the inference of an ordinary observer as to mental condition has been rejected.⁸⁰ It seems to be settled that general reputation in a community is not admissible to prove the fact of the sanity⁸¹ of a given individual.⁸²

§ 710. [Psychological Inferences]; Subscribing Witness.⁸³—In the English practice, the subscribing witness is customarily permitted to state his inference as to the sanity of the person executing a will or deed which the witness has been called upon to authenticate.⁸⁴ In the United States, the English view on this subject equally prevails and the inference of the subscribing witness as to the sanity of the executing party is, in general, received,⁸⁵ even in jurisdictions which exclude the reasoning of other ordinary observers.⁸⁶ It will be received although formed subsequent to the time of the transaction in connection with which he has acted.⁸⁷ Questions calling for the use of a large proportion of inference on the part of the witness may be rejected.⁸⁸

An Anomalous Position.—Grounds assigned for so unusual an anomaly have been various.⁸⁹ In New York, which concurs with Massachusetts in rejecting the inferences of ordinary observers as to insanity,⁹⁰ the exceptional admissibility conferred upon the estimates of attesting witnesses is placed upon the ground of administrative necessity.⁹¹ The dissentient American states

73. *Supra*, § 701; 3 Chamb., Ev., § 1899.

74. *Town of Londonderry v. Fryor*, 84 Vt. 294, 79 Atl. 46 (1911); 3 Chamb., Ev., § 1921, n. 5.

75. *Supra*, § 404; 2 Chamb., Ev., § 974.

76. *Supra*, § 705; 3 Chamb., Ev., § 1911.

77. *State v. Soper*, 148 Mo. 217, 235, 49 S. W. 1007 (1899); 3 Chamb., Ev., § 1922, n. 4.

78. *Mollering v. Kinneburg*, 78 Neb. 758, 111 N. W. 788 (1907).

79. *Myatt v. Myatt*, 149 N. C. 137, 62 S. E. 887 (1908).

80. *Braham v. State*, 143 Ala. 28, 38 So. 919 (1905).

81. *People v. Pico*, 62 Cal. 53 (1882); *Townsend v. Pepperell*, 99 Mass. 40 (1868); *State v. Coley*, 114 N. C. 879, 19 S. E. 705 (1894); 3 Chamb., Ev., § 1922, n. 14.

82. *Foster v. Rooks*, 6 Ga. 290 (1849).

83. 3 Chamberlayne, Evidence, §§ 1923–1927.

84. *Tatham v. Wright*, 11 Eng. Ch. 1, 39 Eng. Reprint 295 (1831).

85. *Scott v. McKee*, 105 Ga. 256, 31 S. E. 183 (1898); *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689 (1901); *In re Du Bois*, 164 Mich. 8, 128 N. W. 1092 (1910); 3 Chamb., Ev., § 1925, n. 1.

86. *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473 (1874); *May v. Bradlee*, 127 Mass. 414 (1879); *Hewlett v. Wood*, 55 N. T. 634 (1873).

87. *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459 (1864).

88. *In re Du Bois*, *supra*.

89. See *Needham v. Ide*, 5 Pick. (Mass.) 510 (1827); *Williams v. Spencer*, 150 Mass. 346, 23 N. E. 105, 15 Am. St. Rep. 206, 5 L. R. A. 790 (1890).

90. *Supra*, § 703; 3 Chamb., Ev., § 1907.

91. *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681 (1866).

have, however, imposed certain limitations upon the scope of the anomaly. In case of a will, only as to insanity as it existed at the time of executing it is the subscribing witness permitted to speak.⁹² The result of his observations since the execution of the will⁹³ or other instrument, are not deemed to be relevant.

Marked Administrative Indulgence.—A subscribing witness alone is not required to give a preliminary statement of observed phenomena constituting the basis of his inference.⁹⁴ But the facts observed may be inquired into,⁹⁵ and the probative weight of the inference may be reinforced by stating them.⁹⁶ Beyond the incidents necessarily attendant upon the fact of attestation, no special opportunities for observation need be shown to have been enjoyed by the witness.⁹⁷ He may even invade, to an extent permitted no other witness, the province of the jury⁹⁸ by stating his opinion on the precise point as to which they are to pass, e.g., whether a testator executing a will was possessed at the time of testamentary capacity⁹⁹ or one who signed a deed was sufficiently sane to transact business.¹

Probative Force.—To the inference of a subscribing witness as to the insanity of the maker of the instrument the law attaches no special or predetermined probative force.² Much depends upon the personal credibility of the attesting witness.³ In no case, is it regarded as conclusive.⁴ He may even be impeached, as by proof that he has made inconsistent statements.⁵

§ 711. [Psychological Inferences]; Objective Mental States.⁶—Inference of ordinary observers, as to mental states, is governed by the same general rules which have been seen to affect inference as to mental condition. An observer of competent knowledge, after the usual preliminary detail of constituting facts,⁷ may properly be permitted to declare an inference as to what mental feeling or state is shown by the manifestations which he has observed.⁸ Wherever a given mental state is a relevant fact,⁹ a properly qualified observer may, under proper administrative conditions, state his inference as to its existence. The mental state of a witness may be given by the witness

92. Robinson v. Adams, *supra*; Williams v. Spencer, *supra*; Clapp v. Fullerton, *supra*.

93. Williams v. Spencer, *supra*.

94. Scott v. McKee, *supra*; Hertrich v. Hertrich, *supra*; Jones v. Collins, 94 Md 403, 51 Atl 398 (1902); 3 Chamb., Ev. § 1927, n. 1.

95. Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691 (1867).

96. Cilley v. Cilley, 34 Me. 162 (1852).

97. Robinson v. Adams, *supra*.

98. A contrary view, declining to permit the witness to apply the standard of legal responsibility, has been adopted. Hall v. Perry, 87 Me. 569, 33 Atl. 160 (1895); Dean v. Fuller, 40 Pa. 474 (1861).

99. Jones v. Collins, *supra*.

1. Brand v. Brand, 39 How. Pr. (N. Y.) 193 (1870).

2. Burney v. Torrey, 100 Ala. 157, 14 So. 685 (1893); 3 Chamb., Ev., § 1923.

3. Farnsworth v. Noffsinger, 46 W. Va. 410, 33 S. E. 246 (1899).

4. Cilley v. Cilley, *supra*.

5. *In re Snelling*, 136 N. Y. 515, 32 N. F. 1006 (1893).

6. 3 Chamberlayne, Evidence, §§ 1928–1937.

7. *Supra*, § 678; 3 Chamb., Ev., § 1813.

8. Jones v. State (Tex. Cr. App. 1905), 85 S. W. 5; State v. George, 58 Wash. 681, 109 Pac. 114 (1910).

9. Thompson v. Augusta, etc., R. Co., 21 S. C. 420 (1884); Over v. Missouri, etc., R. Co. (Tex. Civ. App. 1903), 73 S. W. 535; 3 Chamb., Ev., § 1928, n. 3.

who has had suitable opportunities for observation may be allowed to state that a certain person appeared to be of a happy and contented disposition,⁴² and in what way his disposition compared with that of another person.⁴³ While an inference as to a temporary mental state has been rejected,⁴⁴ a change in customary mental attitude may be stated by a qualified observer.⁴⁵ The disposition of an animal may be stated, under proper circumstances, in the form of an inference by a suitably qualified observer,⁴⁶ as that a given animal was kind, safe, or gentle,⁴⁷ or sulky.⁴⁸

§ 712. [Psychological Inferences]; Inference Rejected.⁴⁹—An inference or other reasoning by a witness as to the existence of a mental state which is not justified by some adequate administrative necessity is properly rejected: as where the precise point to be passed upon by the jury, part of the issue raised in the case, is as to the existence of the psychological fact itself,⁵⁰ or where an undue proportion of reasoning is involved in the inference.⁵¹ A very large proportion of reasoning is present in a statement where the witness is making a direct inference as to the mental state of a third person. Thus, a witness may undertake to state that A knows a given fact not because A has been observed by him to show signs of knowing it but because the fact itself having been stated in A's presence, he *must* know it.⁵² Such direct inference, in the absence of manifestation, is to be rejected.⁵³ Even an expert witness is not competent to testify to the existence of a mental state of another, resting merely in the opinion of the expert without any basis for the inference as to it.⁵⁴

Facts May Be Placed before the Jury.—Where such phenomena as are actually present are few and capable of being laid before the jury with no marked impairment of probative force, no administrative reason is shown for receiving the summary of the witness in the form of an inference. The jury

(1899); *Matthewson v. Matthewson*, 81 Vt. 173, 69 Atl. 646 (1908); 3 Chamb., Ev., § 1936, n. 1.

42. *Morrison v. State*, 40 Tex. Cr. 473, 51 S. W. 358 (1899); 3 Chamb., Ev., § 1936, n. 2.

43. *Brownell v. People*, 38 Mich. 732 (1878).

44. *McAdory v. State*, 59 Ala. 92 (1877).

45. *Johnson v. State*, 17 Ala. 618 (1850).

46. *Pioneer Fireproof Constr. Co. v. Sunderland*, 188 Ill. 341, 58 N. E. 928 (1900); *Johnson v. Mack Mfg. Co.*, 65 W. Va. 544, 64 S. E. 841 (1909); 3 Chamb., Ev., § 1937, n. 1.

47. *Sydleman v. Beckwith*, 43 Conn. 9 (1875).

48. *Whittier v. Franklin*, 46 N. H. 23 (1865).

49. 3 Chamberlayne. Evidence, §§ 1938–1946.

50. *Plano Mfg. Co. v. Kautenberger*, 121 Iowa 213, 96 N. W. 743 (1903); *Farrington*

v. Minturn, 70 N. J. L. 627, 57 Atl. 269 (1909); 3 Chamb., Ev., §§ 1938, 1939, n. 2, 1942.

51. *Manahan v. Halloran*, 66 Minn. 483, 69 N. W. 619 (1896); *Diefendorf v. Thomas*, 37 App. Div. 49, 55 N. Y. Supp. 699 (1899); 3 Chamb., Ev., § 1939, n. 3. *Inducing purchase. Duhme Jewelry Co. v. Browning*, 72 S. C. 424, 52 S. E. 1117 (1905).

52. *Braham v. State*, 143 Ala. 28, 38 So. 919 (1905); *Handley v. Missouri Pac. R. Co.*, 61 Kan. 237, 59 Pac. 271 (1899); 3 Chamb., Ev., § 1939, n. 4.

53. *Sneed v. Marysville Gas & Electric Co.*, 149 Cal. 704, 87 Pac. 376 (1906); *Bush & Hathaway v. W. A. McCarty*, 127 Ga. 308, 56 S. E. 430 (1907); 3 Chamb., Ev., § 1939, n. 5.

54. *Consol. Gas, etc., Co. v. State*, 109 Md. 186, 72 Atl. 651 (1909).

will be regarded as being as well qualified to draw an inference as the witness.⁵⁵

Lack of Objective Relevancy.—The inference of an observer as to the existence of a particular mental state will not be received in evidence unless the psychological fact itself is objectively relevant, in some respect, to the proposition in issue. Simply, it is not evidence.⁵⁶

Subjective Relevancy.—Should the observing witness fail to show to the court, in connection with his preliminary detail of constituting phenomena,⁵⁷ that he has had such opportunities for observation, and is possessed of sufficient mental powers for utilizing them to enable him to draw an inference reasonably helpful to the jury, his inference will be rejected.⁵⁸ The inference of an observer as to the intent or intention with which a particular act was done is usually a complex one, involving a large amount of the element of reasoning, thus more nearly constituting a conclusion,⁵⁹ and it is, therefore, rejected.⁶⁰ In many cases where the substantive law itself attaches consequences to given acts or failures to act, regardless of the intent with which they were done or omitted, the existence of the psychological fact is irrelevant⁶¹ and, consequently, to be rejected.⁶²

Failure to state an adequate number of constituting phenomena and the usually accompanying presence of a large portion of reasoning, for receiving which no satisfactory administrative necessity is shown, unite, in many cases, to lead the court to reject the inference of ordinary observers as to the existence of complicated mental states. Of this nature is fraud,⁶³ good faith,⁶⁴ motive,⁶⁵ purpose,⁶⁶ or any similar mental state fairly like these.⁶⁷ The reasons assigned by the observed person for his conduct⁶⁸ or the facts upon which reliance was placed⁶⁹ may be rejected for similar reasons. Statements of be-

55. 3 Chamb., Ev., § 1940.

56. Louisville, etc., R. Co. v. Goben, *supra*: Solomon v. American Mercantile Exch., 93 Me. 436, 45 Atl. 510, 74 Am. St. Rep. 366 (1900); Jennings v. Supreme Council, etc., Assoc., 81 App. Div. 76, 81 N. Y. Supp. 90 (1903): 3 Chamb., Ev., § 1941, n. 2.

57. *Supra*, § 711; 3 Chamb., Ev., § 1932.

58. Bush v. State, 109 Ga. 120, 34 S. E. 298 (1899); State v. Stockhammer, 34 Wash. 262, 75 Pac. 810 (1904); 3 Chamb., Ev., § 1943.

59. *Supra*, § 676; 3 Chamb., Ev., § 1803; *Infra*, § 792; 3 Chamb., Ev., § 2291.

60. Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904 (1908); Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111 (1886); 3 Chamb., Ev., § 1944, n. 2. *But see* Starr v. Stevenson, 91 Iowa 684, 60 N. W. 217 (1894); Farrington v. Minturn, *supra*.

61. Sayre v. Woodyard, 66 W. Va. 288, 66 S. E. 320 (1909). See also § *supra*; 3 Chamb., Ev., § 1928.

62. *Supra*, § 29; 3 Chamb., Ev., § 1941.

63. Maier v. Board of Public Works, 151 Ind. 197, 51 N. E. 233 (1898); 3 Chamb., Ev., § 1945, n. 2.

64. Durrence v. Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726 (1903).

65. Tait v. Hall, 71 Cal. 149, 12 Pac. 391 (1886); Dwight v. Badgley, 60 Hun 144, 14 N. Y. Supp. 498 (1891); 3 Chamb., Ev., § 1945, n. 4.

66. Western Nat. Bank v. Flannagan, 35 N. Y. Supp. 848, 14 Misc. 317 (1895); Heath v. Slocum, 115 Pa. 549, 9 Atl. 259 (1887).

67. Fleckinger v. Taffee, 149 Mich. 678, 113 N. W. 311 (1907); Bogart v. City of New York, 200 N. Y. 379, 93 N. E. 937 (1911); State v. Stockhammer, *supra*; 3 Chamb., Ev., § 1945, n. 6.

68. Goodale v. Worcester Agricultural Soc., 102 Mass. 401 (1869); Jennings v. Supreme Council, etc., Assoc., *supra*; 3 Chamb., Ev., § 1945, n. 7.

69. Wabash R. Co. v. Smillie, 97 Ill. App.

which can be conceded to the trial of an action at law. Skilled witnesses, like any other, state, either as facts or by way of inference, what they claim to *know*. Experts, on the other hand, testify as to their reasoning upon facts known to others. These experts may testify as skilled witnesses, and, *vice versa*, skilled observers may testify as experts. The circumstance, however, has no effect to impair the validity of the distinction between the two.

In connection with divers occupations, mercantile, professional, trading, and the like, or relations growing out of them, an ever increasing volume of business is presented to the court. Here is the field of the "skilled witness," so called. To the administration of justice, this witness contributes three things, to which it will be necessary to give some examination in the same order. (1) He may contribute *facts* known to those engaged in his trade or calling. (2) He may submit inferences and conclusions, acts of reasoning based, more or less completely, upon observation. (3) He may, testifying as an expert, offer an act of pure reasoning, his judgment, rested upon the assumed truth of certain facts stated to him in the form of a hypothetical question. These several tenders, judicial administration regards, and therefore treats, in different ways.

§ 714. [Ordinary and Skilled Observers; Differentiation by Subject-matter]; What Topics are Technical.²—Special training brings with it special powers of observation. To know for what one should look is a powerful aid to finding the crucial point in a complicated set of phenomena. The *desire* to find it is that which tends to deflect attention. The skilled observer is, therefore, able, in a technical matter, to give unique assistance in the search for truth. He sees the bearing of facts which come under his notice in a way impossible to the ordinary witness. He is very apt, partly by reason of this fact, to observe really significant phenomena which might escape the attention of others. These technical matters, as has been said, are those as to which the witness has enjoyed a special training and experience not shared by men in general.³

§ 715. [Ordinary and Skilled Observers]; Necessity and Relevancy.⁴—In receiving the inference of the skilled observer, administration is admitting secondary evidence. Upon the reception of this, it at all times imposes restrictions. In this connection, as usual, the proponent must show that it is *necessary* for the proof of his case to receive secondary evidence and that the evidence actually tendered is relevant for the purpose.

The necessity may arise because he is testifying about complicated facts which the jury cannot properly co-ordinate. The relevancy of the evidence resolves itself into a question of the qualifications of the witness. The experience of the witness may be short and it need not be technical but it may be practical.

2. 3 Chamberlayne, Evidence, § 1952.

4. 3 Chamberlayne, Evidence, §§ 1953-

3. Gerbig v. New York, etc., R. Co., 69 Hun (N. Y.) 177 note (1893).

1957.

§ 716. **Architects and Builders.**⁵— Building trades furnish numerous instances of the reasoning of the trained observer. A suitably qualified member of a building trade⁶ may testify as to his inferences from what he has observed. No other witness is entitled to speak on a trade matter.⁷

§ 717. **Business Affairs.**⁸— One connected with a particular business may state his inferences from facts observed by him as to technical matters not familiarly known to those outside that special calling and which the jury cannot coordinate into a reasonable act of judgment by the aid of any experience of their own.⁹ In other respects, the presence or absence¹⁰ of business difficulties may be announced by a properly qualified witness. He may declare his conclusion as to whether a given line of industry¹¹ could be successfully carried on under prescribed conditions or books kept in a particular way.¹²

§ 718. **Technical Matters.**¹³— A skilled observer may testify as to the results of chemical analysis¹⁴ or as to various problems in engineering whether civil¹⁵ or electrical¹⁶ hydraulic¹⁷ or surveying¹⁸ or as to farming matters whether

5. 3 Chamberlayne, Evidence, §§ 1958-1962.

6. Bowen v. Sierra Lumber Co. (Cal. App. 1906), 84 Pac. 1010 (life of red fir timber); Line v. Mason, 67 Mo. App. 279 (1896); Behaman v. Waldo, 38 Misc. (N. Y.) 820, 78 N. Y. Suppl. 1108 (1902) (architects and mechanical engineers). An experienced builder who has seen a house just after its abandonment and who has looked over the plans and specifications may state how large a proportion of the building was completed at the time it was abandoned. U. Scheerer & Co. v. Deming (Cal. 1908), 97 Pac. 155.

7. Alexander v. Mt. Sterling, 71 Ill. 366 (1874) (sidewalk); Galveston, etc., R. Co. v. Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955 (1892) (sufficiency of a bridge); Carroll v. Welch, 26 Tex. 147 (1861). Where a photograph is in evidence showing the condition of a bridge opinion evidence of railroad men is not admissible that it was not a safe place to work as the jury can judge this for themselves. Duncan v. Atchison, Topeka & Santa Fe R. Co., 86 Kan. 112, 119 Pac. 356, 51 L. R. A. (N. S.) 565 (1911).

8. 3 Chamberlayne, Evidence, § 1963.

9. Barrie v. Quimby, 206 Mass. 259, 92 N. E. 451 (1910); Daniels v. Fowler, 123 N. C. 35, 31 S. E. 598 (1898); Cochran v. U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704 (1895). The proper method of stacking flour in 50-pound sacks is a subject of expert testimony. Commerce Milling & Grain Co. v. Gowan (Tex. Civ. App. 1907), 104 S. W. 916.

10. Crusoe v. Clark, 127 Cal. 341, 59 Pac. 700 (1899) (no problem in bookkeeping).

11. Belding v. Archer, 131 N. C. 287, 42 S. E. 800 (1902) (lumbering).

12. Fry v. Provident Sav. L. Assur. Soc. (Tenn. Ch. App. 1896), 38 S. W. 116.

13. 3 Chamberlayne, Evidence, §§ 1964-1987.

14. Nussbaumer v. State, 54 Fla. 87, 44 So. 712 (1907) (intoxicating quality of wine); U. S. Health & Accident Ins. Co. v. Jolly (Ky. 1909), 118 S. W. 28 (pus).

See also Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201, 120 N. W. 613 (1909).

15. Gault v. Concord R. Co., 63 N. H. 356 (1885) (whether a bridge obstructs a stream).

16. H. J. Reedy Co. v. Cameron (Mich. 1910), 129 N. W. 27, 17 Detroit Leg. N. 1025 (proper operation of electric motor).

17. H. J. Reedy Co. v. Cameron (Mich. 1910), 129 N. W. 27, 17 Detroit Leg. N. 1025. Beery v. Driver (Ind. 1906), 76 N. E. 967. A nonexpert cannot testify that it would be impossible to drain all the land in controversy towards a certain river. Hetland v. Bilstead (Iowa 1908), 118 N. W. 422. Whether a stream is "floatable," is a proper subject for the inference of a skilled observer. Hot Springs Lumber & Mfg. Co. v. Revercomb (Va. 1909), 65 S. E. 557.

18. Jackson v. Lambert, 121 Pa. St. 182, 15 Atl. 502 (1888) (location).

Basis of Inference.—The medical witness should be guided entirely by his professional training in dealing with observed phenomena.⁵⁰ He cannot properly use his individual knowledge for the purpose, except so far as the latter is disclosed by the evidence or is within the scope of his summarizing inference.⁵¹ Unless something affirmative appears to the contrary, it will be assumed that the witness is confining himself within these obvious limitations.⁵²

It is essential that the views of the medical man be held with a reasonable degree of certainty⁵³ and he may also state the causes of the conditions he finds.⁵⁴ The inference of the medical man may be so clear from a medical standpoint as to be intuitive.⁵⁵ He may state any bodily conditions he finds⁵⁶ including death and its probable cause⁵⁷ or diseases of human beings⁵⁸ or of animals⁵⁹ or the cause of injuries⁶⁰ or their nature.⁶¹ His testimony should not, however, intrude on the province of the jury and he may state what could or might have caused the injury but not what did cause it.⁶² He may make

50. *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321 (1878); *O'Flaherty v. Nassau Electric R. Co.*, 165 N. Y. 624, 59 N. E. 1128 (1900); *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804 (1901) (X-ray negative taken by himself).

51. *Hitchcock v. Burgett*, 38 Mich. 501 (1878).

52. *Western, etc., R. Co. v. Stafford*, 99 Ga. 187, 25 S. E. 656 (1896).

53. *Spear v. Hiles*, 67 Wis. 361, 30 N. W. 511 (1886).

54. *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844 (1909). Opinion as to cause of injury, see note, Bender ed., 146 N. Y. 165. Expert testimony as to cause of injury, see note, Bender ed., 127 N. Y. 667. Opinions of physicians as to cause of disease, see note, Bender ed., 149 N. Y. 329.

55. *Hartzler v. Metropolitan St. Ry. Co.*, 140 Mo. App. 665, 126 S. W. 760 (1910) (pneumonia).

56. *Johnson v. Northern Pac. R. Co.*, 47 Minn. 430, 50 N. W. 473 (1891).

57. *Eggler v. People*, 56 N. Y. 642 (1874). A question to an expert as to the cause of death in a homicide case based upon a given hypothesis or upon personal knowledge of the conditions or both is one that a properly qualified witness may answer. The witness is not limited to stating what could or might have been the cause of death on the ground that this is an invasion of the province of the jury. *State v. Buck*, 88 Kan. 114, 127 Pac. 631, 42 L. R. A. (N. S.) 854 (1912); *State v. Hassenius*, 165 Iowa 415, 146 N. W. 58, L. R. A. 1915 A 1078 (1914).

58. *Reininghaus v. Merchants' L. Assoc.*, 116 Iowa 364, 89 N. W. 1113 (1902) (liver trouble).

59. *Moore v. Haviland*, 61 Vt. 58, 17 Atl. 725 (1888).

60. *Smith v. State* (Ala. 1910), 51 So. 610 (wounds); *St. Louis & S. F. R. Co. v. Savage* (Ala. 1909), 50 So. 113; *Clemons v. State* (Fla. 1904), 37 So. 647 (fracture of cheekbone by fist); *St. Louis Southwestern Ry. Co. of Texas v. Taylor* (Tex. Civ. App. 1909), 123 S. W. 714. The general rule is that expert evidence is not admissible for the purpose of proving that a wound was or was not self-inflicted. But where a wound is of an extraordinary nature and is upon a portion of the body of which men have little or no knowledge, then expert evidence is admissible for that purpose. *Miller v. State*, 9 Okla. Crim. Rep. 255, 131 Pac. 717, L. R. A. 1915 A 1088 (1913). There is a sharp distinction between a question calling for an opinion by an expert as to what might or might not have caused an injury and one calling for an opinion as to what in fact did cause it. The latter question cannot be answered, as this is the question which the jury are to settle. *Sever v. Minneapolis & St. L. R. Co.*, 156 Iowa 664, 137 N. W. 937, 44 L. R. A. (N. S.) 1200 (1912).

61. A dentist may state from the condition of teeth observed by him whether the blow which caused it was a heavy one. *Gierczak v. Northwestern Fuel Co.*, 142 Wis. 207, 125 N. W. 436 (1910).

62. *Riser v. Southern R. Co.*, 67 S. C. 419, 46 S. E. 47 (1903).

mechanical estimates⁶³ as in case of injury as to the force,⁶⁴ direction⁶⁵ and nature of a blow⁶⁶ and location of parties⁶⁷ or the instrument used.⁶⁸

He may state the mental condition of the person⁶⁹ as in cases where insanity is claimed.⁷⁰ The attending physician is always permitted although not an expert⁷¹ to testify as to insanity or other medical conditions of the patient, but the medical witness cannot invade the province of the jury by giving his opinion as to whether the patient was or was not of sufficient mental capacity to perform the act in question.⁷²

So an alienist may examine the person and from his observation give his opinion as to the sanity⁷³ and even a trained nurse may give her inference based on her observation.⁷⁴ The inferences of the medical witness may be of a non-technical character,⁷⁵ and cover a wide range⁷⁶ and may include the prognosis or the future chances of the patient,⁷⁷ and the probable permanence of the disease.⁷⁸ So competent surgeons may give their opinions as to the proper method of treating surgical cases.⁷⁹

§ 723. [Medical Inferences]; Qualifications of Witnesses.⁸⁰—In general, the

63. *Fort v. State*, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163 (1889); *Com. v. Spiropoulos*, 208 Mass. 71, 94 N. E. 451 (1911) (wound self-inflicted).

64. *Com. v. Piper*, 120 Mass. 185 (1876); *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y.) 370 (1901); *People v. Schmidt*, 108 N. Y. 568, 61 N. E. 907 (1901).

65. *Rash v. State*, 61 Ala. 89 (1878); *Fort v. State*, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163 (1889); *People v. Phelan*, 123 Cal. 551, 56 Pac. 424 (1899).

66. *Fort v. State*, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163 (1889); *People v. Fish*, 125 N. Y. 136, 26 N. E. 319 (1891).

67. *State v. Buralli* (Nev. 1903), 71 Pac. 532.

68. Abortion.—Medical experts can tell the kind of instrument with which an abortion was committed. *Commonwealth v. Sinclair* (Mass. 1907), 80 N. E. 799.

69. *Chicago Union Traction Co. v. Scanlon*, 136 Ill. App. 212 (1907) (injured child developed mentally according to her years); *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71 (1870) (impaired); *Burns v. Brier*, 204 Mass. 195, 90 N. E. 399 (1910) (fears of hydrophobia).

70. A physician need not be an alienist, in the sense that he is a specialist in that line, to qualify him to testify as to mental conditions. *United Ry. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606 (1909).

71. *Hastings v. Rider*, 99 Mass. 622 (1868);

Clark v. State, 12 Ohio 483, 40 Am. Dec. 481 (1843).

72. An expert witness cannot be asked whether a person is capable of making a deed as this involves not only an opinion as to mental capacity but also as to what kind and degree of mental capacity is necessary to make an instrument valid and binding and this is a question of law and not of fact. *Coblentz v. Putifer*, 87 Kan. 719, 125 Pac. 30, 42 L. R. A. (N. S.) 298 (1912).

73. *Fairchild v. Bascomb*, 35 Vt. 398 (1862).

74. *Illinois Steel Co. v. Delac*, 103 Ill. App. 98 [affirmed in 201 Ill. 150, 60 N. E. 245] (1903); *Van Deusen v. Newcomer*, 40 Mich. 90 (1879).

75. That certain witnesses were physicians did not disqualify them to testify that plaintiff walked with a limp, that she dragged her right foot, and that the toe of her right shoe was worn, matters which could have been testified to by lay witnesses. *Schmidt v. Chicago City Ry. Co.*, 239 Ill. 404, 88 N. E. 275 (1909).

76. *White v. Clements*, 39 Ga. 232 (1869).

77. *People v. Johnson*, 70 Ill. App. 634 (1896).

78. *Palmer v. Warren St. R. Co.*, 206 Pa. St. 574, 56 Atl. 49, 63 L. R. A. 507 (1903).

79. *State v. McCoy*, 15 Utah 136, 49 Pac. 420 (1897).

80. 3 Chamberlayne, Evidence, § 2018.

qualifications required by judicial administration in a skilled medical observer are the same as those upon which it insists in case of other specially trained witnesses when speaking from observation.⁸¹ These are two. The witness must be shown to have enjoyed suitable opportunities for observation of the phenomena or appearances concerning which he purposes to speak.⁸² But this, standing alone, is by no means sufficient.⁸³ In the second place, he must be proved or be fairly assumed to have had sufficient training by instruction, reading or experience to have developed the mental power necessary to enable him to coördinate what he has perceived into an inference helpful to the jury. It need not be shown that the witness stands at the head of his branch of science or department of technical experience.⁸⁴

§ 724. [Medical Inferences]; Detail of Constituting Facts.⁸⁵—As in other cases where the offer is to summarize, in part at least, the results of observation, judicial administration will require that the medical observer state, with such completeness as he can, the constituting facts upon which he grounds his inference.⁸⁶

These facts may be gleaned from the statements of the patient himself so far as the symptoms are internal or not open to perception⁸⁷ but the statements of others cannot be used by the skilled witness as a basis for his opinion.⁸⁸ Where the witness shows that he does not know the necessary facts his opinion will not be received.⁸⁹

§ 725. [Medical Inferences]; Who is Qualified; Proof.⁹⁰—As a matter of practice, any regularly qualified and acting member of the medical profession will be received as a witness,⁹¹ whether practising in the country or in the city,⁹² except in some special branch of the field of medicine as insanity.⁹³ It will be assumed that physicians are qualified without special proof,⁹⁴ and the experience of the witness may be of a practical character as in case of nurses.⁹⁵

81. *Clemmons v. State* (Ala. 1910), 52 So. 467 (coagulation of blood); *In re Yanauken*, 10 N. J. Eq. 186 (1854).

82. *Barnes v. Chicago City Ry. Co.*, 147 Ill. App. 601 (1909).

83. *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1904 (1896).

84. *State v. Lyons*, 113 La. 959, 37 So. 890 (1904) (disease of the optic nerve).

85. 3 Chamberlayne, *Evidence*, §§ 2019-2022.

86. *Johnson v. Steam Gauge, etc., Co.*, 146 N. Y. 152, 40 N. E. 773 (1895).

87. *Louisville, etc., R. Co. v. Sandlin*, 25 Ala. 585, 28 So. 40 (1900).

88. *Heald v. Thing*, 45 Me. 392 (1858); *Foster v. New York Fidelity, etc., Co.*, 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833 (1898).

89. *Prince v. State*, 100 Ala. 144, 14 So.

409, 46 Am. St. Rep. 28 (1893); *Manhattan L. Ins. Co. v. Beard*, 112 Ky. 455, 66 S. W. 35, 23 Ky. L. Rep. 1747 (1902).

90. 3 Chamberlayne, *Evidence*, §§ 2023-2029.

91. *Stone v. Moore*, 83 Iowa 186, 49 N. W. 76 (1891) (female physician).

92. *Bunel v. O'Day*, 125 Fed. 303 (1903) (impotency).

93. *Cox v. State* (Tex. Cr. App. 1910), 132 S. W. 125.

94. *State v. Kammell* (S. D. 1909), 122 N. W. 420; *Smits v. State*, 145 Wis. 601, 130 N. W. 525 (1911).

95. *Dashiell v. Griffiths*, 84 Md. 363, 35 Atl. 1094 (1896); *Com. v. Gibbons*, 3 Pa. Super. Ct. 408, 89 Wkly. Notes Cas. (Pa.) 565 (1897) (discoloration of a limb).

The qualifications may be based on reading and study.⁹⁶ or on special training⁹⁷ and even an unlicensed doctor may be allowed to give his opinion.⁹⁸

§ 726. [Medical Inferences]; Probative Weight.⁹⁹—Many considerations may, as is natural, affect the weight in evidence properly to be attached to the inference of a medical observer. Thus, the fact that an examination was not recently made diminishes, so far as its influence extends, the probative force which would otherwise attach to the inference of a medical observer drawn from it.¹ In like manner, that the view of the medical witness rests, in large part, upon the truth of the statements made to him by the patient or by others is regarded as impairing, to a certain extent, merely the weight of his testimony.² The general features upon which the credibility of witnesses is based are the same in this as in other connections. The results arrived at by an examination which is searching and thorough are, naturally, more reliable than those reached by a casual or cursory inspection.³ The bias of a medical witness toward the side for which he testifies may be established in any logical way, e.g., that the witness is interested to support his present contention in other connections.⁴

Province of the Jury.—The question as to the weight properly to be accorded to the medical inference of a qualified physician is one for the jury.⁵

§ 727. [Medical Inferences]; Results of Autopsy.⁶—A professionally trained medical witness who has made an autopsy or has attended at the making of one, may state his inference or conclusion as to what it indicated.⁷

Ordinary Observers.—Where one not qualified as a skilled witness is present at an autopsy he may state the result of his personal observation.⁸

96. *Hardiman v. Brown*, 162 Mass. 585, 39 N. E. 192 (1895) (tumors).

97. Where the presiding judge feels that the medical inference to be drawn is one which can most satisfactorily be reached by a specialist, and that it is fairly within the power of the proponent to produce such a witness, the evidence of an ordinary physician may be rejected. *Emerson Gaslight Co.*, 6 All. 146 (1863) (effect of gas on the human system). The skilled observer need not, however, be a specialist. *Castner v. Sliker*, 33 N. J. L. 95 (1869); *O'Neil v. Dry Dock, etc., R. Co.*, 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 (1891) (deafness).

98. *Smits v. State*, 145 Wis. 801, 130 N. W. 525 (1911). See also *Golder v. Lund*, 50 Neb. 867, 70 N. W. 379 (1897); *People v. Rice*, 150 N. Y. 400, 54 N. E. 48 (1899).

99. 3 Chamberlayne, Evidence, § 2030.

1. *Reininghaus v. Merchants' L. Assoc.*, 116 Iowa 364, 99 N. W. 1118 (1902). Should the

observation of the witness have been made at a time too remote to be relevant it will of necessity be rejected.

2. *Mitchell v. State*, 58 Ala. 417 (1877).

Cross-examination.—The fact may be ascertained upon cross-examination. *Lay v. Adrian*, 75 Mich. 438, 42 N. W. 959 (1889).

In other cases, the inference so affected has been entirely rejected. *Moore v. State*, 17 Ohio St. 521 (1867).

3. *Johnson v. Great Northern Ry. Co.*, 107 Minn. 285, 119 N. W. 1061 (1909).

4. *Witty v. Springfield Traction Co.* (Mo. App. 1911), 134 S. W. 82.

5. *Levering v. Com.* (Ky. 1909), 117 S. W. 253.

6. 3 Chamberlayne, Evidence, § 2031.

7. *People v. Schmidt*, 168 N. Y. 568, 61 N. E. 907, 14 N. Y. Cr. 188 (1901).

8. *State v. Lyons*, 113 La. 959, 37 So. 890 (1904); *Carson v. State*, 57 Tex. Cr. R. 394, 123 S. W. 590 (1909).

§ 728. **Military Affairs.**⁹— War is scientific. Members of the army or navy will be permitted to state the relevant technical inferences which may arise from their observation. As a matter of special knowledge, military men of sufficient experience or training may be heard to declare the written regulations¹⁰ and unwritten practice relating to their branch of the service.

§ 729. **Mining Matters.**¹¹— In sections of the country where mining is a prominent industry, the skill of a trained observer in this branch of art is frequently utilized by courts of justice. Any witness sufficiently equipped by scientific training or practical experience to make his reasoning helpful to the jury may state a technical inference from what he has observed.¹² Unless a scientific or practical skill commensurate with the quality of the inference is shown by the witness, his testimony will be rejected as irrelevant.¹³

The testimony may relate to the construction and lay-out,¹⁴ or equipment,¹⁵ operation,¹⁶ and dangers from soil-caving¹⁷ in mines. The expert should state such of the constituting phenomena as he reasonably can.¹⁸

§ 730. **Photographic Art.**¹⁹— An observer skilled in photography may state his inferences from appearances which he has observed. He may be a competent judge as to the quality of work, e.g., whether a particular photograph has been well taken.²⁰ It has been very rationally required that for one skilled in photography to testify that a photographic likeness is a good one, his observation must have covered not only the photograph, but also the sitter as well.²¹ On the other hand, one entirely unacquainted with the technical merits of a photograph as a piece of professional work, may state whom, if any one, it resembles.²²

§ 731. **Railroad Matters; Qualifications.**²³— As a source of litigation, railroads have few compeers. Abundant opportunity is therefore furnished for receiving, under proper administrative conditions of necessity and relevancy, the inferences of observers trained in the various branches of the art of rail-

9. 3 Chamberlayne, Evidence, § 2031a.

10. Bradley v. Arthur, 4 B. & C. 292, 6 D. & R. 413, 10 E. C. L. 585 (1825).

11. 3 Chamberlayne, Evidence, §§ 2032, 2033.

12. Ferrari v. Beaver Hill Coal Co. (Or. 1909), 102 Pac. 1016 (signal out of repair); Anderson v. U. S., 152 Fed. 87, 81 C. C. A. 311 (1907) (value of land for mining purposes).

13. Bennett v. Morris (Cal. 1894), 37 Pac. 929; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153 (1885). See also Harris v. Consolidation Coal Co., 111 Md. 209, 73 Atl. 805 (1909).

14. Hickey v. Anaconda Copper Min. Co. (Mont. 1905), 81 Pac. 806; Wells v. Leek,

151 Pa. St. 431, 25 Atl. 101 (1892) (coal).

15. Harvey v. Susquehanna Coal Co., 201 Pa. St. 63, 50 Atl. 770, 80 Am. St. Rep. 800 (1902).

16. Clark v. Willett, 35 Cal. 534 (1868) (tunneling).

17. Sloss-Sheffield Steel & Iron Co. v. Green (Ala. 1909), 49 So. 301.

18. Wells v. Leek, 151 Pa. St. 431, 25 Atl. 101 (1892).

19. 3 Chamberlayne, Evidence, § 2034.

20. Barnes v. Ingalls, 39 Ala. 193 (1863).

21. Schwartz v. Wood, 21 N. Y. Suppl. 1053 (1893).

22. Russell v. State (Ala. 1905), 38 So. 291.

23. 3 Chamberlayne, Evidence, §§ 2035-2040.

roading. As a general rule, wherever the observed phenomena are too numerous and intangible effectively to be placed before the jury, the skilled railroad witness is received. Should it happen that the inference is a technical one, requiring for its formation and expression the use of special faculties which the jury cannot be assumed to possess, the same result follows.

To Admit the Witness, the judge must be satisfied that his qualifications are commensurate with the conclusion which he purposes to draw.²⁴

Preliminary Detail of Constituting Facts.—The witness will be required, as a matter of practice, to state the detail of constituting facts, so far as he reasonably can, upon which he bases his act of reasoning.²⁵

Special Training.—While the qualifications of the skilled observer as to railroad matters are usually gained through employment in the railroad business, it is not necessary that this should be the fact. One who like an experienced traveler,²⁶ has been brought into close connection with railroads in some other capacity may be regarded by the presiding judge as competent to draw certain inferences.

Protecting the jury.—Upon familiar administrative principles, the inference of the witness must be connected with his observation and no unnecessary intrusion upon the reasoning of the jury will be permitted. It naturally results that general expressions as, in case of an engineer, that he "could not have done more"²⁷ to avert an accident will not be received.

The evidence may cover the construction,²⁸ equipment,²⁹ operation³⁰ and methods of transportation of goods³¹ or animals³² provided it is given by a trained man.³³

§ 732. **Street Railways.**³⁴—The technical learning of the trolley or street railway is second in importance, if inferior at all, only to that of the railroad.³⁵

24. *Dillburn v. Louisville & N. R. Co.* (Ala. 1908), 47 So. 210; *Dietrichs v. Lincoln, etc., R. Co.*, 13 Nebr. 361, 13 N. W. 624 (1882). See also *Horton v. Louisville & N. R. Co.* (Ala. 1909), 49 So. 423 (engineer); *Pennsylvania Co. v. Whitney*, 169 Fed. 572, 95 C. C. A. 70 (1909) (brakeman).

25. *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44, 65 S. W. 210 (1901).

26. *Central of Georgia Co. v. Storrs* (Ala. 1910), 53 So. 746.

27. *Macon, D. & S. R. Co. v. Stewart*, 125 Ga. 88, 54 S. E. 197 (1906).

28. *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399 (1888) (dangerous).

29. *Birmingham R., etc., Co. v. Baylor*, 101 Ala. 488, 13 So. 793 (1893) (switch secured); *Baltimore, etc., R. Co. v. Elliott*, 9 App. Cas. (D. C.) 341 (1896) (coupling).

30. That shutting off steam causes the

smoke to rise from the locomotive is a proper subject for skilled inference. *Harrison v. New York Cent. & H. R. R. Co.*, 195 N. Y. 86, 87 N. E. 802 (1909).

31. *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, 31 Am. Rep. 353 (1878); *Ft. Worth, etc., R. Co. v. Harlan* (Tex. Civ. App. 1901), 62 S. W. 971 (properly packed and iced with a given quantity of ice).

32. *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692 (1887) (suffering from heat).

33. *Hoyt v. Long Island R. Co.*, 57 N. Y. 678 (1874); *Missouri Pac. R. Co. v. Jurrard*, 65 Tex. 560 (1886) (safety of track). Propriety of expert testimony on railroad operations, see note, *Bender ed.*, 164 N. Y. 436.

34. 3 Chamberlayne. Evidence, § 2041.

35. **Sanding track.**—As a matter of reasoning, suitably qualified motormen may state as to how far the providing of appliances by

In much the same way as the latter, and presenting many instructing analogies to it, the construction, equipment and operation of transportation lines for carrying passengers, express or freight, employing electricity as a motive power,³⁶ present numerous opportunities for utilizing the reasoning of skilled observers.

§ 733. **Telegraphing.**³⁷— The use of electricity for the conveyance of intelligence is an art in which a high degree of skill may be acquired. Facts of special knowledge³⁸ and inferences relating to technical matters can be stated only by the trained observer.

The ordinary construction³⁹ and equipment of telegraph lines may, in their usual incidents, be established in the same way.

which sand may be placed on slippery rails is essential to the safety of employees and passengers. *Mayer v. Detroit, Y., A. A. & J. R. Co.*, 152 Mich. 276, 116 N. W. 429, 15 Detroit Leg. N. 231 (1908).

36. **Electricity as a motive power.**— Use of electricity as a motive power in street cars has had a marked effect in bringing the man of science to the aid of the courts in the numerous cases resulting from the employment

of the new agency. *Nolan v. Newton St. Ry. Co.*, 206 Mass. 384, 92 N. E. 505 (1910).

37. 3 Chamberlayne, Evidence, § 2041a.

38. *Postal Telegraph-Cable Co. of Texas v. S. A. Pace Grocery Co.* (Tex. Civ. App. 1910), 126 S. W. 1172.

39. *Barrett v. New England Telephone & Telegraph Co.*, 201 Mass. 117, 87 N. E. 565 (1909) (setting poles).

CHAPTER XXIX.

ESTIMATES.

Estimates, 734.

Administrative requirements, 735.

Age, 736.

Capabilities; animate objects, 737.

mechanical, 738.

causation, 739.

Dimensions, speed, weight, etc., 740.

§ 734. **Estimates.**—The inferences of witnesses, ordinary or skilled, are with great frequency received in the form of an estimate.¹ Indeed it may fairly be said that such estimating is a constant and necessary incident of daily life. Where the results are intuitive, as they commonly are, the statement is one of fact. Exactness is confessedly only approximate, the process of estimating being like many acts of judgment, the application of a standard, of distance, quality, quantity, value or the like, to certain observed phenomena.

§ 735. **Administrative Requirements.**—Estimates, like other forms of reasoning by witnesses, present a grade of secondary evidence. An adequate forensic necessity for receiving it must accordingly be shown. Judicial administration does not accept secondary proof while the primary can reasonably be required. Should exact measurements of the phenomena by the application of any standard have been made and be available, estimates, except occasionally by way of corroboration, will be rejected.² In many cases, however, necessity is shown for the reception of the secondary evidence.³

1. "It came within that class of cases where evidence is received from necessity, arising from the impossibility of stating those minute characteristics of appearance, sound, and the like, which, nevertheless, may lead the mind to a satisfactory conclusion, and be reasonably reliable in judicial investigations. Among instances of this class, forming an exception to the general rule, is the proof of identity in a great variety of cases; such as the identity of person, handwriting, animals, and inanimate objects: and so where the identity is detected by the ear, or by the sound of the human voice, of a musical instrument, the discharge of a pistol, and the like. In the same class are opinions as to distances, size, weight, and age. In

these and an infinite variety of other cases, the conclusion is drawn from evidence addressed to the eye or ear, or both, and which, from its very nature, cannot be described to another. If it could be, so as to enable a jury to decide, then the necessity of receiving the opinion, if it may be so called, would not exist, and the opinion should not be received." *State v. Shinhorn*, 46 N. H. 497, 501, 88 Am. Dec. 224 (1866).

2. *Rothchild v. New Jersey Cent. R. Co.*, 163 Pa. St. 49, 29 Atl. 702 (1894). See also *Blauvelt v. Delaware, etc., R. Co.*, 206 Pa. St. 141, 55 Atl. 857 (1903).

3. *Pennsylvania Co. v. Conlan*, 101 Ill. 93, 101 (1881).

Administration further requires, not only that a suitable necessity for receiving the estimate should be shown, but also that the latter should be so probatively relevant as to be rationally helpful to the jury. That this should be so, it is insisted, as in other connections where judicial use is made of the results of observation, that the witness should have had both adequate opportunities for observing⁴ and sufficient mental powers for coördinating what he has seen into an act of helpful reasoning. It is to be understood, moreover, that the fact to be established by the act of reasoning is *objectively* relevant.⁵

§ 736. **Age.**— From appearances presented to his observation, a qualified witness⁶ may estimate the *age* of a given individual. The status of the person is immaterial. The estimate may apply equally well to adults,⁷ minors⁸ and even to children,⁹ animals¹⁰ or inanimate objects,¹¹ but if the person or object is in court the jury will be permitted to judge for themselves without any estimates from witnesses.¹²

§ 737. **Capabilities; Animate Objects.**— The inference that one with ordinary powers could have heard a given sound¹³ may be estimated by a witness who has had sufficient opportunity for observing the attending phenomena. Whether a person *actually did* hear a given conversation or individual sound

4. *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843 (1898) (control horse); *Pridmore v. State* (Tex. Cr. App. 1898), 44 S. W. 177.

5. *Chicago, etc., R. Co. v. O'Sullivan*, 143 Ill. 48, 32 N. E. 398 (1892).

6. *People v. Bond* (Cal. App. 1910), 109 Pac. 150. Knowledge of the color of the hair of a person in question and of his strength and activity is not a sufficient qualification. *Hartshorn v. Metropolitan L. Ins. Co.*, 55 N. Y. App. Div. 471, 67 N. Y. Suppl. 13 (1900). These preliminary details of observation, the witness may reasonably be called upon to state. *People v. Davidson*, 240 Ill. 191, 88 N. E. 585 (1909).

7. *State v. Grubb*, 55 Kan. 678, 41 Pac. 951 (1895); *Com. v. O'Brien*, 134 Mass. 198 (1883). Most courts have admitted non-expert opinion as to age but it has recently been excluded in New Jersey. *State v. Koettgen*, 89 N. J. L. 678, 99 Atl. 400.

8. *State v. Bernstein*, 99 Iowa 5, 68 N. W. 442 (1896).

9. *People v. Johnson*, 70 Ill. App. 634 (1896); *McFadden v. Benson*, Wils. (Ind.) 527 (1874); *Stewart v. Anderson*, 111 Iowa 329, 82 N. W. 770 (1900).

10. *Clague v. Hodgson*, 16 Minn. 329 (1871).

11. *Bufford v. Little* (Ala. 1909), 48 So. 697 (stumps old or recently cut); *Standefer v. Aultman Machinery Co* (Tex. Civ. App. 1904), 78 S. W. 552 (thresher old and worn out).

12. *State v. Megorden* (Ore. 1907), 88 Pac. 306 (wound); *State v. Robinson*, 32 Oreg. 43, 48 Pac. 357 (1897). See also *Ham v. State* (Ala. 1908), 47 So. 126.

Where there is a conflict in the evidence as to the age of the witness the jury have a right to consider his size, appearance, etc., in connection with the other evidence, but the better rule is to have such description supplied by evidence which can be preserved in the record. But where no evidence has been offered on the subject and where the attention of the jury has not been called to the appearance of the witness for that purpose it is error to accept the finding of the jury on the question. *Quinn v. People*, 51 Col. 350, 117 Pac. 996, 40 L. R. A. (N. S.) 470 (1911).

13. *Chicago, etc., R. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559 (1888) [*affirming* 24 Ill. App. 203 (1887)]; *Crane v. Michigan Cent. R. Co.*, 107 Mich. 511, 65 N. W. 527 (1885).

may properly be rejected as being an inference involving too large a porportion of the element of reasoning to be warranted by any administrative necessity shown to exist.¹⁴ A suitably qualified witness may be allowed to state, under proper conditions of necessity and relevancy, his inference by way of estimate as to whether a certain person could, in a particular situation, have observed a certain occurrence.¹⁵ So an opinion will be received as to whether a given individual could have smelt a particular odor.¹⁶

§ 738. [Capabilities]; Mechanical.— In passing from animate to inanimate objects, the same administrative rule is found continuing to apply. The possibility that a given object could have produced a particular result, e.g., a razor make a special wound,¹⁷ may be proved by the estimate of an observer. Whether a machine,¹⁸ mechanical device¹⁹ or a coördinated unit of many parts, such as a manufacturing establishment,²⁰ is capable of turning out a stated amount of work, may properly be estimated in the same way.

§ 739. [Capabilities]; Causation.— Whoso understands causation, comprehends the universe. For practical purposes, the number of instances in which an estimate may properly be made as to the existence of a relation of cause and effect are innumerable. In fact it is in connection with the category of causation alone that the uniformity of nature or of conduct upon which, as the ultimate basis of all sound induction, evidence is based, becomes practically available for the discovery of truth.

So estimates may be received as to the cause of natural occurrences,²¹ the effect of the application of force,²² the cause of sickness²³ or injury²⁴ to human beings or the actions of animals.²⁵ The same rule permits the observer to state the effect of certain phenomena²⁶ and the witness need not confine his

14. *Dyer v. Dyer*, 87 Ind. 13 (1882)

15. *Case v. Perew*, 46 Hun 57 (1887) (light on shore from harbor).

16. *Adler & Co. v. Pruitt* (Ala. 1910). 53 So. 315 (sewage disposal plant).

17. *State v. Knight*, 43 Me. 11. 130 (1857).

18. *McCormick Harvesting Mach. Co. v. Cochran*, 64 Mich. 636, 31 N. W. 561 (1887) (harvester); *Sprout v. Newton*, 48 Hun (N. Y.) 209, 15 N. Y. St. 699 (1888).

19. *Romona Oölitic Stone Co. v. Shields* (Ind. 1909). 88 N. E. 595 (derrick).

Basis of estimate.— Studying a similar machine may be regarded by judicial administration as furnishing satisfactory opportunities for observation in order to form an estimate helpful to the jury. *Sprout v. Newton*, 48 Hun (N. Y.) 209, 15 N. Y. St. 699 (1888).

20. *Fletcher v. Prestwood* (Ala. 1905), 38 So. 847 (sawmill); *Paddock v. Bartlett*, 68 Iowa 16, 25 N. W. 906 (1885) (pork-pack-

ing); *Burns v. Welch*, 8 Yerg. (Tenn.). 117 (1835) (sawmill).

21. *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725 (1894).

22. *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585, 36 Pac. 125 (1894); *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64 (1893).

23. *Suddeth v. Boone*, 121 Iowa 258, 96 N. W. 853 (1903) (that smell of sewer outlet made witness sick); *Pullman Palace Car Co. v. Smith*, 79 Tex 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215 (1890).

24. *Everett v. State*, 62 Ga. 65 (1878); *State v. Smith*, 22 La. Ann. 468 (1870).

25. **Fright of horse.**—*Clinton v. Howard*, 42 Conn. 294, 307 (1875); *Yahn v. Ottumwa*, 60 Iowa 429, 15 N. W. 257 (1883); *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. 643 (1899).

26. *Seagel v. Chicago, etc., R. Co.*, 83 Iowa 380, 49 N. W. 990 (1891) (collision with a locomotive).

remarks to actual conditions,²⁷ but may extend them to hypothetical cases and inferences²⁸ and the present probabilities of future effects.²⁹

§ 740. **Dimensions; Speed; Weight; Etc.**—Dimensions, length, breadth, thickness, width, and the like,³⁰ are frequently estimated by the inference of ordinary observers. It is equally open to a qualified witness to state any *change* which he has observed in these or other dimensions.³¹

Where *exact measurements* have been taken or attempted, the result may be stated by any person who is aware of it from observation.³² One found to be qualified may properly state his estimate upon area,³³ or grade,³⁴ height,³⁵ direction,³⁶ distance,³⁷ expense,³⁸ identity,³⁹ location,⁴⁰ number,⁴¹ quality,⁴²

27. Technical inferences.—Should the reasoning of the witness relate to a matter of special knowledge and no qualifying acquirements be shown the inference will be rejected. *Marshall v. Bingle*, 36 Mo. App. 122 (1889).

28. *Gulf, etc., R. Co. v. Richards*, 83 Tex. 203, 18 S. W. 611 (1892) (railroad construction).

29. *West v. State*, 71 Ark. 144, 71 S. W. 483 (1903) (nuisance on health); *Pennsylvania Co. v. Mitchell*, 124 Ind. 473, 24 N. E. 1065 (1890); *Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78 (1882) (drainage); *Rochester, etc., R. Co. v. Budlong*, 6 How. Pr. (N. Y.) 467 (1851) (railroad layout).

30. *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201 (1862); *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102 (1903) (two-throw switch); *Park v. Northport Smelting & Refining Co.*, 92 Pac. 442 (1907) (board feet). A shoemaker may state that a certain boot will fit a given foot. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (1893).

31. *Romack v. Hobbs* (Ind. Sup. 1892), 32 N. E. 307 (ditch).

32. *Busch v. Kilborne*, 40 Mich. 297 (1879) (unprofessional log scaler).

33. *Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78 (1882); *Dashiel v. Harshman*, 113 Iowa 283, 85 N. W. 85 (1901).

34. Where the witness has seen the work done in changing the grade of a street, he may state his estimate as to the height of the change, though he has not actually measured it. *Downey Bros. Spoke & Bending Co. v. Pennsylvania R. Co.*, 219 Pa. 32, 67 Atl. 916 (1907).

35. *Downey Bros. Spoke & Bending Co. v. Pennsylvania R. Co.*, 219 Pa. 32, 67 Atl. 916 (1907) (grade). See also *Vermillion Co. v.*

Vermillion, 6 S. D. 466, 61 N. W. 802 (1894) (column water from main); *Richardson v. State* (Tex. Cr. App. 1906), 94 S. W. 1016.

36. *State v. Shinborn*, 46 N. H. 497, 89 Am. Dec. 224 (1866); *Ohio, etc., R. Co. v. Wrape*, 4 Ind. App. 108, 30 N. E. 427 (1891) (cattle struck); *State v. Knight*, 43 Me. 11 (1857).

37. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592 (1899); *People v. Alviso*, 55 Cal. 230 (1880); *Illinois, etc., R. Co. v. Swisher*, 53 Ill. App. 411 (1893); *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201 (1862).

Railroad matters.—An ordinary witness properly qualified by opportunities for observation may estimate the distance to which the headlight of a given locomotive will throw its light. *St. Louis, M. & S. E. Ry. Co. v. Shannon* (Ark. 1905), 88 S. W. 851.

38. *Thompson v. Keokuk, etc., R. Co.*, 116 Iowa 215, 89 N. W. 975 (1902).

39. *Jackson v. State*, 52 So. 730 (1910) (gun); *State v. Vanella*, 40 Mont. 326, 106 Pac. 364 (1910) (voice).

Complete certainty is not required. *State v. Richards* (Iowa 1905), 102 N. W. 439; *Sparkman v. State* (Tex. Cr. App. 1911), 135 S. W. 134 (impression); *Buzan v. State* (Tex. Cr. App. 1910), 128 S. W. 388. Some satisfactory basis of inference must, however, be shown. That the accused corresponded with a horse thief in "size, shape and build" is not sufficient. *Pool v. State* (Tex. Cr. App. 1905), 88 S. W. 350.

40. *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550 (1902) (wagon); *International & G. N. N. R. Co. v. Morin* (Tex. Civ. App. 1909), 116 S. W. 656 (railroad tracks). See also *McDonald v. Wood*, 118 Ala. 589, 22 So. 489, 24 So. 86 (1897) (survey line).

41. A witness, skilled or ordinary, may

quantity,⁴³ or resemblance.⁴⁴ In the same category fall estimates of sound⁴⁵ and the speed of objects⁴⁶ as automobiles,⁴⁷ animals,⁴⁸ railroad⁴⁹ and trolley cars,⁵⁰ comparative speed,⁵¹ temperature,⁵² time,⁵³ value,⁵⁴ and weight.⁵⁵

state the average number of farm hands employed during a given time. *Fowler v. Fowler*, 111 Mich. 676, 70 N. W. 336 (1897).

42. A qualified witness may testify that the grade of gold employed in certain jewelry is inferior to that designated by the marks with which it is stamped. *Moline Jewelry Co. v. Dinnan*, 81 Conn. 111, 70 Atl. 634, 17 L. R. A. (N. S.) 1119 (1908).

43. *Baker v. Cotney* (Ala. 1905), 38 So. 131; *Bryant Lumber Co. v. Crist* (Ark. 1908), 112 S. W. 965 (timber); *Montgomery v. Southern Power Co.* (S. C. 1910), 68 S. E. 1047 (timber); *Berge v. Kittleson* (Wis. 1907), 114 N. W. 125 (milk).

44. *Com. v. Dorsey*, 103 Mass. 412 (1869) (that hair resembled that of deceased). The estimate that a child was begotten by A, i.e., that A was his father, because of certain physical resemblances to him in color, feature and the like, has been regarded by a majority of American jurisdictions as too fanciful and conjectural to be of assistance to the jury. *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587 (1895); *People v. Carney*, 29 Hun 47 (1883). As is said by the court in Maryland [*Jones v. Jones*, 45 Md. 144, 152 (1876)], "We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another, with equal knowledge of the parties between whom the resemblance is supposed to exist. Where the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered. But to allow third persons to testify as to their notions of the resemblance supposed to exist between parties, would be allowing that to be given as evidence upon which no rational conclusion could be based, but which might readily serve to mislead the jury." This is true in case of an infant of tender years.

45. That a certain sound appeared to be that of a collision is not objectionable as opinion evidence. *Binsbacher v. St. Louis Transit Co.*, 108 Mo. App. 1, 82 S. W. 546 (1904).

46. *Johnson v. Coey*, 142 Ill. App. 147 (1908). Estimates of witnesses of speed even though undisputed are not physical facts sufficient to overthrow the direct testimony of a witness as to his acts. *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916 A 943 (1913).

47. *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526 (1910). See also *Scholl v. Grayson* (Mo. App. 1910), 127 S. W. 415; *State v. Watson* (Mo. 1909), 115 S. W. 1011.

48. *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550 (1902); *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280 (1896).

49. *Flanagan v. New York Cent., etc., R. Co.*, 173 N. Y. 631, 66 N. E. 1108 (1903) [affirming 70 N. Y. App. Div. 505, 75 N. Y. Suppl. 225 (1902)].

50. *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11, 83 N. W. 1036 (1900).

51. *Kansas City, etc., R. C. Co. v. Crocker*, 95 Ala. 412, 11 South. 262 (1891) (car); *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64 (1893); *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11, 83 N. W. 1036 (1900).

52. *Leopold v. Van Kirk*, 29 Wis. 548 (1872).

53. *Atlanta, etc., R. Co. v. Strickland*, 116 Ga. 439, 42 S. E. 864 (1902) (short time); *Bayley v. Eastern R. Co.*, 125 Mass. 62 (1878); *McGrath v. Great Northern R. Co.*, 80 Minn. 450, 83 N. W. 413 (1900). The rule is the same even in criminal cases. *State v. Williams* (Nev. 1909), 102 Pac. 974.

54. See Chapter xxx. §§ 741 *et seq.*

55. *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972 (1903) (counter balance on a derrick); *People v. Wilson*, 16 N. Y. Suppl. 583 (1891) (blue stone).

CHAPTER XXX.

VALUE.

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§ 741. *Value*.¹— Few estimates by observers are so frequently utilized by judicial administration as is that of value.² The special reason for this lies in the fact of its intimate connection with the substantive law relating to damages. In most actions at law this is the object sought and the ascertainment of damages, being in terms of money, has necessarily given to value, in legal acceptation, a special meaning. Of the broader signification assigned by political economy, that of the power of the article in question to command other commodities, exchange or barter, the law knows little or nothing. Legally speaking, value means very nearly what the political economist understands by *price*. Value, then, may, for present purposes, be defined as the amount of money which real estate, personal property or services will command in an open market.

1. 3 Chamberlayne, Evidence, § 2096.

2. Taft v. Com., 158 Mass. 526, 33 N. E. 1046 (1893).

§ 742. [Value] Various Methods of Proof.³— The fact of value is, in general, determined, according to certain considerations hereafter mentioned, in one of two ways: (1) The establishment of a market value; (2) The estimates of observers, ordinary or skilled, or the judgments of experts.

§ 743. Market Value.⁴— Of the two modes of proving value, it has been said that their respective employment is dependent upon whether the existence of a *market value* can or cannot be assumed. The definition of the term “market value” need furnish no particular difficulty. It is, using “value” as equivalent to price, and may fairly be defined as: The price current, the price a commodity will bring when sold in open market. Market value is regulated by the proportion which is actually brought to market and the demand of those who are willing to pay the natural price of the article. This latter, “natural price,” as political economy might well put it, represents the rent, labor and profit which must be paid in order to bring the commodity to the market in question. Wherever real estate,⁵ personal property⁶ or services can fairly be said to have a true market value,⁷ it may be proved, as a fact,⁸ as it was at any relevant time” and for any germane use.¹⁰ The method of establishing it, however difficult in practice, is, in theory at least, simple from the standpoint of judicial administration in relation to evidence.

Absence of Market Value.— Should it be claimed that there is no market value for a given commodity or piece of land, it will be sufficient in order to let in other evidence, that the court should be satisfied that there is in fact no market value.¹¹ It will not be necessary to make the existence or non-existence of a market value an issue in the case.

3. 3 Chamberlayne, Evidence, §§ 2097–2099

4. 3 Chamberlayne, Evidence, §§ 2099a, 2099b

5. Gearhart v. Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891 (1902); Sullivan v. Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745 (1902).

6. Missouri, etc., R. Co. v. Truskett, 184 U. S. 480, 22 S. Ct. 943, 46 L. ed. 1259 (1902) (cattle).

7. Smith v. Griswold, 15 Hun (N. Y.) 273 (1878); Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App. 1908), 113 S. W. 767

The fact that there is a market value must first be established as a preliminary matter. Smith v. Griswold, 15 Hun (N. Y.) 273 (1878).

8. Cost of production.— Where a market value is shown to exist, the cost of production; Chamberlayne, Evidence, § 2175c) is immaterial. Moelering v. Smith, 7 Ind. App. 451, 34 N. E. 675 (1893).

9. Atchison, etc., R. Co. v. Gabbert, 34 Kan. 132, 8 Pac. 218 (1885); Park v. Chateaugay Iron Co., 8 N. Y. St. 507 (1887); McNicol v. Collins, 30 Wash. 318, 70 Pac. 753 (1902); Boyd v. Gunnison, 14 W. Va. 1 (1878).

10. Gerhart v. Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891 (1902). Knowledge of market value as it exists for some purpose unconnected with the case, is not sufficient to qualify a witness. Loesch v. Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682 (1896). The estimate must be confined to the precise quality involved in the inquiry. Todd v. Warner, 48 How. Pr. (N. Y.) 234 (1871). Opinion evidence on damage, see note, Bender ed., 29 N. Y. 39. Proper evidence on question of value, see note, Bender ed., 141 N. Y. 140. To prove value of property basis for, see note, Bender ed., 43 N. Y. 284.

11. Pennington v. Redman Van & Storage Co., 34 Utah 223, 97 Pac. 115 (1908).

§ 744. [Market Value]; Hearsay.¹²— In connection with proof of market value, judicial administration sanely rejects the influence of the so-called "hearsay rule." Courts have recognized that there is, in reality, no valid distinction to be drawn between the inference that a statement is true because it has been made and any other inference which may rationally be inferred from its existence. In other words, it is perceived, with increasing clearness, that the assertive capacity of a statement differs in no essential particular from its independently relevant function. In either case, whatever satisfies the reason is given probative weight, more especially in accordance with what it has been thought convenient to designate the Relevancy of Spontaneity and the Relevancy of Regularity.

The present practice seems an illustration of the same tendency. Market value is a fact.¹³ The witness may derive his knowledge as to it from the information furnished by others.¹⁴ It may even be learned from an examination of stock or market reports,¹⁵ price lists,¹⁶ trade circulars,¹⁷ sales of similar property¹⁸ and the like.¹⁹ In short, a witness may testify to the value of property if his knowledge of it has been derived through the general avenues of information to which the ordinary business man resorts, to inform himself as to values for the proper conduct of his affairs. Where the market report, trade circular or the like has been credited by the person against whom it is offered, an additional administrative reason for receiving it is furnished.²⁰

As an administrative matter, the court may properly require to be satisfied, before admitting the stock report or similar publications, that the methods of their compilation are such as to entitle them to credit.²¹

§ 745. [Market Value]; Individual.²²— Still, even in this connection, the

12. 3 Chamberlayne, Evidence, § 2099c.

13. Franklin v. Krum, 171 Ill. 378, 49 N. E. 513 (1898).

14. Thatcher v. Kaucher, 2 Colo. 698 (1875); Cleveland, etc. R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804 (1903) (horses).

15. Rodee v. Detroit F. & M. Ins. Co., 74 Hun (N. Y.) 146, 26 N. Y. Suppl. 242 (1893); Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202 (1875).

16. Willard v. Mellor, 19 Colo. 534 (1894) (daily price-circulars excluded); Marris v. Columbian Iron-Works, etc., Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851 (1892); Harrison v. Glover, 72 N. Y. 454 (1878) (price lists admissible); Cliquot v. U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116 (1865).

17. Tyson v. Chestnut, 118 Ala. 387, 24 So. 73 (1898) (postal cards excluded); Smith v. North Carolina R. Co., 68 N. C. 107 (1873).

18. 3 Chamberlayne, Evidence, §§ 2175o

et seq.; St. Louis Southwestern Ry. Co. v. Arkansas & T. Grain Co. (Tex. Civ. App. 1906), 95 S. W. 636.

19. Whitney v. Thacher, 117 Mass. 523 (1875) (prices current); Hoxsie v. Empire Lumber Co., 41 Minn. 548, 42 N. W. 476 (1889).

20. Western Wool Commission Co. v. Hart (Tex. Sup. 1892), 20 S. W. 131.

21. Whelan v. Lynch, 60 N. Y. 474 (1875); Fairley v. Smith, 87 N. C. 367 (1882).

22. 3 Chamberlayne, Evidence, § 2099d.

23. Long v. Douthitt, 142 Ky. 427, 134 S. W. 453 (1911); Cobb v. Whitsett, 51 Mo. App. 146 (1892); Hess v. Missouri Pac. R. Co., 40 Mo. App. 202 (1890); Hoskins v. Missouri Pac. R. Co., 19 Mo. App. 315 (1885); Kent v. Miltenberger, 15 Mo. App. 480 (1884) (editor of a newspaper); Flynn v. Wokl, 10 Mo. App. 582 (1881).

hearsay rule is far from being without influence. The unsworn statement of an identified individual in its *assertive* capacity, i.e., as evidence of the facts announced, is still rejected.²³ Only to hearsay in its blended or composite²⁴ form has administrative indulgence been accorded.²⁵ No particular credit is placed in any single voice of the blended whole.²⁶ To do so would be illegal under the hearsay rule.²⁷

Printed hearsay.—Printed hearsay is no more admissible in this connection than it would be in any other. Should a market report in a newspaper be the work of an identified firm of stock-brokers, the quotations will be rejected as individual hearsay.²⁸

§ 746. [Market Value]; Qualifications.²⁹—The indispensable and sufficient qualification of a witness who undertakes to testify as to the fact of market value is that he should know what it is.³⁰ Proof on this point must be affirmatively³¹ made to the satisfaction of the court unless the circumstances disclosed in the case may warrant the presiding judge in assuming provisionally, as an administrative matter, that such qualifications exist.³² A skilled witness acquainted with a particular market may give his conclusion from observation³³ or his judgment as an expert as to what is the fair value of a given commodity in that market. It is probably in this sense that market value has been said to be a matter of opinion.³⁴ The probative force of the reasoning will be determined, in large measure, by the intimacy of the acquaintance with the market in question which the witness shows.³⁵

§ 747. [Market Value]; The proper Market.³⁶—The market in which value is to be proved is, as a rule, easily determined. If property possesses a market

24. §§ 873 et seq.

25. *Harrison v. Glover*, 72 N. Y. 451 (1878); *Ferris v. Sutcliff*, 1 Alb. L. J. (N. Y.) 238 (1870); *Lush v. Druse*, 4 Wend. (N. Y.) 313 (1830); *Cliquot v. U. S.*, 3 Wall. (U. S.) 114, 18 L. ed. 116 (1865).

26. "It [a list of sales and prices collected from the stock exchange] is all hearsay; but it is the only evidence we can have: it is the only evidence we have of the price of sales of any description. I do not receive it as the precise thing, but as what is in the ordinary transactions of mankind received as proper information; and I suppose there is hardly a gentleman living who would not act on this paper." *De Berenger's Trial*. *Gurney's Rep.* 188 (1814), per *Ellenborough*, L. C. J.

27. *Lewis v. Ins. Co.*, 10 Gray 511 (1858); *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452 (1900); *Alfonso v. U. S.*, 2 Story 426 (1843).

28. *National Bank of C. v. New Bedford*, 175 Mass. 57, 56 N. E. 288 (1900).

29. 3 Chamberlayne, *Evidence*, §§ 2099e, f.

30. *Missouri, K. & T. Ry. Co. of Texas v. Moss* (Tex. Civ. App. 1911), 135 S. W. 626 (cattle).

31. *Russell v. Hayden*, 40 Minn. 88, 41 N. W. 456 (1889); *Missouri, etc., R. Co. v. Truskett*, 186 U. S. 480, 22 S. Ct. 943, 46 L. ed. 1259 (1902).

32. *Cleveland, etc., R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804 (1903) (owner of horses); *McLennan v. Minneapolis, etc., Elevator Co.*, 57 Minn. 317, 59 N. W. 628 (1894) (wheat).

33. *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 315 (1885).

34. *Brockman Commission Co. v. Aaron* (Mo. App. 1910), 130 S. W. 116.

35. *Suttle v. Falla*, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338 (1887).

36. 3 Chamberlayne, *Evidence*, § 2099g.

value at the place involved in the inquiry, evidence is properly directed to establishing it at that point.³⁷ Should the question arise as to the value of personal property converted or injured the damages are assessed in relation to the market value as it existed at the time and place of such conversion or injury. In a case of a contract for the delivery of goods at a particular market, damages are to be estimated in accordance with the market value of the property as it was at the time and place of delivery. Should it be affirmatively shown³⁸ that the land or chattels have no market value in the place where it is to be computed under the rules of substantive law, proof is to be made of the market value as it exists in the nearest³⁹ or if a market other than the nearest is the controlling one,⁴⁰ in the latter. Incessant reference is being made to "fair market value" in connections where, as is understood by every one, there is, strictly speaking, no market value whatever. To parcels or tracts of land are to be assigned their just market value by the jury, under the instructions of the judge. Unique articles of personal property, rare coins, engravings, paintings and the like, are to be fairly appraised by the jurors at this same "market value." In legal usage, the phrase is unceasingly employed.⁴¹ What is meant by it? Confessedly, there is no actual market for these things.

There are *res non-fungibles*. The phrase, therefore, is not to be taken literally. Apparently, what is meant by it is this: The court is leaving to the jury to say what price would result, under the circumstances of the case, were the conditions of an ideal market to be applied to the property in question. The reference is always to the standard established of an entirely fair, fully attended and absolutely open place of sale.

§ 748. **Proof by Estimate; Time of Estimate.**⁴²—Where no relevant⁴³ market value can fairly be claimed to exist, the administrative situation is materially altered. Reliance must, in most cases, be placed upon the inference or estimate of witnesses applying the standard of money to the subject-matter in hand.⁴⁴ The period to which the inference relates may be prior⁴⁵ or subsequent⁴⁶ to

37. *Alabama Iron Works v. Hurley*, 86 Ala. 217, 5 So 418 (1889).

38. *Jones v. St. Louis, etc., R. Co.*, 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175 (1890).

39. This is usually demanded by the presiding judge. *Porter v. Chandler*, 27 Minn. 301, 7 N. W. 142, 38 Am. Rep. 293 (1880); *McDonald v. Unaka Timber Co.*, 48 Tenn. 38, 12 S. W. 420 (1889).

40. *Hogan v. Donohue*, 49 Ill. App. 432 (1893); *Aulls v. Young*, 98 Mich. 231, 57 N. W. 119 (1893); *French v. Piper*, 43 N. H. 439 (1862).

41. *Cooper v. Randall*, 59 Ill. 320 (1871); *Daly v. Kimball Co.*, 67 Ia. 135, 24 N. W. 756 (1885); *Russell v. Hayden*, 40 Minn. 90, 41

N. W. 456 (1889); *Beard v. Kirk*, 11 N. H. 400 (1840).

42. 3 Chamberlayne, Evidence, §§ 2099i-2100.

43. *Raridan v. Central Iowa R. Co.*, 69 Iowa 527, 29 N. W. 509 (1886) (cornstalks); *Beard v. Kirk*, 11 N. H. 397 (1840); *Erd v. Chicago, etc., R. Co.*, 41 Wis. 65 (1876).

44. *Morris v. Columbian Ironworks, etc., Co.*, 76 Md. 354, 25 Atl 417, 17 L. R. A. 851 (1892).

45. *Texas, etc., R. Co v. Cella*, 42 Ark. 528 (1884); *Johnson v. Farmers' F. Ins. Co.*, 106 Mich. 96, 64 N. W. 5 (1895).

46. *Paden v. Goldbaum* (Cal. 1894), 37 Pac 759; *Doane v. Garretson*, 24 Iowa 351 (1868); *Central Branch Union Pac. R. Co.*

that of the *res gestae*. A sole limitation imposed in respect to admissibility is that the court should feel, in view of the nature of the property,⁴⁷ the period to which the inference attaches is not too remote to be relevant and that, having in mind the "state of the case," the judge feels it to be necessary to receive it.

§ 749. **Change in Value.**⁴⁸— Ability to estimate value from observation necessarily implies, where the latter has extended over any considerable period, the power of declaring the occurrence of any *change* in value which has appeared during the interval. Adequate acquaintance with the property in question is essential.⁴⁹ These principles apply to animals,⁵⁰ personal property,⁵¹ real estate⁵² or to change in value induced by manufacture.⁵³

§ 750. **Relative Value.**⁵⁴— Even where a witness is ignorant of absolute value, he may be permitted to state the relative worth in money of two pieces of property.⁵⁵ The same rule applies to land.⁵⁶ "A man may know the effect on the relative value without being able to fix the actual market price."⁵⁷

§ 751. **Administrative Requirements; Necessity.**⁵⁸— A suitable administrative necessity for receiving the secondary evidence of an estimate must be shown to the court if the act of reasoning is to be received. Should it happen that all the facts can fully be placed before the jury or more satisfactory and convincing evidence can be submitted to the tribunal,⁵⁹ the inference will be rejected. On the contrary, should the constituting phenomena observed or the component elements of value be such that they cannot fully be placed before the jury,⁶⁰ or should it appear probable that the latter would have neither the special knowledge nor the acquired and developed mental powers necessary to coördinate the phenomena or facts presented into a rational estimate, a suitable administrative necessity for receiving the inference of a witness is deemed to have been established. In the latter case, an adequate necessity may well be deemed to have arisen for utilizing the services of a skilled observer.⁶¹ So estimates of

v. *Andrews*, 37 Kan. 162, 14 Pac. 509 (1887); *Greenfield First Nat. Bank v. Coffin*, 162 Mass. 180, 38 N. E. 444 (1894).

47. Where a stock of goods is not likely to change in value, an interval of seven years is not fatal. *Johnson v. Farmers' F. Ins. Co.*, 106 Mich. 96, 64 N. W. 5 (1895).

48. 3 Chamberlayne, Evidence, § 2101.

49. *Shimer v. Easton R. Co.*, 205 Pa. St. 648, 55 Atl. 769 (1903).

50. *Perine v. Interurban St. R. Co.*, 43 Misc. (N. Y.) 70, 86 N. Y. Suppl. 479 (1904) (horse); *Davis Bros. v. Blue Ridge Ry. Co.*, 81 S. C. 466, 62 S. E. 856 (1908) (cattle).

51. *New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60, 18 N. E. 182 (1888).

52. *Ohio, etc., R. Co. v. Taylor*, 27 Ill. 207 (1862).

53. *Hood v. Maxwell*, 1 W. Va. 219 (1866).

54. 3 Chamberlayne, Evidence, § 2101a.

55. *Kronsnable v. Knoblauch*, 21 Minn. 56 (1874).

56. *Dawson v. Pittsburgh*, 159 Pa. St. 317, 28 Atl. 171 (1891).

57. *Dawson v. Pittsburgh*, 159 Pa. St. 317, 28 Atl. 171 (1891).

58. 3 Chamberlayne, Evidence, §§ 2102-2105.

59. *Williams v. Hersey*, 17 Kan. 18 (1876); *Sanford v. Shepard*, 14 Kan. 228 (1875).

60. *Atchison, etc., R. Co. v. Harper*, 19 Kan. 529 (1878); *Lines v. Alaska Com. Co.*, 29 Wash. 133, 69 Pac. 642 (1902) (value of piano at Nome, Alaska).

61. *Pingery v. Cherokee, etc., R. Co.*, 78 Iowa 438, 43 N. W. 285 (1889); *Phillips v.*

the value of similar property or estimates more remote in time will not be received where better estimates are available. In most instances, where the property is fungible, has a market value, the disputed question is as to what that market value is. Where the property is not fungible, has no market-value, the determination of monetary worth must necessarily be one largely of estimate, of reasoning, of inference. After all, however, the ultimate question is, not as to what is the sum of these elements of value, appraised at a fair separate worth in money for each; but to what conclusion does all this mass of evidence rationally lead the mind of the expert or of the jury regarding the price which such a piece of property is fairly worth, i.e., as between fair men, the one willing to sell and the other to purchase the same on its reasonable merits. The more common the property the more persons will be found qualified to testify concerning it.⁶² Land is not fungible⁶³ so estimates as to its value are always admissible.

§ 752. [Administrative Requirements]; Relevancy demanded.⁶⁴—That the estimate of a witness should be received, it is essential that it be rationally helpful to the jury. It must be, in other words, probatively relevant⁶⁵ both objectively and subjectively considered. This means that the witness must be qualified.⁶⁶

§ 753. [Administrative Requirements; Qualifications of Witness; Adequate Knowledge].⁶⁷—That an estimate as to value should be received, it must, as has just been said, be subjectively relevant. In order for it to be so, the witness must be *qualified*, in the judgment of the court,⁶⁸ to throw light upon the matter in dispute. In case of an ordinary observer, this is equivalent to saying that he should be shown to have enjoyed reasonable opportunities for acquainting himself with the property or acts in question.⁶⁹ He must be shown to the court to have utilized these occasions to advantage.⁷⁰ He must, also, appear to possess the knowledge, experience and mental powers necessary to enable him to coördinate his observations into an act of reasoning upon which the jury might rationally rely.⁷¹ It is essential that the witness should be familiar with the specific property to be appraised⁷² as well as with the

Marblehead, 148 Mass. 326, 19 N. E. 547 (1889).

62. Jones v. Erie, etc., R. Co., 151 Pa. St. 30, 48, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758 (1892).

63. Derby v. Gallup, 5 Minn. 134 (1860).

64. 3 Chamberlayne, Evidence, §§ 2106-2113.

65. Clark v. Baird, 9 N. Y. 183 (1853).

66. Florence v. Calmet (Colo. 1908), 96 Pac. 183; Whitcomb v. Brant (N. J. Sup. 1908), 68 Atl. 1102.

67. 3 Chamberlayne, Evidence, §§ 2114, 2115.

68. The judge should find some real potential value in the estimate before admitting it. Rea v. Pittsburg & C. R. Co., 229 Pa. 106, 78 Atl. 73 (1910).

69. Avery v. New York Cent., etc., R. Co., 2 N. Y. Suppl. 101 (1888).

70. Pittsburg, V. & C. R. Co. v. Vance, 115 Pa. 332, 8 Atl. 764 (1886).

71. Gallagher v. Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673 (1891).

72. Crouse v. Holman, 19 Ind. 38 (1862) (real estate).

standard of value by which it is to be measured. Whatever assumptions may be made by administration, as a provisional matter, regarding the possession of knowledge as to value by witnesses who offer to give their estimates on the subject, two requirements must ultimately be satisfied if the evidence is to be received. (1) The knowledge must be shown to be *adequate*.⁷³ (2) It must be proved to be *actual*.⁷⁴ The witness may be qualified by his experience as appraiser,⁷⁵ or auctioneer⁷⁶ or broker⁷⁷ or as being in charge of real estate,⁷⁸ and mere residence in a community may be enough.⁷⁹ So public officers charged with the duty of appraising property,⁸⁰ like assessors,⁸¹ or dealers in property⁸² may be qualified.

§ 754. [Administrative Requirements]; Claim of Knowledge.⁸³—Should a witness assert that he knows the property in question, whether real,⁸⁴ or personal,⁸⁵ and is acquainted with its value, judicial administration may well be warranted for the sake of economizing time,⁸⁶ in holding that such a claim furnishes a *prima facie* ability to give a helpful estimate.⁸⁷ Should the actual

73. Butsch v. Smith (Colo. 1907), 90 Pac. 61; Arnd v. Aylesworth (Iowa 1907), 111 N. W. 407; Catlin v. Northern Coal & Iron Co. (Pa. 1909), 74 Atl. 56. Some foundation must be laid for the opinion of a witness as to value by showing that he has had the means of forming an intelligent opinion, derived, in part, from an adequate knowledge of the nature and kind of property in controversy. Western Union Telegraph Co. v. Coyle (Okl. 1909), 104 Pac. 367.

74. Schaaf v. Fries, 77 Mo. App. 346 (1898); Oregon Pottery Co. v. Kern, 30 Oreg. 328, 47 Pac. 917 (1897); Pennock v. Crescent Pipe Line Co., 170 Pa. St. 372, 32 Atl. 1085 (1895); Michael v. Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204 (1893); Gorgas v. Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715 (1891). Such witnesses "should affirmatively appear to have actual personal knowledge of the facts affecting the subject-matter of the inquiry." Michael v. Crescent Pipe Line Co., 159 Pa. St. 99, 104, 28 Atl. 204 (1893).

75. Lyman v. Boston City, 164 Mass. 99, 41 N. E. 127 (1895); State v. Sattley, 131 Mo. 464, 33 S. W. 41 (1895).

76. Amory v. Melrose, 162 Mass. 556, 39 N. E. 276 (1895).

77. Bristol County Sav. Bank v. Keavy, 128 Mass. 298 (1890); Griswold v. Gebbie, 126 Pa. St. 353, 17 Atl. 673, 24 Wkly. Notes Cas. 72, 12 Am. St. Rep. 878 (1889).

78. That the witness is not in business for himself, but is a clerk in the office of another, is not conclusive against his compe-

tency. Teele v. Boston City, 165 Mass. 88, 42 N. E. 506 (1895).

79. Hewlett v. Saratoga Carlsbad Spring Co., 84 Hun (N. Y.) 248, 32 N. Y. Suppl. 697 (1895).

Especially in large cities the word "neighborhood" is a relative one. The field which a witness may take into consideration in forming an opinion of the selling price of particular land should be reasonably adjacent thereto and embrace real estate of the same general character. Rea v. Pittsburg & C. R. Co., 229 Pa. 166, 78 Atl. 73 (1910).

80. Chandler v. J. P. Aqueduct, 125 Mass. 551 (1878); Swan v. Middlesex, 101 Mass. 177 (1869); Fowler v. Middlesex, 6 All. 97 (1863). See also Gayle v. Court of County Com'rs (Ala. 1908), 46 So. 261; Town of Ripton v. Town of Brandon, 80 Vt. 234, 67 Atl. 541 (1907).

81. Muskeget Island Club v. Nantucket, 185 Mass. 303, 70 N. E. 61 (1904).

82. Muskeget Island Club v. Nantucket, 185 Mass. 303, 70 N. E. 61 (1904); Allen v. Chicago & N. W. Ry. Co., 145 Wis. 263, 129 N. W. 1094 (1911).

83. 3 Chamberlayne, Evidence, §§ 2116, 2117.

84. Union Elevator Co. v. Kansas City Suburban Belt R. Co. (Mo. Sup. 1896), 33 S. W. 926.

85. State v. Montgomery (S. D. 1903), 97 N. W. 716 (hogs).

86. §§ 304 et seq.

87. Wichita R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. 75 (1887); Browne v. Moore, 32

erty, as well as other witnesses, may detail to the jury the constituting facts upon which he bases his estimate of value. This he may be permitted by the judge to do not only for the purpose of reinforcing the credibility of his own statement, but also for that of enlightening the court and jury as to his opportunities for observation and his mental power of coördinating what he has seen.¹⁷ Where the owner is not shown to have any familiarity with the value of a certain class of articles, such as jewelry,¹⁸ his inference as to it will be rejected.¹⁹ These principles apply to farmers,²⁰ householders,²¹ merchants,²² real estate owners,²³ or a claimant for services rendered.²⁴

§ 759. **Skilled Observer as Witness.**²⁵—The estimate of value may require the services of a skilled witness. The value of the property in question may be so far related to a particular profession, trade or calling, as to make the estimate regarding it a technical one. The personal property, for example, may not be fungible, have a market value. A rare gem or a painting by an old master has a value known accurately to the *connoisseur* alone and to him only within limits. The real estate may be adapted only to a particular use, and that an uncommon one. Its intrinsic value must be estimated, and the elements may be of an unusual nature. The services to be appraised may be those of a doctor or of a lawyer. Such cases are typical of a very large number of similar instances. This is the field of the skilled witness. The witness must be shown to be acquainted with the property²⁶ and qualified by experience²⁷ to give an estimate. Thus one specially qualified by skill and experience may testify as to the value of personal property,²⁸ real estate,²⁹ crops,³⁰ trees,³¹ or of similar property,³² or as to the value of services³³ in building

17. *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51 (1887); *Galveston, H. & S. A. Ry. Co. v. Giles* (Tex. Civ. App. 1910), 126 S. W. 282 (clothing).

18. *Gregory v. Fichtner*, 14 N. Y. Suppl. 891, 27 Abb. N. Cas. (N. Y.) 86, 21 N. Y. Civ. Proc. 1 [reversing 13 N. Y. Suppl. 593 (1891)].

19. *Armstrong v. Smith*, 44 Barb. (N. Y.) 120 (1865).

20. *Metropolitan St. Ry. Co. v. Walsh*, 197 Mo. 392, 94 S. W. 860 (1906).

21. *Frederick v. Sault*, 19 Ind. App. 604, 49 N. E. 909 (1898) (piano).

22. *Union Pac. R. Co. v. Lucas*, 136 Fed. 374, 69 C. C. A. 218 (1905).

23. *Shea v. Hudson*, 165 Mass. 43, 42 N. E. 114 (1895).

24. *Mercer v. Vose*, 67 N. Y. 56, 58 (1876).

25. 3 Chamberlayne, Evidence, §§ 2151-2170

26. *Ives v. Quinn*, 7 Misc. (N. Y.) 155, 27 N. Y. Suppl. 251 (1894) (renting).

27. *Buffum v. New York, etc., R. Co.*, 4 R. I. 221 (1856).

28. *Werten v. K. B. Koosa & Co.* (Ala. 1910), 53 So. 98 (damaged dry goods); *Lewis v. State* (Ala. 1909), 51 So. 308 (diamonds); *Echols v. State* (Ala. 1906), 41 So. 298 (stolen goods); *St. Louis & S. F. Ry. Co. v. Ewing* (Tex. Civ. App. 1910), 126 S. W. 625 (typewriters damaged by water).

29. *Bearss v. Copley*, 10 N. Y. 93 (1854).

Altering grade.—Raising the grade of a street may have an injurious effect upon the value of land. *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852 (1896).

30. *Colorado Farm & Live Stock Co. v. York* (Colo. 1906), 88 Pac. 181 (melons); *Anderson v. Chicago, B. & Q. Ry. Co.* (Neb. 1909), 120 N. W. 1114.

31. *Williams v. Hathaway*, 21 R. I. 566, 45 Atl. 578 (1900); *Cochran v. Casey* (Tex. Civ. App. 1910), 128 S. W. 1145 (size of chinquapin trees). See also *Mabry v. Ran-*

operations,³⁴ commercial employments³⁵ or professional services.³⁶ The skilled witness may go further and state his judgment as to what might be the value of real³⁷ or personal³⁸ property in case of certain contingencies.

§ 760. Skilled Witness testifying as an Expert.³⁹—The judgments of experts with regard to the value of property are received by judicial administration cautiously and under fixed conditions.⁴⁰ The administrative advantage obviously is that, in this way, one who has never seen the property may be able to apply to it what is perhaps a very accurate and discriminating standard of value. The primary requirement is that some forensic necessity should be shown for invoking the judgment of the expert. In any case, the judge presiding at a trial will insist that the judgment as to value of an expert be a well defined exercise of the reasoning faculty upon ascertained and identified facts. Conjecture and speculation are to be excluded. The judgment must be something more than a guess.⁴¹ Where an article of personal property possesses exceptional worth as in case of pedigreed horses,⁴² crops,⁴³ real estate,⁴⁴ or technical services⁴⁵ the judgment of the expert is frequently employed.

dolph (Cal. App. 1908), 94 Pac. 403 (orange grove).

32. *Morrison v. Watson*, 101 N. C. 332, 7 S. E. 795, 1 L. R. A. 833 (1882).

33. *Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180 (1897) (cost of a house); *Ingham Lumber Co. v. Ingersoll & Co.* (Ark. 1910), 125 S. W. 139 (sawing lumber); *Floore v. J. T. Burgher & Co.* (Tex. Civ. App. 1910), 128 S. W. 1152.

34. *O'Keefe v. St. Francis' Church*, 59 Conn. 551, 22 Atl. 325 (1890).

35. *Matter of Benton*, 71 N. Y. App. Div. 522, 75 N. Y. Suppl. 859 (1902).

36. *McDonald v. Dodge County*, 41 Nebr. 905, 60 N. W. 366 (1904).

37. *Vandine v. Burpee*, 13 Metc. (Mass.) 288, 46 Am. Dec. 733 (1847) (brick-kiln); *Brennan v. Corsicana Cotton-Oil Co.* (Tex. Civ. App. 1898), 44 S. W. 588; *Gauntlett v. Whitworth*, 2 C. & K. 720, 61 E. C. L. 720 (1849).

38. *Joy v. Hopkins*, 5 Denio (N. Y.) 84 (1847) (cow); *Houston, etc., R. Co. v. Shirley*, 89 Tex. 95, 31 S. W. 291 (1895) (railroad bonds).

39. 3 Chamberlayne, Evidence, §§ 2171-2171f.

40. A skilled witness, so testifying, need not have seen the property. *Ross v. Schrieves*, 199 Mass. 401, 85 N. E. 468 (1908).

41. *Comesky v. Postal Tel. Cable Co.*, 41 N.

Y. App. Div. 245, 58 N. Y. Suppl. 467 (1899) (damage by erection of telegraph poles).

42. *Southern Ry. Co. in Kentucky v. Graddy* (Ky. 1908), 33 Ky. Law Rep. 183, 109 S. W. 881 (thoroughbred colts); *Miller v. Smith*, 112 Mass. 470 (1873).

43. *Foster v. Ward*, 75 Ind. 594 (1881) (farmer); *Lawton v. Chase*, 108 Mass. 238 (1871) (logs); *International, etc., R. Co. v. Searight*, 8 Tex. Civ. App. 593, 28 S. W. 39 (1894) (grass).

44. *Fox v. Chicago, etc., Rapid Transit R. Co.*, 68 Ill. App. 417 (1896) (taking for railroad); *St. Louis, etc., R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069 (1893) (railroad); *Hunter v. Manhattan R. Co.*, 141 N. Y. 281, 36 N. E. 400 (1894) (elevated railroad); *Gerber v. Metropolitan El. R. Co.*, 3 Misc. (N. Y.) 427, 23 N. Y. Suppl. 166 (1893).

45. *Holiday v. Watson*, 6 Ky. L. Rep. 590 (1885); *Hiale v. Hiale's Estate*, 157 Mich. 45, 121 N. W. 465, 16 Detroit Leg. N. 244 (1909) (trimmer's wages); *Thomas v. Caulkett*, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369 (1885). Expert upon prices and values, see note, Bender ed., 144 N. Y. 9.

Practical Suggestions for Putting in Evidence of Expert.—There is only one sure way to examine one's own expert. First qualify him by asking him to state his experience in the subject on which he is to tes-

§ 761. [Skilled Witness Testifying as an Expert]; Probative Force of the Judgment; How Tested.⁴⁶—The proponent may increase the value of the expert's testimony by drawing from him his reasons,⁴⁷ and the basis of his judgment may also be elicited in cross-examination.⁴⁸ Inconsistent statements made by the witness at other times may be brought out⁴⁹ and the scope of the cross-examination is entirely within the discretion of the presiding judge.⁵⁰

§ 762. Probative Force of the Estimate of Value; Function of the Jury.⁵¹—Questions of fact are for the jury.⁵² Incidentally, they must determine the credibility, the belief-carrying quality, of witnesses and their statements. To this administrative truism, the probative force of estimates as to value furnishes no exception. Whether the reasoning be in the form of the inference or conclusion of an ordinary or skilled⁵³ observer or as represented in the judgment of the skilled witness testifying as an expert, its probative force is to be determined by the jury.⁵⁴ The latter are to consider and weigh them in connection with all other facts in the case.⁵⁵ The jury may, as usual in the event of conflict in the testimony, prefer one witness or set of witnesses to another as guides to their judgment.⁵⁶ That is entirely for them to decide, within the bounds of reason. If a view of the property has been given to the jury, the results of it may properly be regarded as part of the evidence in the case.⁵⁷

tify. Second, ask him if he has examined the property in question, when, and how thoroughly. Third, if he has formed an opinion as to its value. Fourth, what that opinion is. Fifth, what are the reasons for his opinion. If this order of questions is followed, by the time the fifth question is reached the expert is then ready to make a little speech on the subject explaining the whole situation and, if he is clever, so strengthening himself that he cannot be attacked with success on cross-examination. If any other procedure is adopted counsel lays himself open to all sorts of objections by clever opposing counsel which will embarrass the witness and confuse the jury and weaken the effect of anything the expert may finally be allowed to say.

46. 3 Chamberlayne, Evidence, § 2171g.

47. Cram v. Chicago, 94 Ill. App. 199 (1900).

48. Questions as to sales of adjacent property are always admissible. Snouffer v. Chicago, etc., R. Co., 105 Iowa 681, 75 N. W. 501 (1898); Brown v. Worcester, 13 Gray (Mass.) 31 (1859) (opposite side of the street); Eno v. Manhattan R. Co., 21 N. Y. App. Div. 548, 48 N. Y. Suppl. 516 (1897) (rental value).

49. Phillips v. Marblehead, 148 Mass. 326,

19 N. E. 547 (1889); Krider v. Philadelphia, 180 Pa. St. 78, 36 Atl. 405 (1897) (valued land differently as an assessor).

50. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903 (1902); Cassidy v. Com., 173 Mass. 533, 54 N. E. 249 (1899) (land in another city).

51. 3 Chamberlayne, Evidence, §§ 2172-2175.

52. Conjecture will be excluded.—Thus, where the manager of mines stated that he did not know what they were worth, it was error to permit him to testify that the persons interested appraised the property at a certain sum. Thornburg v. Doolittle (Iowa 1910), 125 N. W. 1003.

53. Linforth v. San Francisco Gas & Electric Co. (Cal. 1909), 103 Pac. 320.

54. Johnson v. Freeport, etc., R. Co., 111 Ill. 413 (1884); Aldrich v. Grand Rapids Cycle Co., 61 Minn. 531, 63 N. W. 1115 (1895); *In re* Manhattan Terminal of the New York and Brooklyn Bridge, 120 N. Y. Suppl. 465 (1909).

55. Johnson v. Freeport, etc., R. Co., 111 Ill. 413 (1884).

56. Jacksonville, etc., R. Co. v. Caldwell, 21 Ill. 75 (1859).

57. Terre Haute, etc., R. Co. v. Flora, 29 Ind. App. 442, 64 N. E. 648 (1902); Chicago,

So far as the matter is one of common knowledge,⁵⁸ the jury may employ their general experience as men of affairs in dealing with the estimates of witnesses as to the value of property,⁵⁹ whether drawn from observation or deduced from assumed facts. In any case, the jury may rationally accord probative force to the estimate of a witness in proportion to the subjective relevancy of his statement, the amount⁶⁰ and freshness⁶¹ of his knowledge and his freedom from any motive to misrepresent which could fairly be deemed controlling.⁶² The jury are not necessarily obliged to follow the estimate of a witness simply because he is uncontradicted.⁶³ Such inferences are not conclusive.⁶⁴ The jury may be allowed in matters of common knowledge to make findings of value based on their own knowledge without evidence⁶⁵ but where the question is technical the jury should not be allowed to find in disregard of the evidence of skilled witnesses and any such finding may be set aside.⁶⁶

§ 763. **Constituents for the Expert's Judgment; Factors Controlling it.**⁶⁷—The judgment of the expert may be controlled or aided by auction sales⁶⁸ or by the cost of property either actual⁶⁹ or based on the cost of reproduction⁷⁰ figuring also the depreciation.⁷¹ The expert may also consider the various

etc., *R. Co. v. Drake*, 46 Kan. 568, 26 Pac. 1039 (1891); *Matter of Gullford*, 85 N. Y. App. Div. 207, 83 N. Y. Suppl. 312 (1903); *Wead v. St. Johnsbury, etc., R. Co.*, 66 Vt. 420, 29 Atl. 631 (1894); *Shoemaker v. U. S.*, 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170 (1893).

58. §§ 345 *et seq.*

59. *Johnson v. Freeport, etc., R. Co.*, 111 Ill. 413 (1884).

60. *Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1 (1888); *Lee v. Pindle*, 12 Gill & J. (Md.) 288 (1842); *Springfield, etc., R. Co. v. Calkins*, 90 Mo. 538, 3 S. W. 82 (1886).

61. *Atty.-Gen. v. Cross*, 3 Meriv. 524, 17 Rev Rep. 121 (1817).

62. *Atty.-Gen. v. Cross*, 3 Meriv. 524, 17 Rev Rep. 121 (1817).

This is more important than a consideration of the particular class of persons to which the observer belongs. *Blizzard v. Aplegate*, 61 Ind. 368 (1878).

63. *Princeton Town v. Gienske*, 93 Ind. 102 (1884); *Aldrich v. Grand Rapids Cycle Co.*, 61 Minn. 531, 63 N. W. 1115 (1895).

64. *Johnson v. Chicago, etc., R. Co.*, 37 Minn. 519, 35 N. W. 438 (1887).

65. *Stevens v. City of Minneapolis*, 42 Minn. 136, 43 N. W. 842 (1889).

66. *Wood v. Barker*, 49 Mich. 295, 22 Am. Law Reg. (N. S.) 323 (1882). See also *Turnbull v. Richardson*, 69 Minn. 400, 37 N. W. 499 (1888).

67. 3 Chamberlayne, Evidence, § 2175a.

68. *Thornton v. Campton*, 18 N. H. 20 (1845); *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544 (1890); *Mayberry v. Lilly Mill Co.* (Tenn. 1905), 85 S. W. 401 (corn).

69. **Involuntary sales.**—Where the sale has been a forced one, especially when accompanied by other circumstances calculated to defeat the full and fair competition by bidders, the prices realized may constitute no adequate criterion of value and be, therefore, rejected as irrelevant for that purpose. *Rickards v. Bemis* (Tex. Civ. App. 1903), 78 S. W. 239 (execution sale). Still, the price realized at a sheriff's sale of goods has been received, though by no means conclusive between the parties, as some evidence of the age, condition, etc., of the articles sold. *Corey v. Penney* (Ala. 1910), 51 So. 624. See *Goodman v. Baumann*, 43 Misc. Rep. 83, 86 N. Y. Suppl. 287 (1904).

70. *Brooks v. Hazen*, 3 G. Greene (Iowa) 553 (1852); *Pierce v. Boston City*, 164 Mass. 92, 41 N. E. 227 (1895).

71. Where cost is relied on to show value, depreciation by use and natural causes may be proved. *Utz v. Orient Ins. Co.*, 139 Mo. App. 552, 123 S. W. 538 (1909). Factors to be considered in estimating the value of a public service plant, see *Murray v. Public Utilities Comm.*, 27 Idaho 603, 150 Pac. 47, L. R. A. 1916 F 756; *Oshkosh Waterworks Co. v. Railroad Comm.*, 161 Wis. 122, 152 N. W. 859,

elements of value of the property⁷² or the financial condition of a company issuing securities.⁷³ Even offers to buy or sell property are sometimes considered if made in good faith and accompanied by a present ability to carry out the offer.⁷⁴ The physical condition of the property⁷⁵ and its rental value⁷⁶ may also be considered. The price paid for the property although not conclusive⁷⁷ is always some evidence of value⁷⁸ whether of real estate⁷⁹ or personal property⁸⁰ and even sales of similar property may be used both as to personal⁸¹ and real⁸² property. The charge usually made for similar

L. R. A. 1916 F 592 (1915). The value of a water right may be shown by the cost of acquiring it, but other elements must also be considered in estimating its market value. *Murray v. Public Utilities Com.*, 27 Idaho 603, 150 Pac. 47, L. R. A. 1916 F 756 (1915). See also *Oshkosh Waterworks Co. v. Railroad Comm.*, 161 Wis. 122, 152 N. W. 859, L. R. A. 1916 F 592 (1915).

72. The "market value" of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property, and all uses to which it may be applied, are to be considered. *Seaboard Air Line Ry. v. Chamblin*, 108 Va. 42, 60 S. E. 727 (1908).

73. *Halper v. Wolff*, 82 Conn. 552, 74 Atl. 890 (1909); *Green-Grieb Sherman Co. v. John C. Quinlen Co.*, 148 Ill. App. 1 (1909); *Diel v. Kellogg* (Mich. 1910), 128 N. W. 420, 17 Detroit Leg. N. 891.

74. *Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240, 23 Pac. 265 (1890); *Faust v. Hosford*, 119 Iowa 97, 93 N. W. 58 (1903); *Cottrell v. Rogers*, 99 Tenn. 488, 42 S. W. 445 (1897); *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757 (1890). Authority is, however, to be found to the opposite effect. *Southern Ry Co. v. Parnell*, 37 So. 925 (1904) (two years before); *Watson v. Milwaukee, etc., R. Co.*, 57 Wis. 332, 15 N. W. 468 (1883); *Sharpe v. U. S.*, 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 (1903).

75. *McAvoy v. Wright*, 137 Mass. 207 (1884); *McLennan v. Minneapolis, etc., Elevator Co.*, 57 Minn. 317, 59 N. W. 628 (1894).

76. *Senglaup v. Acker Process Co.*, 105 N. Y. Suppl. 470, 121 App. Div. 49 (1907). Evidence of the value of an article is admissible as having some bearing on the value of its use. *Carey Coal Co. v. Bebee Concrete Co.*, 88 Kan. 515, 129 Pac. 191, 44 L. R. A. (N. S.) 499 (1913).

77. *Miller v. Bryden*, 34 Mo. App. 602 (1889). Where market value can be shown, price is not material. *Chicago, R. I. & G. Ry. Co. v. Rogers* (Tex. Civ. App. 1910), 129 S. W. 1155.

78. *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292 (1874); *Gulf, etc., R. Co. v. Lowe*, 2 Tex. App. Civ. Cas. § 648 (1885).

79. *West Skokie Drainage Dist. v. Dawson*, 243 Ill. 175, 90 N. E. 377 (1909); *In re Manhattan Terminal of the New York and Brooklyn Bridge*, 120 N. Y. Suppl. 465 (1909); *American States Security Co. v. Milwaukee Northern Ry. Co.* (Wis. 1909), 120 N. W. 844.

Forced sales.—Prices realized at forced sales possess but slight evidentiary weight. *West Skokie Drainage Dist. v. Dawson*, 243 Ill. 175, 90 N. E. 377 (1909) (foreclosure proceedings); *W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App. 1903), 78 S. W. 239.

80. *Jelalian v. New York, N. H. & H. R. Co.*, 119 N. Y. Suppl. 136, 134 App. Div. 381 (1909) (clothing, oriental rug); *De Groat v. Fulton F. Ins. Co.*, 4 Rob. 504 (1867).

81. *Aken v. Clark* (Iowa, 1909), 123 N. W. 381 (cattle); *Dean v. Van Nostrand*, 101 N. Y. 621, 4 N. E. 134 (1886); *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421 (1905) (timber on adjacent land). See also *James H. Rice Co. v. Penn. Plate Glass Co.*, 117 Ill. App. 356 (1904).

82. *Paine v. Boston*, 4 Allen (Mass.) 168 (1862); *Galway v. Metropolitan El. R. Co.*, 13 N. Y. Suppl. 47 (1890); *Belding v. Archer*, 131 N. C. 287, 42 S. E. 800 (1902). Evidence may be excluded of the sale of neighboring property where the sale was practically forced as the owners had failed to make payments due and a foreclosure suit was then pending. *Lewisburg & N. R. Co. v. Hinds*, 134 Tenn. 293, 193 S. W. 985, L. R. A. 1916 E 420 (1916). The value of property may be shown by sales but the price at

services is however so uncertain a test as seldom to be of probative quality.⁸³ The expert may always state the specific uses to which property may be put.⁸⁴

which it is estimated in an exchange is not satisfactory evidence. *Epp v. Hinton*, 91 Kan. 515, 138 Pac. 576, L. R. A. 1914 A 675 (1914). Evidence of the sale of neighboring property may be excluded when the sale took place two years before and extensive improvements had taken place in the meanwhile, in the immediate neighborhood. *Lewisburg & N. R. Co. v. Hinds*, 134 Tenn. 293, 183 S. W. 985, L. R. A. 1916 E 420 (1916). An offer of sale may well be excluded where it appears that when it was made the property was dead and a park and boulevard had not

been built where these improvements greatly enhanced the value of the land. *Lewisburg & N. R. Co. v. Hinds*, 134 Tenn. 293, 183 S. W. 985, L. R. A. 1916 E 420 (1916).

83. *McKnight v. Detroit & M. Ry. Co.* (Mich. 1904), 97 N. W. 772, 10 Detroit Leg. N. 777.

84. *Russell v. St. Paul, etc., R. Co.*, 33 Minn. 210, 22 N. W. 379 (1885); *Ohio Valley R., etc., Co. v. Kerth*, 30 Ind. 314, 30 N. E. 298 (1891); *Forsyth v. Doolittle*, 120 U. S. 73, 7 S. Ct. 408, 30 L. ed. 586 (1877); *Chandler v. Geraty*, 10 S. C. 304 (1878).

CHAPTER XXXI.

HANDWRITING.

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§ 764. **Proof by Direct Evidence.**¹— The genuineness of handwriting, including under this broad term marks, figures,² or signs, may be proven as a fact by the direct evidence of persons who saw it made. Nothing could well be more satisfactory than this.³ “The general rule seems to be, that the best evidence

1. 3 Chamberlayne, Evidence, § 2177.

v. Benham, 4 Hill (N. Y.) 129, 40 Am. Dec.

2. Stone v. Hubbard, 7 Cush. (Mass.) 595

271 (1843).

(1851); Kux v. Central Michigan Sav. Bank,

3. The most obvious proof of handwriting

93 Mich. 511, 53 N. W. 828 (1892); Sheldon

is the testimony of a witness who saw the

of handwriting is a witness who actually saw the party write it." ⁴ Evidence such as this presents no peculiarity for the consideration of judicial administration. Transaction witnesses are, however, comparatively rare. Seldom does it happen in practice that the actual writing of a disputed specimen of chirography has been witnessed. The primary evidence being thus absent, administration is obliged to rely upon proof of facts of a secondary grade. The latter may be one of two kinds. (1) Circumstantial evidence, (2) Inferences of competent observers testifying from the resemblance of a disputed writing to a mental standard created by means which the law deems adequate. The use of these species of secondary evidence will be considered in the order indicated.

§ 765. Proof by Secondary Evidence; Circumstantial.⁵—Circumstantial evidence of handwriting may be used ⁶ and may be extrinsic as from the fact that one was seen to enter a room containing writing materials and left leaving a document behind him, or it may be intrinsic as from the paper, ink, spelling,⁷ and handwriting ⁸ of the document itself. Where other evidence fails letters may sometimes be authenticated by their contents as where letters sent by an illiterate were shown to relate to the account in question and they referred to checks and corresponding checks were produced.⁹

§ 766. [Proof by Secondary Evidence]; Characteristics of Handwriting.¹⁰—In a broad sense, the entire reasoning as to the genuineness of handwriting from resemblance is a study of the characteristics displayed by the writer. The probative force rests upon moral uniformity,¹¹ the proposition of experience that a person who has done a given thing at one time will do it at another.

§ 767. [Proof by secondary Evidence]; Phenomena of Documents.¹²—In de-
paper or signature actually written. In the absence of such proof the best evidence is the information of witnesses acquainted with the supposed writer, and who from seeing him write have acquired a knowledge of his handwriting. *Tarnofker v. Grissler*, 108 N. Y. Suppl. 606 (1908).

4. *Redford v. Peggy*, 6 Rand. (Va.) 316, 328 (1828), *per Carr, J.* See also *State v. Witherspoon*, 231 Mo. 706, 133 S. W. 323 (1910).

5. 3 Chamberlayne, Evidence, § 2178.

6. *Shaffer v. U. S.*, 24 App. D. C. 417 (1904).

7. *Brookes v. Tichborne*, 5 Exch. 929 (1850), *per Parke, B.* It is evidence of forgery that the signature of the will of an uneducated man not given to much writing is exactly the same as that of an authenticated copy of it, even though the will antedates the authenticated signature. *Connolly v. Hop-*

kins, 89 Wash. 168, 154 Pac. 155, L. R. A. 1916 D 635 (1916). As to genuineness of handwriting. See note, Bender Ed., 82 N. Y. Book, 42.

9. *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

10. 3 Chamberlayne, Evidence, § 2179.

11. "The theory upon which these expert witnesses are permitted to testify is that handwriting is always in some degree the reflex of the nervous organization of the writer, which, independently of his will and unconsciously, causes him to stamp his individuality in his writing. I am convinced that this theory is sound." *Gordon's Case*, 50 N. J. Eq. 397, 422, 26 Atl. 268 (1893), *per McGill, Ch.* Attempts at disguise in handwriting seldom eradicate those peculiarities which indicate the real author. *McGarry v. Healey*, 78 Conn. 365, 62 Atl. 671 (1905).

12. 3 Chamberlayne, Evidence, § 2180.

termining the identity of the writer of a disputed document, much aid may occasionally be gained by an inspection of the paper itself, attention being directed not primarily to the thought conveyed but to the structure or other peculiarity of the vehicle employed. Embedded in the paper or on its surface may be many phenomena of documents, genuine or disputed. These indications may be relevant upon issues other than that of genuineness, the identity of a writer. As to this alone it is, however, proposed to consider the subject at the present time. The work of the jury on this point may be assisted by the alert observation and trained reasoning of skilled witnesses.¹³ The latter may point out the physical indications shown by a document and the inferences fairly to be deduced from them.

Preliminary Detail of Fact.—Sound judicial administration may well require that the witness, as a preliminary to giving his inference, should detail to the jury with such particularity as he reasonably can, the constituent facts upon which he bases it¹⁴ and the lines of reasoning by which it is reached.

Typewriting.—The characteristics of work done on various typewriters may be examined and pointed out to the court when relevant.¹⁵

§ 768. [Proof by secondary Evidence]; Who are qualified as Witnesses.¹⁶—A witness qualified by experience, commonly superimposed upon natural endowment, is the only person whom the court will probably regard as helpful. The matters covered by the testimony must be those of special skill or knowledge not shared by ordinary men.¹⁷ Otherwise, no reason is suggested for invading the province of the jury. In this connection, persons acquainted with the handling,¹⁸ inspection¹⁹ or examination of writings will usually be found to possess the required experience. Special knowledge as of a bank officer of

13. *Withee v. Rowe*, 45 Me. 571 (1858); *Demerritt v. Randall*, 116 Mass. 331 (1874); *Dubois v. Baker*, 30 N. Y. 355 (1864); *Calkins v. State*, 14 Ohio St. 222 (1863).

14. *May v. Dorsett*, 30 Ga. 116 (1860).

15. Where certain defects in a typewritten sheet were shown an expert mathematician may not be asked what the chances are of a recurrence of all these defects in another machine. The court seems to lay down the proposition that mathematical calculations of probability are not admissible in evidence. *People v. Risley*, 214 N. Y. 75, 108 N. E. 200. Where forgery of a will is charged and it becomes vital to know on which typewriter it is written specimens of the work done on the instrument with which the will is alleged to be written are admissible for comparison only in the same way that where an impression is made on paper, wood, leather or any other plastic material by an instru-

ment having or possessing a defect or peculiarity the identity of the instrument may be established by proving the identity of the defects or peculiarities which it impresses on different papers. *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730, 45 L. R. A. (N. S.) 860 (1912).

16. 3 Chamberlayne, Evidence, § 2181.

17. It is error to permit a witness not shown to possess expert knowledge on the subject to give his opinion that a copy of a letter is on stationery different from that in use at a certain hotel. *State v. Denny* (N. D. 1908), 117 N. W. 869.

18. *Glover v. Gentry*, 104 Ala. 222, 16 So. 38 (1893).

19. *Hadcock v. O'Rourke*, 6 N. Y. Suppl. 549 (1889) (order of additions to paper). *Dubois v. Baker*, 30 N. Y. 355 (1864) (bank cashier).

bank notes is always a qualification.²⁰ Such a duly qualified witness may testify as to the meaning of abbreviations²¹ or figures²² or illegible portions²³ of a writing provided that he testifies to something beyond the apparent knowledge of the jury.²⁴

§ 769. [Proof by secondary Evidence]; Age or Alterations.²⁵—A witness whom the trial judge regards as qualified may state from the appearances of documents submitted to his inspection his inference regarding their age,²⁶ or alterations.²⁷ The jury may make their own deductions from prominent features of a writing as which of two words was written over the other²⁸ but where necessary the skilled witness may testify as to the handwriting,²⁹ inks,³⁰ pens³¹ and even the peculiarities of typewritten matter.³²

§ 770. [Proof by secondary Evidence]; Inference from Observation.³³—Handwriting is a matter of inference from observation.³⁴ There is here no field for the expert as such as the skilled witness testifies almost invariably from personal observation and not from facts established by others or in response to hypothetical questions. His opinions need not be given with certainty³⁵ but a mere claim of a witness to familiarity with a certain handwriting may be enough to qualify him³⁶ and only a skilled witness may give his opinion.³⁷ The original of the document should always be produced in

20. *Hadcock v. O'Rourke*, 6 N. Y. Suppl. 549 (1889) (order of additions to paper).

21. *Sheldon v. Benham*, 4 Hill (N. Y.) 129, 40 Am. Dec. 271 (1843).

22. *Stone v. Hubbard*, 7 Cush. (Mass.) 595 (1851) (date).

23. *Stone v. Hubbard*, 7 Cush. (Mass.) 595 (1851) (decipher date); *Kux v. Central Michigan Sav. Bank*, 93 Mich. 511, 53 N. W. 828 (1892) (bank pass book); *New York Mut. L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 515, 21 S. W. 1072 (1895) (date). See also *People v. King*, 125 Cal. 369, 58 Pac. 19 (1899).

24. *Collins v. Crocker*, 15 Ill. App. 107 (1884) (cancellation); *Dresler v. Hard*, 57 N. Y. Super. Ct. 192, 6 N. Y. Suppl. 500 (1889); *Bridgman v. Corey*, 62 Vt. 1, 20 Atl. 273 (1889); *Beach v. O'Riley*, 14 W. Va. 55 (1878).

25. 3 Chamberlayne, Evidence, §§ 2182–2185.

26. *Eisfeld v. Dill*, 71 Iowa 442, 32 N. W. 420 (1887).

27. *Rass v. Sebastian*, 160 Ill. 602, 43 N. E. 708 (1896) [affirming 57 Ill. App. 417]; *Hawkins v. Grimes*, 14 B. Mon. (Ky.) 257 (1852); *Dubois v. Baker*, 40 Barb. (N. Y.) 556 (1864). Should the witness be one

skilled in the phenomena of documents, his opinion on the subject may properly be received. *State v. Owens*, 73 Mo. 441 (1881); *State v. Tompkins*, 71 Mo. 617 (1880); *Wagner v. Jacoby*, 26 Mo. 531 (1858).

28. *Morse v. Blanchard*, 117 Mich. 37, 75 N. W. 93 (1898).

29. *Shaffer v. Clark*, 90 Pa. 94 (1879).

30. *Glover v. Gentry*, 104 Ala. 222, 16 So. 38 (1893); (practical experience sufficient); *Porell v. Cavanaugh*, 69 N. H. 364, 41 Atl. 860 (1898); *Ellingwood v. Bragg*, 52 N. H. 488 (1872); *Dubois v. Baker*, 40 Barb. (N. Y.) 556 (1864); *Com. v. Pioso*, 18 Lanc. L. Rev. 27 (1899).

31. *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711 (1850).

32. *Huber Mfg. Co. v. Claudel* (Kan. 1905), 80 Pac. 960.

33. 3 Chamberlayne, Evidence, §§ 2186–2198.

34. *Washington v. State* (Ala. 1905), 39 So. 388.

35. *Stevens v. Seibold*, 5 N. Y. St. 258 (1886).

36. *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702 (1907).

37. Forgery may be shown either by the evidence of the person whose name is claimed

court, when it is available but if not the handwriting can be proved by the evidence of one who has had an opportunity of seeing the original and comparing it with a specimen conceded to be genuine.³⁸ The witness may be required to state the facts on which he bases his opinion.³⁹ The basis of the opinion of the witness must be in all cases a mental standard created in the mind of the witness either by seeing the person write or by comparison of recognized examples of his handwriting.⁴⁰ In all cases, the skill of the witness must be commensurate with the subtlety of the inference which he is asked to draw.⁴¹ Evidently, the various qualifications of the witness who proposes to testify from a mental standard,—(1) seeing the person write, (2) having corresponded in course of business, (3) acquired familiarity by experience and, (4) comparison by juxtaposition,—present an increasing proportion of this element of pure reasoning. His qualifications may be of various kinds as from instruction in handwriting⁴² or from practical experience in examination of hands.⁴³ Specimens of penmanship will be preferred when made *ante litem motam*.⁴⁴

§ 771. **Ordinary Observer; Qualifications; Seeing Person write.**⁴⁵—An early qualification, procedural in its nature,⁴⁶ enables an ordinary⁴⁷ observer to testify to his inference⁴⁸ if he has formed any⁴⁹ as to the genuineness of a disputed specimen of A's handwriting if he has ever seen him write⁵⁰ under such circumstances as to be able to gain some knowledge as to his style of handwriting.⁵¹

to be forged or by a skilled witness. Royce v. Gazan, 76 Ga. 79 (1885); Abat v. Riou, 9 Mart. (La.) 465, 466 (1821); Smith v. Valentine, 19 Minn. 452, 454 (1873); McCully v. Malcom, 9 Humph. 187, 192 (1848); Osborne v. State, 9 Yerg. 488 (1836).

38. Hammond v. Wolf, 78 Iowa 227.

39. State v. Ryno, 6 Kan. 348, 74 Pac. 1114 (1904); Keith v. Lothrop, 10 Cush. 457 (1852).

40. Allen v. State, 3 Humph. 368 (1842).

41. Com. v. Nefus, 135 Mass. 533, 534 (1883). See also Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559 (1891).

Qualifications should be substantial.—Other witnesses not so qualified will be rejected. Winch v. Norman, 65 Iowa 186, 21 N. W. 511 (1884).

42. Buchanan v. Buckler, 8 Ky. L. Rep. 617 (1887); Heffernan v. O'Neill, 1 Nebr. (Un-off.) 363, 96 N. W. 244 (1901).

43. Forgery v. Cambridge City First Nat. Bank, 66 Ind. 123 (1879) (bank manager).

44. Pate v. People, 8 Ill. 644 (1846); Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003 (1890); Reese v. Reese, 90 Pa. St. 89, 35 Am. Rep. 634 (1879). Some degree of suspicion

may often attach to the trustworthiness of any qualification gained by a witness from having seen A write at a time after the date of the disputed signature. Keith v. Lothrop, 10 Cush. (Mass.), 453 (1852).

45. 3 Chamberlayne, Evidence, §§ 2199–2207.

46. **A discredited rule.**—It is not surprising, in view of the growth of rational administration, to find judges questioning the value of a rule so archaic and blindly procedural. Wilson v. Van Leer, 127 Pa. 337, 17 Atl. 1097 (1889); Doe v. Suckermore, 5 A. & E. 720 (1836), per Williams, J.

47. Moon v. Crowder, 72 Ala. 79 (1882); Kendall v. Collier, 97 Ky. 446, 30 S. W. 1002, 17 Ky. L. Rep. 337 (1895); Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. 536 (1893).

48. Bruyn v. Russell, 52 Hun. 17, 4 N. Y. Suppl. 784 (1889).

49. Putnam v. Wadley, 40 Ill. 346 (1866).

50. Nagle v. Schmadt, 239 Ill. 595, 88 N. E. 178 (1909).

51. Rowt's Adm'r v. Kile's Adm'r, 1 Leigh 225 (1829).

*That the qualification is procedural, i.e., a matter of substantive law relating to procedure, appears from the fact that the creation in the mind of the witness of a satisfactory mental standard, to which the genuineness of the writing can be referred, need not be affirmatively shown. The witness is not required to have seen A write on more than one occasion⁵² and it will be enough that he believes the signature in question to be his,⁵³ but the witness must have seen the writing done *ante litem motam*.⁵⁴ The witness may refresh his memory by inspection of other writings⁵⁵ but may consider the writing only and not base his opinion on the moral or other qualities of the writer.⁵⁶ The witness must have been near enough to see what was written⁵⁷ and must have himself been able to read.⁵⁸ A sound modern limitation on this rule is that the witness must be able to show a reasonably satisfactory acquaintance with the handwriting in dispute.⁵⁹ The witness cannot state the undisclosed author of a disputed document.⁶⁰ The weight of this species of evidence depends on the frequency for observaton of the witness and his skill.⁶¹*

§ 772. [Ordinary Observer]; Adoption in Course of Business.⁶²— Even from a standpoint of technical procedure, as established later, it was not absolutely necessary that a witness as to the genuineness of handwriting should ever have seen the person in question actually write. He may also testify that he has received letters which purport to be written by A in the regular course of correspondence⁶³ acted on as A's writing⁶⁴ and approved by A⁶⁵ *ante litem motam*.⁶⁶ So where a letter is sent to A and it appears that he acted upon it by a letter in reply this latter letter will be used as a standardizing document.⁶⁷

52. *Com. v. Nefus*, 135 Mass. 533 (1883).

53. *Fash v. Blake*, 38 Ill. 363 (1865).

Cross-examination.— Questions on cross-examination have been permitted tending to develop the extent of the confidence which the witness has in the correctness of his own estimate. Thus, he may be asked whether he would act upon a certain note as genuine were the instrument presented to him in an ordinary business transaction. *Holmes v. Goldsmith*, 147 U. S. 150, 163, 13 Sup. 288, 37 L. ed. 118 (1893).

54. *Keith v. Lothrop*, 10 Cush. 457 (1852); *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887 (1902); *Porter v. Wilson*, 13 Pa. 646 (1850).

55. *Bedford v. Peggy*, 6 Rand. (Va.) 316 (1828).

56. *Dacosta v. Pym*. Peake N. P. 144 (1797).

57. *Brigham v. Peters*, 1 Gray. (Mass.) 139 (1854).

58. *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066 (1895).

59. *Nelms v. State*, 91 Ala. 97, 96 South. 193 (1890); *People v. Corey*, 148 N. Y. 476, 42

N. E. 1066 (1896); *Magie v. Osborn*, 1 Rob. (N. Y.) 689 (1863); *Allen v. State*, 3 Humphr. (Tenn.), 367 (1842).

60. *Neall v. U. S.*, 118 Fed. 699, 56 C. C. A. 31 (1902).

61. *Rogers v. Ritter*, 12 Wall. (U. S.) 317, 20 L. ed. 417 (1870).

62. 3 Chamberlayne, Evidence, § 2208.

63. *State v. Goldstein*, 65 Atl. 1119 (1907).

64. "The mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no value as means of knowledge. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of the letters in a responsible way of their genuineness." *Pinkham v. Cockell*, 77 Mich. 272, 43 N. W. 921 (1889), *per Campbell, J.*

65. *Coffey's Case*, 4 City Hall Rec. (N. Y.) 52 (1819) (paid checks drawn by the persons in question).

66. *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538 (1880). *See also Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003 (1890).

Even clerks in an office which received A's letters in the regular course of business are competent to testify to it.⁶⁸

§ 773. [Ordinary Observer; Qualifications]; Special Experience.⁶⁹— Leaving the procedural qualifications of seeing a person write and adoption in the course of business, one breathes a more rationally stimulating atmosphere. Quite in accordance with the methods of modern judicial administration, the broad rule is announced, in case of an ordinary observer, that any person who can be affirmatively shown, to the satisfaction of the trial court, to have acquired a mental standard as to A's handwriting,⁷⁰ to such an extent as will enable him to give the jury an inference likely to be helpful to them may testify on an issue as to handwriting. No limitation is imposed as to the precise method by which the requisite mental certainty is acquired. In other words, a witness who has sufficient knowledge of the handwriting of another may give his opinion as to the genuineness of a disputed specimen.⁷¹ Such a witness may point out by comparison the similarities between the authentic and the disputed specimens⁷² but cannot give his opinion directly from comparison of hands.⁷³ So one familiar with ancient document,⁷⁴ from the proper custody⁷⁵ or with signatures on official documents⁷⁶ *ante litem motam*⁷⁷ or tellers in a bank dealing with checks⁷⁸ may testify to the genuineness of the signature.

§ 774. Skilled Observer; Qualifications required.⁷⁹— Handwriting may well

67. *Violet v. Rose*, 39 Nebr. 660, 58 N. W. 216 (1894).

68. *District of Columbia*.— *Tyler v. Mutual D. M. Co.*, 17 D. C. App. 85, 93 (1900). "The knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which in the ordinary course of the transactions of life induces a reasonable presumption that the letters or documents were the handwriting of the party." *Doe v. Suckermore*, 5 A. & E. 727 (1836), *per* Patteson, J.

69. 3 Chamberlayne, Evidence, §§ 2209–2213.

70. *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289 (1889); *Slaymaker v. Wilson*, 1 Penr. & W. (Pa.) 216 (1829).

71. *State v. Witherspoon*, 231 Mo. 706, 133 S. W. 323 (1910).

72. *Martin v. Knight* (N. C. 1908), 61 S. E. 447.

73. *Griffin v. Working Woman's Home Ass'n* (Ala. 1907), 44 So. 605; *Ware v. Burch* (Ala. 1906), 42 So. 562.

74. *Jackson v. Brooks*, 8 Wend. 431, 15 Wend. 112 (1832) (deeds); *R. v. Barber*, 1 C. & K. 436 (1844).

75. *Tuttle v. Rainey*, 98 N. C. 514, 4 S. E. 475 (1887) (an accompanying photograph).

76. *Sill v. Reese*, 47 Cal. 294 (1874); *Rogers v. Ritter*, 12 Wall. (U. S.) 317, 20 L. ed. 417 (1870).

Maps, plans, etc.— One familiar, as a surveyor, with all the maps and plans on record in a public office may testify to the genuineness of a signature which he has frequently seen on these papers. *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884 (1901).

77. *Goodyear v. Vosburgh*, 63 Barb. 154 (1872).

78. *State v. Tutt*, 2 Bailey, 44, 21 Am. Dec. 508 (1830) (bank president); *Brooks v. State*, 57 Tex. Cr. R. 251, 122 S. W. 386 (1909).

79. 3 Chamberlayne, Evidence, § 2214.

be a matter of special knowledge. Natural endowments enriched by skill and added powers of coördination, may well produce a witness capable of acquiring and holding a clear and definite mental standard of handwriting. This he may do to an extent impossible to the ordinary observer. Undoubtedly, the trained witness is capable, to an exceptional extent, of rendering assistance to the jury, and through them to the cause of justice, in the matter of handwriting. Where the inference as to resemblance is a technical one, some adequate qualification must be shown.⁸⁰ The qualifications of the expert are determined as a preliminary matter by the judge⁸¹ either on the *voir dire* or on the cross-examination.

§ 775. "Comparison of Hands."⁸²—The difficulty which technical procedure experienced in securing to judicial administration the benefit of the skilled observer as to handwriting was obvious. Seldom would it be found to happen that an observer sufficiently skilful in the matter to make his inference helpful to the jury would either have seen the person in question write or have received business communications from him under conditions which would make them available as standardizing documents. It would even be highly improbable that the skilled witness should have acquired from any source an antecedent familiarity with the penmanship of a particular writer. The difficulty was obviated by letting the witness examine specimens of A's handwriting proved by others or admitted to be genuine and upon a juxtaposition of the genuine with the disputed writing known as "a comparison of hands" the witness was allowed to give his opinion. The term "comparison of hands" in early times had a broader significance than this and meant all evidence of handwriting except where the witness sees the document written.⁸³ Popular opposition to this species of evidence was engendered in England through its use by the notorious Judge Jefferies in the judicial murder of Colonel Sidney in 1683⁸⁴ and it was excluded after the Revolution of 1688 and was also banned in the Colonies. Yet reason won in the end and "comparison by handwriting" is now firmly established.

§ 776. ["Comparison of Hands"]; Qualifications must be affirmatively proved.⁸⁵—Unless an administrative assumption as to qualification may reasonably be made as a preliminary matter, the proponent of the inference of a skilled observer must affirmatively establish, to the satisfaction of the presiding

80. *In re Thomas' Estate*, 155 Cal. 488, 101 Pac. 798 (1909); *In re Lord's Will* (Me. 1909), 75 Atl. 286; *In re Burbank's Will*, 185 N. Y. 559, 77 N. E. 1183 (1906); *Berkley v. Maurer*, 41 Pa. Super. Ct. 171 (1909).

81. *Forgey v. Bank*, 66 Ind. 125 (1879). Expert testimony as to handwriting. See note, *Bender Ed.*, 127 N. Y. 242. Proof of handwriting expert. See note, *Bender Ed.*, 127 N. Y. 242.

82. 3 Chamberlayne, Evidence, § 2214a.

83. *Doe v. Suckermore*, 5 A. & E. 703, 730, 7 L. J. Q. B. 33, 2 N. & P. 16, W. W. & D. 405, 31 E. C. L. 791 (1836).

84. *Algernon Sidney's Trial*, 9 How. St. Tr. 851, 864 (1683).

85. 3 Chamberlayne, Evidence, §§ 2215-2220.

judge, that the proposed witness is capable of giving an estimate reasonably helpful to the jury. The proponent must fairly show, as he would be required to do in case of other observers, that the trained or, so-called, "expert" witness has had reasonable opportunities for observation and possesses the mental powers necessary to coördinate the phenomena in such a way as to advance the search for truth. An unskilled witness will, therefore, necessarily be rejected in case of "comparison of hands."⁸⁶ Qualifications may be based on special technical study⁸⁷ or instruction in the art⁸⁸ or on practical experience⁸⁹ as in clerical positions⁹⁰ and his intelligence and opportunities for observation may be shown.⁹¹ Even the fact that the witness claims to have adequate knowledge on the subject may be allowed to weigh with the court to a *prima facie* extent.⁹²

§ 777. ["Comparison of Hands"]; Requirements.⁹³— Apparently, "comparison of hands" or, as it may be called in its more restricted modern meaning, comparison by juxtaposition,⁹⁴ was at all times a simple and valuable method of eliciting the opinion of the skilled witness. In modern times, this method of proving handwriting is received by the practically unanimous action of every English speaking jurisdiction. "Comparison of hands" at the present day implies juxtaposition, placing side by side authentic or standardizing documents with that in dispute, for use by one who has, up to that time, acquired no mental standard on the subject.⁹⁵ The phrase refers, in other words, to a particular method of creating the mental standard. From resemblance to this, the skilled witness respecting handwriting announces his inference or estimate as to whether the disputed writing is authentic. The witness is in all cases an observer and not an expert as the term is used in this work.

86. *Strother v. Lucas*, 6 Pet. 766 (1832).

87. *Forgey v. Cambridge City First Nat. Bank*, 66 Ind. 123 (1879).

88. *Buchanan v. Buckler*, 8 Ky. L. Rep. 617 (1887); *Heffernan v. O'Neill*, 1 Nebr. (Un-off.) 363, 96 N. W. 244 (1901).

89. *Lyon v. Lyman*, 9 Conn. 55 (1837) (cashier).

90. *Clerk of Court*.—*State v. David*, 131 Mo. 380, 33 S. W. 28 (1895); *Yates v. Yates*, 76 N. C. 142 (1877).

91. *Hyde v. Woolfolk*, 1 Iowa 159 (1855). Having seen the person write may not be sufficient qualification in this connection *People v. Collins*, 57 N. Y. App. Div. 257, 68 N. Y. Suppl. 151, 15 N. Y. Cr. 305 (1901).

92. *State v. DeGroff*, 113 N. C. 688, 18 S. E. 507 (1893). Comparison to prove handwriting. See note, *Bender Ed.*, 129 N. Y. 352; 148 N. Y. 476, 506.

93. 3 *Chamberlayne*, *Evidence*, §§ 2221-2224.

94. *Comparison by juxtaposition defined*.—

"Comparison of handwriting" has been defined as "a comparison by the juxtaposition of two writings, in order, by such comparison, to ascertain whether both were written by the same person. A method of proof resorted to where the genuineness of a written document is disputed; it consists in comparing the handwriting of the disputed paper with that of another instrument which is proved or admitted to be in the writing of the party sought to be charged, in order to infer, from their identity or similarity in this respect, that they are the work of the same hand" *Black Law Dict.* See also *Burdick v. Hunt*, 43 Ind. 381, 386 (1873); *Woodman v. Dana*, 52 Me. 9, 14 (1860); *Travis v. Brown*, 43 Pa. St. 9, 12, 82 Am. Dec. 540 (1862); *Com. v. Smith*, 6 Serg. & R. (Pa.) 568, 571 (1819); *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315 (1866).

95. *Rowt's Adm'x v. Kiles, Adm'r*, 1 Leigh (Va.) 222 (1829).

§ 778. ["Comparison of Hands"]; English Rule.⁹⁶—Prior to the statute of 1854, it was well established in the common law courts of England during the first half of the nineteenth century that comparison by *juxtaposition* could not be received. The jury were permitted to compare with the disputed writing documents already properly in evidence for other purposes⁹⁷ upon the somewhat naïve theory that so much, at least, could not well be prevented.⁹⁸ But even authentic writings, properly verified by proof or admission, could not be introduced into evidence or used by the skilled witness for the purpose of enabling the latter to testify from resemblance⁹⁹ or the jury to make their comparison.¹ Some opposition to such a view, which clearly prevented the cause of justice from receiving the aid of well-recognized scientific skill in an important branch of litigation, was not entirely lacking.² But the more liberal view could scarcely be said to have become firmly established.³ Final relief was obtained only by the passage of the statute of 1854,⁴ which permitted comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine. It is not necessary under this statute that the standardizing document be itself relevant to the case.⁵

§ 779. ["Comparison of Hands"; American Rule].⁶—Even without the aid of an enabling statute, American courts have conceded exceptional privileges to both court and jury in the use of "comparison of hands." Genuine documents already in the case for some other purpose might freely be compared by judge or jury with the disputed writing, for the purpose of determining the identity of the writer.⁷ The practice on this point, therefore, is substantially the same in the United States as in England. Writings which have no relevancy to any issue in the case cannot, it is said, be introduced into evidence for the purpose of allowing the court and jury to institute comparisons with a disputed specimen of handwriting.⁸ Certain courts, disregarding minor

96. 3 Chamberlayne, Evidence, §§ 2225–2228.

97. Cobbett v. Kilminster, 4 F. & F. 490 note (1865); Doe v. Wilson, 10 Moore P. C. 502, 14 Eng. Reprint 581 (1855).

98. "The real ground is that comparison in such a case is unavoidable. . . . No human power can prevent the jury from forming some opinion, . . . and consequently when the mind of the jury must be so employed, it is better for the Court to enter into the consideration." Doe v. Newton, 1 Nev. & P. 1 (1830), per Denman, L. C. J.

99. R. v. Shepherd, 1 Cox Cr 237 (1845), per Erle, J.; Fitzwalter Peerage Case, 10 Cl. & F. 193 (1843).

1. Hughes v. Rogers, 10 L. J. Exch. 238, 8 M. & W. 123 (1841).

2. R. v. Cator, 4 Esp. 117 (1802).

3. Even Lord Kenyon, however, was assumed to have recanted in other cases decided by him. Carey v. Pitt, Peake, Add. Cas. 131 (1797); Stanger v. Searle, 1 Esp. 14 (1793).

4. Stat. 17 & 18 Vict., chap. 125, § 27 (1854).

5. Birch v. Ridgway, 1 Falc. & F. 270 (1858). See also Roupell v. Haws, 3 F. & F. 784 (1863); Cresswell v. Jackson, 4 F. & F. 1, 5 (1864); Cresswell v. Jackson, 2 F. & F. 24 (1860).

6. 3 Chamberlayne, Evidence, §§ 2229–2235.

7. Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393 (1892).

8. White Sewing Mach. Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 100 (1890).

distinctions, have laid down the broad rule that documents otherwise irrelevant may be introduced into evidence for the use of the court or jury in forming a standard of comparison should the genuineness of the standardizing specimens be proved or conceded.⁹

The danger of presenting to the jury collateral issues to confuse them has been a strong argument against the receipt of such documents but they are always admitted where admitted by the party to be genuine¹⁰ or where the objection is waived.¹¹ Special rules on the subject prevail in various states.¹²

§ 780. ["Comparison of Hands"]; Witness to Comparison rejected.¹³— In the absence of statutory regulations, many American states declined to allow a skilled witness to testify as to his inference or conclusion regarding the authenticity of a handwriting from its resemblance to a mental standard previously or contemporaneously created in his mind by the examination of genuine documents.¹⁴ That the authorship of a forgery cannot be established in this way is the conclusion which has been reached in several cases.¹⁵ There are, however, a large number of decisions which, either directly or by inference, sustain the contrary view.¹⁶

Prominent among the anticipated evils of this species of evidence is the fear of raising collateral issues to confuse the jury¹⁷ but even in States which reject this evidence it may be received where the danger of collateral issues is eliminated by a concession that the standardizing document is genuine¹⁸ or the opponent is estopped to deny its genuineness.¹⁹

Like other evidence of a secondary character, evidence by "comparison of hands" has been received to corroborate other evidence even where its proba-

9. *Costelo v. Crowell*, 139 Mass. 588, 2 N. E. 698 (1895).

10. *Dietz v. Grand Rapids Fourth Nat. Bank*, 69 Mich. 287, 37 N. W. 220 (1888).

11. *Moon v. Crowder*, 72 Ala. 79 (1882); *People v. Gale*, 50 Mich. 237, 15 N. W. 99 (1883).

12. *Rockey's Estate*, 155 Pa. 453, 456, 26 Atl. 656 (1893); *Weaver v. Whilden*, 33 S. C. 190, 11 S. E. 686 (1890).

13. 3 Chamberlayne, *Evidence*, §§ 2236-2239.

14. *Rockey's Estate*, 155 Pa. St. 453, 26 Atl. 656 (1893).

15. *Powers v. McKenzie*, 90 Tenn. 179, 16 S. W. 559 (1890).

16. *Tower v. Whip*, 53 W. Va. 158, 43 S. E. 179, 63 L. R. A. 937 (1903).

17. *McDonald v. McDonald*, 142 Ind. 55, 70, 41 N. E. 336 (1895). A non-expert witness as to handwriting cannot be asked on cross-examination to pass upon the authenticity of various signatures presented to

him. This would introduce many collateral issues into the case but it seems that such testing of the witness should be allowed within proper limits. *Fourth National Bank v. McArthur*, 168 N. C. 48, 84 S. E. 39. One may qualify as an expert on the handwriting of a lost letter who has been in the banking business for about fourteen years and who had never seen the party write and had never seen any of his handwriting except the alleged letter and had never seen the plaintiff write and was not acquainted with his signature at the time he received a letter from him. It is sufficient if he is shown his admitted handwriting and can then say by comparison that the letter was the handwriting of the party. *Cochran v. Stein*, 118 Minn. 323, 136 N. W. 1037, 41 L. R. A. (N. S.) 391 (1912).

18. *Morrison v. Porter*, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331 (1886).

19. *State v. Noe*, 119 N. C. 849, 25 S. E. 812 (1896).

tive quality has been denied.²⁰ In some cases even where there was no danger of raising collateral issues as where the comparison was sought with documents already in the case²¹ the comparison was nevertheless excluded on the ground that his handwriting might change or that fraud might be committed.

§ 781. ["Comparison of Hands"]; Witness to Comparison accepted.²²— Other courts have gone even further in the admission of "comparison of hands" than is indicated by some of the decisions we have referred to. Contrary to the English common-law, they have permitted the use of otherwise irrelevant writings for the creation of a mental standard on the part of a skilled witness from which to estimate the genuineness of a disputed handwriting.²³

The tendency of the American courts has been to regard the raising of collateral issues as the chief objection to this sort of evidence and therefore it has been readily admitted where referred to documents admittedly genuine or already in the case²⁴ or where the other side was estopped to deny their genuineness,²⁵ or where the paper was already on file.²⁶ The rationalizing tendencies of judicial administration have, in several jurisdictions, led to the admission into evidence of documents in the disputed handwriting which were otherwise irrelevant. The purpose of this has been to enable a suitably skilled witness to state an inference from resemblance to a mental standard as to whether an alleged specimen of the handwriting in question was or was not genuine.²⁷

§ 782. ["Comparison of Hands"]; Statutory Modifications.²⁸— Into this marked diversity of rules of practice, to which the rigid adherence to the doctrine of *stare decisis*, characteristic of technical procedure, had given the force of law, came a series of unifying statutes. These followed, in a large degree, the model furnished by the English statute of 1854, permitting of comparison by juxtaposition by witnesses with specimens of the disputed handwriting shown to the satisfaction of the court to be genuine. Similar statutes, in code revisions or independently, have been passed in many American states.

It scarcely needed an express decision to establish the fact that such statutes are not violative of the constitutional provisions guaranteeing a trial by jury. The jury are still the ultimate judges of the issue of genuineness. Properly construed, a statute permitting "comparison of hands" requires the jury to

20. *Commonwealth Bank v. Haldeman*, 1 Penr. & W. (Pa.) 161 (1829); *Graham v. Nesmith*, 24 S. C. 285 (1885); *Benedict v. Flanigan*, 18 S. C. 506, 44 Am. Rep. 583 (1882).

21. *State v. Woodruff*, 67 N. C. 91 (1872); *Otey v. Hoyt*, 3 Jones L. 410 (1856); *Outlaw v. Hurdle*, 1 Jones L. 165 (1853).

22. 3 Chamberlayne, Evidence, §§ 2240-2243.

23. *Reed v. Mattapan Deposit & Trust*

Co., 198 Mass. 306, 84 N. E. 469 (1908).

24. *Appeal of Anderson*, 222 Pa. 182, 70 Atl. 1005 (1908).

25. *Kennedy v. Upshaw*, 64 Tex. 411 (1885).

26. *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937 (1903).

27. *State v. Thompson*, 80 Me. 194, 13 Atl. 892, 6 Am. St. 172 (1888).

28. 3 Chamberlayne, Evidence, §§ 2244-2262.

make the ultimate decision concerning the authenticity of the standard with which the disputed writing is compared. It leaves to the court only the determination of the preliminary question whether sufficient proof has been given that the papers are genuine so as to authorize their submission to the jury.²⁹ The ordinary common law function of the trial judge in passing upon the genuineness of the standardizing specimens or as to the qualifications of the witness to aid the jury do not appear to have been materially enlarged.³⁰ The old procedural qualifications of seeing a person write, adoption in course of business or the like, are still available to a proponent.³¹

Irrelevant documents.—It is not essential, under these statutes, that the standardizing documents should be relevant for any other purpose in the case. Except for their influence in creating the standard, the writings may be entirely irrelevant.³²

§ 783. [**“Comparison of Hands”**]; **Proof of Standard.**³³—Both at common law and under the statute, whether comparison was to be made by the court and jury or by the aid of witnesses, the ever present administrative danger of raising collateral issues was to be eliminated, so far as possible. As a practical matter, this could only be done either by such clear proof of the genuineness of the standardizing document that no reasonable conflict on the point could well arise; or by the exhibition of such a state of affairs that the party alleging the falsity of the disputed document could not, under the rules of procedure or substantive law, be heard to object.

This may be done either by an admission of the party, whose chirography is in dispute by his statement³⁴ or by his conduct in regard to it.³⁵ There may also be an estoppel³⁶ as where the opposite party is himself claiming rights under the document offered as a standardizing document.³⁷

§ 784. [**“Comparison of Hands”**]; **Proof.**³⁸—Proof of the genuineness of a standardizing document must be clear and positive and to the satisfaction of the presiding judge. It is, therefore, addressed to him,³⁹ rather than to the jury. Old writings or documents over thirty years of age, coming from the

29. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

30. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

31. *McKay v. Lasher*, 121 N. Y. 482, 24 N. E. 711 (1890).

32. *Peck v. Callaghan*, 95 N. Y. 73 (1884).

33. 2 *Chamberlayne*, Evidence, §§ 2263–2264.

34. *State v. Noe*, 119 N. C. 849, 25 S. E. 812 (1896).

35. *Cunningham v. Bank*, 21 Wend. 580 (1839), *per* Bronson, J.

36. *Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778 (1888).

37. *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 373 (1893) [*affirming* 44 Ill. App. 516].

38. 3 *Chamberlayne*, Evidence, §§ 2265–2270.

39. *Hall v. Van Vranken*, 28 Hun (N. Y.) 403, 64 How. Pr. (N. Y.) 407 (1892).

Resemblance excluded.—The genuineness of the standardizing document cannot be itself established by its similarity to another authenticated by the opinion of a skilled witness. *Sankey v. Cook*, 82 Iowa 125, 47 N. W. 1077 (1891); *Contra* *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

proper custody,⁴⁰ will, in the absence of circumstances of suspicion, be received in evidence as standards of the handwriting which they contain without further proof of genuineness.⁴¹

The fact that the document of similar handwriting was found on the person of the alleged author may be a ground for receiving it⁴² and in any event the evidence must be positive and clear.⁴³ Magnified drawings of the document may be used to assist in illustrating it⁴⁴ and the standardizing document must always be produced in court.⁴⁵

§ 785. ["Comparison of Hands"]; Testing upon Cross-Examination.⁴⁶—According to the better opinion, the requirements for proof of genuineness of handwriting, or as to the identity of the writer of a disputed specimen or the maker of a signature,⁴⁷ apply equally upon cross-examination⁴⁸ as on that which is direct. A different view, however, is not without authority to sustain it.⁴⁹

The testing of a skilled witness is a matter of administration and there is no objection to testing him on cross-examination by reference to documents admittedly genuine⁵⁰ produced in court⁵¹ but the courts have commonly refused to allow efforts to trap a witness⁵² as by submitting to him specimens some of which are not genuine.⁵³

40. *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679 (1887).

41. *U. S. v. Ortiz*, 176 U. S. 422, 20 Sup. 466 (1899) (ancient Mexican official documents).

42. *Crosby's Case*, 12 Mod. 72 (1695).

43. *Renner v. Thornburg*, 111 Ia. 515, 82 N. W. 950 (1900).

44. *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525 (1889).

45. *People v. Dorthy*, 50 N. Y. App. Div. 44, 63 N. Y. Suppl. 592, 14 N. Y. Cr. 545 (1900).

46. 3 Chamberlayne, *Evidence*, §§ 2271, 2272.

47. *Richardson v. Newcomb*, 21 Pick. (Mass.) 315 (1838).

It is error to strike out an admission by a handwriting expert, made upon cross-examination, that he had been mistaken as to signatures which he had pronounced genuine, although the trial judge might, in his discretion, have excluded an effort to secure such admission in the first instance. *Hoag v. Wright*, 174 N. Y. 36, 63 L. R. A. 163 (1903).

48. *Gaunt v. Harkness*, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297 (1894); *Massey v. Virginia Farmer's Nat. Bank*, 104 Ill. 327 (1882); *Pierce v. Northey*, 14 Wis. 9 (1861).

49. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808 (1885).

50. *Young v. Honner*, 2 Moo. & Rob. 536 (1840).

One already in evidence.—*Neal v. Neal*, 58 Cal. 287 (1881); *Thomas v. State*, 103 Ind. 439, 2 N. E. 808 (1885); *Harvester Co. v. Miller*, 72 Mich. 272, 40 N. W. 429, 16 Am. St. Rep. 536 (1888); *Brown v. Chenoweth*, 51 Tex. 477 (1879).

51. See *O'Brien v. McKelvey* (Wash. 1910), 109 Pac. 337.

52. Use of documents of doubtful authenticity excluded.—*Pierce v. Northey*, 14 Wis. 9 (1861); *Griffits v. Ivery*, 11 A. & E. 322 (Q. B.) (1840). See also *Wilmington Sav. Bank v. Waste* (Vt. 1904), 57 Atl. 241.

The line of inquiry has been allowed. *Johnson Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536 (1888). See also *Doe v. Suckermore*, 11 A. & E. 124 (1839).

53. *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227 (1896); *Massey v. Farmers' Bank*, 104 Ill. 332 (1882); *Andrews v. Hayden's Adm'r*, 88 Ky. 455, 459, 11 S. W. 428 (1889) ("deceiving the minds of honest men").

Contra: *Browning v. Gosnell*, 91 Ia. 448, 456, 59 N. W. 340 (1894); *Hornellsville First*

§ 786. ["Comparison of Hands"]; Proof in Criminal Cases.⁵⁴— Subsequent to Colonel Sidneys trial and until the nineteenth century "comparison of hands" while received in civil cases was excluded in criminal cases⁵⁵ but the modern use of reason in matters of evidence has eliminated the distinction⁵⁶ which does not appear in the enabling statutes, passed to admit such testimony.

The privilege against self-incrimination does not extend so far as to render inadmissible, in a criminal case, as the standard of comparison, specimens of defendant's handwriting obtained before any definite charge had been made against him. Nor is it important in this connection that the accused knew that he was suspected of being the perpetrator of a discovered crime. It is equally unimportant that the defendant was at the time in attendance upon the hearing under compulsory process.⁵⁷

§ 787. ["Comparison of Hands"]; Standardizing Documents.⁵⁸— One whose handwriting is in dispute cannot write out standardizing specimens of his own hand⁵⁹ but specimens may be received though written *post litem motam* if written in the regular course of business or under other circumstances which seem to remove the element of self-interest⁶⁰ and in general the standardizing document should always be written without knowledge that it is to be so used⁶¹ except that one who denies the genuineness of a specimen may always be asked to write in the presence of the jury.⁶²

The standardizing document must be proved genuine⁶³ so that it is no longer a question for the jury, and the judge can rule that it is genuine as a matter of law.⁶⁴ It must in short be proved to the satisfaction of the judge⁶⁵ who may test it by mechanical means as by magnified drawings or measurements, microscopes⁶⁶ or photographs.⁶⁷

Nat. Bank v. Hyland, 53 Hun (N. Y.) 108, 6 N. Y. Suppl. 87 (1889).

Information refused.— Where this test is permitted, neither the witness nor the opposing counsel is entitled to know what writings will be used for these purposes, or whether they are genuine or not, or, by whom they were written. Traveler's Ins. Co. v. Shepard, 85 Ga. 751, 12 S. E. 18 (1890).

54. 3 Chamberlayne, Evidence, § 2273.

55. Trial of the Seven Bishops, 12 How. St. Tr. 466 (1688).

56. See Ausmus v. People, 47 Colo. 167, 107 Pac. 204 (1910).

57. People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

58. 3 Chamberlayne, Evidence, §§ 2275-2283.

59. Hickory v. U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170 (1893).

60. Sanderson v. Osgood, 52 Vt. 313 (1880).

61. Keith v. Lothrop, 10 Cush. (Mass.)

453 (1852); Bridgman v. Corey, 62 Vt. 1, 20 Atl. 273 (1889); Hickory v. U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170 (1893).

62. Allen v. Gardner, 47 Kan. 337, 27 Pac. 982 (1891); Chandler v. Le Barron, 45 Me. 534 (1858); Bronner v. Loomis, 14 Hun (N. Y.) 341 (1878); Sprouse v. Com., 81 Va. 374 (1886).

63. Martin v. Maguire, 7 Gray 177 (1856). While great care should be taken in determining whether the standard of comparison is genuine, the usual rule as to a fair balance of testimony applies: *Bowell v. Fuller*, 59 Vt. 688, 10 Atl. 853 (1887).

64. Sankey v. Cook, 82 Iowa 125, 47 N. W. 1077 (1891).

65. University of Illinois v. Spalding, 71 N. H. 163, 51 Atl. 731 (1902).

66. White Sewing Mach. Co. v. Gordon, 124 Ind. 495, 24 N. E. 1033, 19 Am. St. Rep. 109 (1890); Indiana Car. Co. v. Parker, 100 Ind. 181 (1884); Morse v. Blanchard, 117

§ 788. **Probative Weight of the Inference; A Question for the Jury.**⁶⁸— The probative force, belief-compelling quality, of the inference of the identity of a given writer from the resemblance of the disputed specimen to a mental standard created in the observer, presents a question entirely for the jury.⁶⁹ They are to judge both as to genuineness of the standardizing documents, and as to the correctness of the inference which the skilled witness draws from them.⁷⁰ They may themselves, as has been seen, institute comparisons between the disputed writings and specimens which they find to be genuine, using the results of their observation as part of the basis of their final judgment. Their action must, however, be reasonable.

They may consider the education of the witness,⁷¹ the vividness of his impression⁷² and other circumstances as whether the specimen was made before the witness had acquired a mental standard of the handwriting.⁷³

§ 789. **[Probative Weight of the Inference]; Function of the Court.**⁷⁴— Sound administration receives all evidence necessary to the proponent's case on which the jury could reasonably act. The action of the court, therefore, in admitting the testimony of witnesses in regard to handwriting in no way controls the exclusive right of the jury to judge of the weight of the testimony.⁷⁵ So long as the jury may reasonably find in favor of the inferences of skilled witnesses as to handwriting it is no part of the duty of the trial court to reject such evidence when tendered or to instruct the jury that it is "intrinsically weak, and ought to be received and weighed by the jury with great caution."⁷⁶ It is equally true that, should the evidence be such that the jury could not draw a rational inference from it which would be relevant to the existence of a fact in the *res gestæ* it will be rejected.⁷⁷

The use of this species of testimony is now firmly grounded in our practice⁷⁸ but there is still much unfavorable comment as to it.⁷⁹

Mich. 37, 75 N. W. 93 (1898): Kannon v. Galloway, 2 Baxt. (Tenn.) 230 (1872).

67. Marcy v. Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405 (1860); Frank v. Chemical Nat. Bank, 37 N. Y. Super. Ct. 26 (1874); Howard v. Russell, 75 Tex. 171, 12 S. W. 525 (1889); Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853 (1887).

68. 3 Chamberlayne, Evidence, §§ 2284, 2285.

69. *In re* Thomas' Estate, 155 Cal. 488, 101 Pac. 798 (1909).

70. State v. Hastings, 53 N. H. 452 (1873).

71. 17 Cyc p. 183; U. S. v. Gleason, 37 Fed. 331 (1889).

72. Green v. Terwilliger, 56 Fed. 384 (1892).

73. Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963 (1902).

74. 3 Chamberlayne, Evidence, §§ 2286-2288.

75. Pinkham v. Cockrell, 77 Mich. 265, 43 N. W. 921 (1889); State v. Hastings, 53 N. H. 452 (1873); Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853 (1887); State v. Ward, 39 Vt. 225 (1867).

76. Coleman v. Adair, 75 Miss. 660, 23 So. 369 (1898).

77. McConnell v. Playa de Oro Min. Co., 59 N. Y. Suppl. 368 (1899).

78. Green v. Terwilliger, 56 Fed. 384 (1892).

79. Jackson v. Adams, 100 Iowa 163, 69 N. W. 427 (1896); U. S. v. Pendergast, 32 Fed. 198 (1887). *See also* Whitaker v. Parker, 42 Iowa 585 (1876).

§ 790. [Probative Weight of the Inference]; Inference a reasoned One.⁸⁰— While the element of intuition can scarcely be said to be entirely absent from the result of an observation in regard to handwriting, its influence is comparatively slight. Any person, however unskilled, may become conscious of the sense-impressions which are presented to his mind by the written characters. Thus far, intuition serves all observers alike. What they *mean* in terms of identity of the writer is a matter of inference, of reasoning. Intelligent appreciation implies the existence of a previously created standard in the mind. By this the observed phenomena of the writing are, as it were, to be measured. Standard and measuring alike are mental concepts. The element of reasoning when compared to that of observation is, therefore, a large one in such an inference.

§ 791. [Probative Weight of the Inference]; Tests furnished by Cross-Examination.⁸¹— The probative force of an inference from “comparison of hands” may be greatly strengthened or weakened by the results of cross-examination. Such is apparently the result of all testing. Breaking or even bending under the application of a given strain creates distrust. Successful resistance inspires confidence. In the case of a statement, it tends to create belief. Among the various tests furnished by cross-examination, few are specifically applied to handwriting. They furnish, in general, the usual probing, rebutting or supplementing which are characteristic of cross-examination.⁸²

Thus it may be shown that the skilled witness reached an opposite conclusion at another time⁸³ or had no adequate opportunities for observation,⁸⁴ or the witness may be shown a portion of a document and asked who wrote it.⁸⁵ In an important matter strong corroboration has been thought necessary⁸⁶

80. 3 Chamberlayne, Evidence, § 2289.

81. 3 Chamberlayne, Evidence, § 2890.

82. Best on Ev. (Chamberlayne's 3rd Amer. ed.) p. 602.

83. Hoag v. Wright, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163 (1903).

84. Herrick v. Swomley, 56 Md. 439 (1881) (where witness first saw the writing).

85. Kirksey v. Kirksey, 41 Ala. 626 (1868).

86. *In re Taylor's Will*, 10 Abb. Prac. (N. S.) 300 (1871).

CHAPTER XXXII.

CONCLUSION FROM OBSERVATION; FACT.

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§ 792. **Conclusions from Observation.**¹—Midway between Inferences on the one hand, and Judgments on the other, stand Conclusions from Observation. From the former the difference lies in a decreased proportion of the element of intuition or specific observation, while the proportion of reasoning may be, and frequently is, much greater. Conclusions from Observation are distinguished from Judgments by a greater influence of the element of observation, which, in its specific relation to the act of reasoning, entirely disappears, and by a decreased proportion of pure ratiocination. In other words, as has been pointed out, Inference, Conclusion and Judgment stand in a progressive series, varying with the amount of reasoning involved. In Conclusions, the element of specific observation is not lacking. The basis of the reasoning contains much beside it, past experience, information from others, even general knowledge. Conditions may arise when, even with these additions, the basis on which the mind acts is so simple and so little controverted that the result is spontaneous, automatic. In such cases, judicial administration receives the statement without difficulty, as a matter of course. The characteristic conclusion, however, presents so large an element of reasoning and the actual basis of the mental processes are so numerous and obscure that an adequate necessity must be shown for invading the special province of the jury, that of reasoning from general propositions of experience. If this is not done, the conclusion is rejected.²

1. 3 Chamberlayne, Evidence, §§ 2291–2293. O'Donnell, 213 Ill. 545, 72 N. E. 1133 (1904) [affirming judgment 114 Ill. App. 345].

2. Chicago Terminal Transfer R. Co. v.

In dealing with conclusions, the work is largely administrative. No hard and fast rule, so dear to the heart of formal or technical procedure, can well be applied. The question is one as to the degree in which the reasoning is simple and the facts easily understood. The border line between reasoned inference and fairly obvious conclusion is one hazy and difficult to draw. The reasoning is less closely correlated to the phenomena observed, there is a larger basis of assumed or undisclosed fact, and that is the most which can be said. In proportion, however, as the reasoning bulks more largely and the basis of assumed or undisclosed knowledge or experience grows wider and more material, does the hesitancy of administration become more acute against admitting statements which so nearly substitute the witness for the jury.

§ 793. [Conclusions from Observation]; Administrative Requirements; Necessity.³—That which judicial administration views with alarm and is slow to accept is *reasoning*. Not that of judges or jurors: upon them it is imposed. Reasoning by *witnesses* is objectionable because it tends to supplant the jury to whose judgment the parties are entitled. Should it happen, therefore, that the element of inference or reasoning is present to an extent not justified by any administrative necessity the mental act will be rejected.⁴ Witnesses must not intrude, by their conclusions, upon the special field of the jury.⁵ Where all constituent facts can fully be placed before the jury, the conclusion of the witness must be rejected,⁶ no necessity for receiving it having been shown.

§ 794. [Conclusions from Observation]; Relevancy; Preliminary Detail of Facts.⁷—In connection with conclusions, as in other relations which involve the use of the reasoning faculty upon physical or psychological phenomena, the trial judge may well require from the witness a preliminary detail of the constituting facts upon which he grounds his opinion.⁸ By this means, a ready test is furnished for judging of the opportunities for observation enjoyed by him and regarding his mental ability to coordinate these into an act of reasoning helpful to the jury. Under the administrative canon which secures to the parties the use of reason, the judge will exclude a conclusion where it appears that it could not rationally be reached upon the facts enumerated by the witness.⁹

§ 795. Conclusions of Fact; When admitted.¹⁰—As is abundantly illustrated

3. 3 Chamberlayne, Evidence, §§ 2294, 2295.

4. M. S. Huey Co. v. Rothfeld, 84 N. Y. Suppl. 883 (1903) (doing business in the state).

5. Scott v. Sovereign Camp of Woodmen of the World (Iowa 1910), 129 N. W. 302 (inference of suicide).

6. City of Macon v. Humphries, 122 Ga. 800, 50 S. E. 986 (1905).

7. 3 Chamberlayne, Evidence, §§ 2296-2300.

8. Talladega Ins. Co. v. Peacock, 67 Ala. 253 (1880); Tremaine v. Weatherby, 58 Iowa 615, 12 N. W. 609 (1882); Jones v. Merrimack River Lumber Co., 31 N. H. 381 (1855).

9. Gray v. Brooklyn Heights R. Co., 175 N. Y. 448, 67 N. E. 899 [reversing 72 N. Y. App. Div. 424, 76 N. Y. Suppl. 20] (1903).

10. 3 Chamberlayne Evidence, §§ 2301-2309.

by the decisions, the fact that a given mental act assumes the phraseology appropriate to a conclusion is by no means sufficient to insure its rejection. Administration looks not only at the appearance but penetrates through that into the reality, the essential nature of that which it is proposed to submit to the tribunal. It will scrutinize, not the form of language, but the nature of the subject matter with which the reasoning deals, in what ways these are related to the province of the jury or of the court and how largely a matter of speculation or guess work the so-called opinion quoted is. Should the facts involved, the observations made, be comparatively few and simple and lead, in the judgment of all reasonable men, to but one necessary inference, the conclusion will be received,¹¹ whatever may be the language in which it is couched. It is, in main, a matter of fact and will be so treated.

The witness will ordinarily be allowed to state his conclusions as to causation, the cause and effect of certain phenomena,¹² and the conclusion presented from certain conditions will be received where the conclusion is a necessary one¹³ as in case of financial¹⁴ or physical condition¹⁵ or where the witness states that certain things were necessary.¹⁶ So the conclusions of the witness as to negative facts may be admitted,¹⁷ and the possibility of certain acts may be shown where the witness is qualified to give an opinion.¹⁸ So an odor may be described by comparing it with another odor.¹⁹

11. *Pierson v. Illinois Cent. R. Co.*, 149 Mich. 167, 112 N. W. 923, 14 Detroit Leg. N. 405 (1907) (resisted as long as he could).

12. A witness who was present just before a building fell, and who had observed indications of the impending collapse, and examined it immediately after its fall, could testify as to the physical cause thereof. The impression made upon his mind at the time was in the nature of a physical fact, he being obviously unable to portray to the jury all the facts tending to produce it. *Walker v. Strosnider* (W. Va. 1910), 67 S. E. 1087.

13. *Rearden v. St. Louis & S. F. Ry. Co.* (Mo. 1908), 114 S. W. 964 (health); *Roberts v. Virginia-Carolina Chemical Co.*, 84 S. C. 283, 66 S. E. 298 (1909); *Houston & T. C. R. Co. v. Haberlin* (Tex. Civ. App. 1910), 125 S. W. 107 (boiler appeared safe).

14. *Sloan v. New York Cent. R. Co.*, 45 N. Y. 125 (1871).

15. *Kimball v. Northern Electric Co.* (Cal. 1911), 113 Pac. 156; *State v. Vanela*, 40 Mont. 326, 106 Pac. 346 (1910) (very nervous); *Gulf, C. & C. F. Ry. Co. v. Wafer* (Tex. Civ. App. 1910), 130 S. W. 712. Conclusions of fact are not always inadmissible and so far as they relate to collateral facts not directly in issue save much delay and circum-

locution. The same is true of leading questions. To refuse to permit a witness to testify that one appeared "frightened" or "in-solent" has the effect merely of shutting out the testimony of all witnesses of these conditions who have not extraordinary powers of observation and description. Cross-examination will in most cases sufficiently disclose what basis the witness has for his conclusion. *Schultz v. Frankfort Marine Accident, etc., Co.*, 151 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520 (1913). A witness may state that the relations between two men were friendly. This is a case where mere descriptive language is inadequate to convey to the jury the fact friendly relations did exist. *State v. Cooley*, 19 N. M. 91, 140 Pac. 1111, 52 L. R. A. (N. S.) 230 (1914).

16. *Gulf, etc., R. Co. v. Richards*, 83 Tex. 203, 18 S. W. 611 (1892) (taking land). *Scheffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652, 85 N. W. 985 (1901); *Miller v. Meade Tp.*, 128 Mich. 98, 87 N. W. 131 (1901).

17. *State v. McDaniel*, 39 Oreg. 161, 65 Pac. 520 (1901); *Burleson v. Reading*, 110 Mich. 512, 68 N. W. 294 (1896); *Missouri, K. & T. Co. of Texas v. Rich* (Tex. Civ. App. 1908), 112 S. W. 114.

18. *Lake Erie, etc., R. Co. v. Juday*, 19 Ind.

§ 796. [Conclusions of Fact]; Sufficiency.²⁰—An observer who has had satisfactory opportunities for noticing given phenomena²¹ and establishing for himself a capacity to blend them into a helpful inference, may be permitted to state his conclusion as to the relation of *sufficiency* which may exist between two things. Unless ability and opportunity are shown to combine in the witness, his conclusion will be rejected.²²

This sufficiency may be of light,²³ means to an end,²⁴ opportunity,²⁵ space²⁶ or time.²⁷

§ 797. [Conclusions of Fact]; Bloodhounds Tracking Criminal.—Conclusions of fact are sometimes drawn even from the action of animals as in case of tracking a criminal by bloodhounds. The weight of authority seems to be in favor of the admissibility of such evidence²⁸ though there is a very respectable minority holding to what seems the sounder view.²⁹ The evidence is not only very dangerous on account of the superstitious weight given to it by many jurymen but also on account of the impossibility of testing the dog. It is impossible to cross-examine the dog and ascertain just what caused him to take the course he did and just how sure he felt of the correctness of his action, how many mistakes he had made in the past, whether he felt any bias towards the person he tracked, whether he knew him before and whether he tracked him with the hope of receiving a bone or of avenging past insults and whether he was surprised at the result of his following certain smells. There is no way of putting in evidence the workings of what is called the brain of the dog.

The jurisdictions which receive this evidence do attempt to safeguard it

App. 436, 49 N. E. 843 (1898); *Aidt v. State*, 2 Ohio Cir. Ct. 18, 1 Ohio Cir. Dec. 337 (1886); *Bluman v. State*, 33 Tex. Cr. 43, 21 S. W. 1027, 26 S. W. 75 (1893).

19. On an issue as to whether a person had been poisoned a witness may be asked whether certain medicine given her had an odor like a certain poisonous preparation. An odor can only be described ordinarily by comparison with some familiar odor. *State v. Buck*, 88 Kan. 114, 127 Pac. 631, 42 L. R. A. (N. S.) 854 (1912).

20. 3 Chamberlayne, Evidence, §§ 2310–2315.

21. *Chamberlain v. Platt*, 68 Conn. 126, 35 Atl. 780 (1896).

22. *Chamberlain v. Platt*, 68 Conn. 126, 35 Atl. 780 (1896).

23. *Chamberlain v. Platt*, 68 Conn. 126, 35 Atl. 780 (1896); *Colorado Mortg., etc. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42 (1895).

24. *Chamberlain v. Platt*, 68 Conn. 126, 35 Atl. 780 (1896).

25. *Montague v. Chicago Consol. Traction Co.*, 150 Ill. App. 288 (1909).

26. *Kansas City, etc., R. Co. v. Lackey*, 114 Ala. 152, 21 So. 444 (1896); *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732 (1892).

27. *McCrohan v. Davison*, 187 Mass. 466, 73 N. E. 553 (1905) (cross the street).

28. *McDonald v. State*, 165 Ala. 85 (1910); *Padgett v. State*, 125 Ark. 471 (1916); *Davis v. State*, 46 Fla. 137 (1903); *Harris v. State*, 17 Ga. App. 723 (1916); *State v. Adams*, 85 Kan. 435 (1911); *Pedigo v. Commonwealth*, 103 Ky. 41 (1898); *Carter v. State*, 106 Miss. 507 (1914); *State v. Rasco*, 239 Mo. 535 (1912); *State v. Dickerson*, 77 Ohio St. 34 (1907); *State v. Wiggins*, 171 N. Car. 813 (1916); *Commonwealth v. Hoffman*, 52 Pa. Super. Ct. 272 (1913); *State v. Brown*, 103 S. Car. 437, 88 S. E. 21, L. R. A. 1916 B 1295 (1916); *Parker v. State*, 46 Tex. Cr. R. 461 (1904).

29. *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804 (1914); *Ruse v. State* (Ind. 1917), 115 N. E. 778, L. R. A. 1917 E 726; *Brott v. State*, 70 Neb. 395 (1903).

by requiring that it be shown that the dogs have been trained and are experienced in trailing human beings and were started on a trail at a point where the guilty party had been. The surrounding circumstances may also be shown including weather conditions and the time elapsed.

In all the cases where it was admitted it was corroborated by other evidence and in one case it was held that such corroboration was necessary.³⁰

§ 798. [Conclusions of Fact]; Utility.³¹—A witness of sufficient experience and observation may state his conclusion as to the usefulness of certain things presented to his attention. Thus, he may give his opinion as to whether certain supplies are or are not useful to a township.³²

§ 799. [Conclusions of Fact]; Voluminous Data.³³—A unique forensic situation in which the summary or conclusion of a witness customarily is received is where a very large number of entries,³⁴ records or separate documents of any sort or kind³⁵ are submitted. Under such circumstances, a competent witness is permitted to state, from his observation and examination, his conclusion as to what the papers show. For the expediting of trials a presiding judge may well be justified in economizing the court's time by receiving the conclusion of the witness.³⁶

§ 800. [Conclusions of Fact]; When rejected; Conduct.³⁷—In many, perhaps most, instances of conclusions of fact, the reasoning is rejected as obnoxious to the rule excluding opinion evidence. More specifically, the objection may be that the basis of the reasoning is not disclosed, that it tends to substitute the witness for the jury³⁸ or in some other way to evade the province of the latter. Thus, a statement by a witness that a given person is professionally skilful may be one which the judge is well warranted in withdrawing from the consideration of the jury.³⁹ The conclusion also that certain conduct is "pru-

30. The fact that trained bloodhounds trailed from the scene of the crime to the accused may be a circumstance to be considered in connection with other evidence but alone and unsupported it is insufficient, but there must be other and human testimony to convict. *Carter v. State*, 106 Miss. 506, 64 So. 215, 50 L. R. A. (N. S.) 1112 (1914). In *People v. Whitlock*, 171 N. Y. Suppl. 109 (1918), the court assumes that under proper conditions such evidence is admissible but hold that it is not enough to show that the dog was a German police dog which had been trained to track his master by smelling of his handkerchief and for exhibition performances as this does not show that the dog had had any experience in tracking strangers. In this case there had been two rains since the crime before the dog went over the trail and many other persons had since been

over the same ground and the court suggest that it is highly speculative whether the dog was following the old trail or some more recent tracks.

31. 3 Chamberlayne, Evidence, § 2316.

32. *Litten v. Wright School Tp.*, 1 Ind. App. 92, 27 N. E. 329 (1891) (township supplies).

33. 3 Chamberlayne, Evidence, § 2317.

34. *Von Sachs v. Kretz*, 72 N. Y. 548 (1878).

35. *Boston & W. R. Co. v. Dana*, 1 Gray 83, 89, 104 (1854) (sales of tickets).

36. *Rollins v. Board*, 33 C. C. A. 181, 90 Fed. 575 (1898).

37. 3 Chamberlayne, Evidence, § 2318.

38. *Churchill v. Jackson*, 132 Ga. 666, 64 S. E. 691 (1909) (proper person to raise a child).

39. *Hoener v. Koch*, 84 Ill. 408 (1877)

dent" may so clearly invade the right of the jury to reason with regard to facts which they are capable of understanding as to warrant its rejection.⁴⁰ Witnesses should not be permitted to testify that one party or the other is an unfit and improper person to serve as guardian as this is opinion evidence based on facts which should be submitted to the court.⁴¹

§ 801. [Conclusions of Fact]; Inferences.⁴²— Under the administrative canon which protects the province of the jury from reasoning by witnesses, a fact in issue or one material thereto does not constitute the proper subject of a conclusion. This may be the case with inferences as to the necessity of certain conduct,⁴³ or the possibility of certain results⁴⁴ or probability⁴⁵ or the sufficiency of certain things for a given end.⁴⁶

§ 802. [Conclusions of Fact]; Suppositions.⁴⁷— The propriety of rejecting a mere supposition is, in most cases, obvious. The jury can never safely be allowed to wander far from actuality, true existence has disclosed in the realm of matter or in that of mind. Speculation or conjecture is, therefore, to be excluded upon detection. As a rule, a witness will not be allowed to state his conclusion as to what would have taken place if a certain thing which actually occurred had not happened,⁴⁸ or what he supposes would have been the result if an event had come into being which, in fact, failed to.⁴⁹ Should the conclusion, however, be a simple and necessary one, dependent upon well known physical laws or obvious and controlling motives of human conduct, the element of conjecture may be present in such slight proportions as to warrant the reception of the act of reasoning.⁵⁰

(malpractice); *Woekner v. Erie Electric Motor Co.*, 187 Pa. St. 206, 41 Atl. 28 (1898) (motorman).

40. *Card v. Columbia Tp.*, 191 Pa. St. 254, 43 Atl. 217 (1900).

41. *Milner v. Gatlif*, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916 B 977 (1915). *Churchill v. Jackson*, 132 Ga. 686, 64 S. E. 691, 49 L. R. A. (N. S.) 875 (1909).

42. 3 Chamberlayne, Evidence, §§ 2319-2323.

43. *Illinois Southern Ry. Co. v. Hayner*, 225 Ill. 613, 80 N. E. 316 (1907) (conditions at crossing).

44. *Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347, 59 N. E. 206 (1901) (set fires by sparks).

45. *May v. Breunig*, 120 N. Y. Suppl. 98 (1909) (expected profits).

46. *Bohr v. Neuenschwangder*, 120 Ind. 449, 22 N. E. 416 (1889) (drain land).

47. 3 Chamberlayne, Evidence, § 2324.

48. *Kochmann v. Baumeister*, 73 N. Y. App. Div. 309, 76 N. Y. Suppl. 769 (1902) (how many goods a salesman would have sold if he had not been discharged). *Cogdell v. Wilmington, etc., R. Co.*, 130 N. C. 313, 41 S. E. 541 (1902) (persons could have stood on a platform if it had not been unsound).

49. *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1 (1904) (known that a person had been in prison).

50. *Howland v. Oakland Consol. St. R. Co.*, 115 Cal. 487, 47 Pac. 255 (1896).

CHAPTER XXXIII.

CONCLUSIONS FROM OBSERVATION; LAW.

Conclusions of law, 803.

legal reasoning, 804.

when admitted, 805.

intrusion upon the function of the court, 806.

when conclusion is received, 807.

§ 803. **Conclusions of Law.**¹— If the conclusion of fact, considered in the last chapter, be obnoxious to judicial administration as inconsistent with the right of a party to have the reasoning of a jury rather than that of a witness applied to the facts of his case, the conclusion of law is still more objectionable.² In case of the latter, the witness is asked to take a further step, far into the center, as it were, of the jury's position. He is called upon to apply the rule of law to the facts of the case. More than this, the witness takes it upon himself to determine what the rule of law actually is. Here is an invasion of the province of the presiding judge.

For these sufficient reasons, that it usurps the functions both of the jury and of the judge, a conclusion of law, when these two considerations are, or either of them is, operative, should be rejected.³

§ 804. **[Conclusions of Law]; Legal Reasoning.**⁴— Whatever may be the propriety, in a juridical sense of permitting, and, indeed, requiring, the jury to do legal reasoning, a question upon which certain observations are elsewhere made, the right of a party litigant, in most cases, to insist that the jury should apply the rule of law to the constituent facts is unquestionable. Against this principle of judicial administration, protecting the party in his right to a jury trial, the conclusion of law seriously offends, in proportion to the amount of legal reasoning which it involves. This may be slight, the statement, in essence, being merely a convenient method of announcing a fact. On the other hand, the right of a proponent to prove his case may require that a conclusion

1. 3 Chamberlayne. Evidence, § 2325.

2. Where the only effect of testimony sought to be adduced is to elicit the witness' opinion on a question of law and not of fact, it should be excluded. Connor v. Hodges, 7 Ga. App. 153, 66 S. E. 546 (1909). That a witness may possess greater knowledge as to the existence of facts entering into an inquiry than the jury would be supposed to have, does not render his conclusion admissible

where the latter involves a mixed question of law and fact. Houston & T. C. R. Co. v. Roberts (Tex. 1908), 108 S. W. 808.

3. Trenton Potteries Co. v. Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 732 (1903) (what ought to have been done in issuing an insurance policy).

4. 3 Chamberlayne, Evidence, §§ 2326-2328.

of law on the part of a witness be received. Where such is the case, the court, alert to protect the rights of the opponent to the reasoning of the jury, will require that the former establish to its satisfaction a forensic necessity which shall justify the reception of evidence so fraught with possible mischief to the opposing interest.

A negative fact embodies less of legal reasoning than a positive one and will be more readily received⁵ but a psychological fact will be excluded in most cases like a physical fact.⁶

§ 805. [Conclusions of Law]; When admitted.⁷—The rules of evidence cannot be safely extended so far as to exclude every question to which the answer might possibly involve a matter of law. Conclusions of law are frequently admitted.⁸ Administrative considerations or the absence of administrative objections may warrant their reception.

The existence of agency may be a mere statement of fact and hence admissible⁹ and questions of damages may involve so many complicated elements that primary evidence cannot be laid before the jury¹⁰ especially where the legal rule for assessing damages is simple.¹¹ So conclusions as to indebtedness are often received in complicated cases¹² and the same result is often reached in questions of ownership¹³ or possession.¹⁴

But where the question is largely a matter of law as often in cases of

5. *Sewell v. Chicago Terminal Transfer R. Co.*, 177 Ill. 93, 52 N. E. 302 (1898); *Beck v. Pennsylvania, Poughkeepsie & Boston R. Co.*, 148 Pa. St. 271, 23 Atl. 900, 33 Am. St. Rep. 822 (1892) statement that was no injury to property.

6. *Binkley v. State* (Tex. Cr. App. 1907), 100 S. W. 780.

7. 3 Chamberlayne, *Evidence*, §§ 2329–2360.

8. *Spencer v. New York, etc., R. Co.*, 62 Conn. 242, 25 Atl. 350 (1892) (way of necessity). *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306 (1899) (“control”); *Paul v. Conwell*, 51 Ill. App. 582 (1893) (was superintendent).

9. *Clark v. Hoffman*, 128 Ill. App. 422 (1906) (concerning a partnership).

10. *Bee Pub. Co. v. World Pub. Co.*, 59 Nebr. 713, 82 N. W. 28 (1900); *Lazarus v. Ludwig*, 45 N. Y. App. Div. 486, 61 N. Y. Suppl. 365 (1899).

Benefits.—The same administrative principles are applied by the court to proof, in mitigation of damages, of benefits received. Should the minute and complicated phenomena observed by the witness evade effective statement in detail, they may be given by him in the secondary form of his conclusion in re-

gard to them. *Hayes v. Ottawa, etc., R. Co.*, 54 Ill. 373 (1870) (depot near land).

11. *Blaney v. Salem*, 160 Mass. 303, 35 N. E. 858 (1894).

12. *Owen v. McDermott* (Ala. 1906), 41 So. 730; *Richards v. Herald Shoe Co.* (Ala. 1905), 39 So. 615; *Harrison Granite Co. v. Pennsylvania R. Co.*, 145 Mich. 712, 108 N. W. 1081, 13 Detroit Leg. N. 631 (1906). It may be a necessary and obvious fact. *Shrimpton v. Brice*, 109 Ala. 640, 20 So. 10 (1896); *Plank v. Indiana Mut. Bldg., etc., Assoc.*, 28 Ind. App. 259, 62 N. E. 652 (1902); *Studebaker Bros. Mfg. Co. v. Endon*, 50 La. Ann. 674, 23 So. 872 (1898); *Greene v. Tally*, 39 S. C. 338, 17 S. E. 779 (1893); *Miller v. George*, 30 S. C. 526, 9 S. E. 659 (1889).

Collective facts.—That a given person “owed” another may be merely a collective fact. *Owen v. McDermott* (Ala. 1906), 41 So. 730.

13. *Bunke v. New York Telephone Co.*, 188 N. Y. 600, 81 N. E. 1161 (1907). *affirming judgment* 97 N. Y. Suppl. 66, 110 App. Div. 241 (1905), which *affirmed judgment* 91 N. Y. Suppl. 390 (1904) (wires).

14. *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306 (1899); *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. 150 (1887).

agency¹⁵ or damages¹⁶ for personal injury¹⁷ or breach of contract¹⁸ or the fact of indebtedness¹⁹ or the fact of justification for conduct²⁰ or the legal effect of transactions²¹ or the existence of legal rights²² or liability²³ or negligence,²⁴ ownership,²⁵ possession²⁶ or relations between parties²⁷ the conclusions of law of the witness are properly rejected.

§ 806. [Conclusions of Law]; Intrusion upon the Function of the Court.²⁸— A witness will not be permitted to intrude his conclusion into the province of the court.²⁹ A judicial trial involves, in its very nature, the unimpaired performance by the presiding judge of the functions of his office. Therefore, a witness will not ordinarily be permitted to apply a legal standard or rule of law or practice to the facts which he details and then state the conclusion to which he arrives.³⁰ Such a process is administratively objectionable, because it covers a double danger. (1) The witness may be employing facts as part of his reasoning which are known only to himself and not even consciously to him. (2) The rule of law is to be announced by the judge and applied by him or by the jury according to the situation of the case. To this orderly exercise of functions, the parties litigant are entitled. Hence a witness will not be

15. *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774 (1910); *Rice v. James*, 193 Mass. 458, 79 N. E. 807 (1907) (recognized and authorized agent).

16. *Bragan v. Birmingham Ry., Light & Power Co.* (Ala. 1909), 51 So. 30 (consequential damages); *Central of Georgia Ry. Co. v. Keyton* (Ala. 1906), 41 So. 918; *St. Louis, etc., R. Co. v. Hall*, 71 Ark. 302, 74 S. W. 293 (1903) (fire); *Parish v. Baird*, 160 N. Y. 302, 54 N. E. 724 (1899); *Wilson v. Southern R. Co.*, 65 S. C. 421, 43 S. E. 964 (1903) (fire).

17. *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5 (1902).

18. **Profits.**— A witness should not be permitted to testify as to what would have been plaintiffs' profits if they had been allowed to perform a contract. This is a mere conclusion. He should be confined to a statement of fact showing what it would cost to do the work. *Hardaway Wright Co. v. Bradley Bros.* (Ala. 1909), 51 So. 21.

19. *Campbell, etc., Co. v. Ross*, 187 Ill. 553 58 N. E. 596 (1900); *Hollst v. Bruse*, 69 Ill. App.

20. *State v. Babcock*, 25 R. I. 224, 55 Atl. 685 (1903).

21. *Boyd v. New York Security, etc., Co.*, 176 N. Y. 556, 613, 68 N. E. 1114 (1903) ("know of any lien given by you to any odhv" on a certain fund).

22. *Chicago, etc., R. Co. v. Kuckkuck*, 197

Ill. 304, 64 N. E. 358 (1902) (enter railroad premises).

23. *Quincy Gas, etc., Co. v. Bauman*, 104 Ill. App. 600, affirmed in 203 Ill. 295, 67 N. E. 807 (1902); *Sheldon v. Bigelow*, 118 Iowa 586, 92 N. W. 701 (1902); *Sisson v. Yost*, 12 N. Y. Suppl. 373 (1890); *Berryhill v. McKee*, 1 Humphr. (Tenn.) 31 (1839).

24. *State v. Campbell*, 82 Conn. 671, 74 Atl. 927 (1910).

25. *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884 (1902) (boundaries).

26. *Arents v. Long Island R. Co.*, 156 N. Y. 1, 50 N. E. 422 (1898).

27. *Boye v. Andrews* (Cal. App. 1909) 102 Pac. 551 ("confidential relation").

28. 3 Chamberlayne, Evidence, §§ 2361–2365.

29. *Lightman Bros. & Goldstein v. Epstein* (Ala. 1909), 51 So. 164 (reasonable price); *People v. Newton*, 11 Cal. App. 762, 106 Pac. 247 (1909) (officer's opinion as to his duty); *Hirsch & Co. v. Beverly*, 125 Ga. 657, 54 S. E. 678 (1906) (lien).

30. *Evans v. Dickey*, 117 Ill. 291, 7 N. E. 263 (1886) (employment); *Gall v. Dicky*, 91 Iowa 126, 58 N. W. 1075 (1894) (forfeiture); *Western Nat. Bank v. Flannagan*, 14 Misc. 317, 35 N. Y. Suppl. 848 (1895) (authority); *Dean v. Fuller*, 40 Pa. St. 474 (1861) (undue influence); *Elrod v. Alexander*, 4 Heisk, 342 (1871) (contraband).

allowed to state the legal effect of documents³¹ or of spoken language³² or the meaning of contracts.³³

§ 807. [Conclusions of Law]; When Conclusion is received.³⁴— Rejection of the conclusion of a witness as to the meaning of an oral contract is not a necessary outcome of the administrative situation. Should the element of reasoning involved be slight, the inference one about which reasonable men could not well differ in opinion, the conclusion of a witness may amount merely to a shorthand statement of a fact, the constituents of which are obvious. Under these circumstances, especially where the fact inferred is not intimately connected with the province of the jury, the conclusion may be received.³⁵

Under recognized conditions, the understanding of a witness as to the effect of spoken language will be received. The evidence is, of course, admissible in the absence of objection.³⁶ Even where the opponent contends that the conclusion is inadmissible, it may still be admitted.

But the meaning of ordinary English words is a matter of common knowledge concerning which evidence will be rejected³⁷ and so of figures³⁸ or phrases³⁹ unless they are technical.⁴⁰

31. Rankin v. Sharples, 206 Ill. 301, 69 N. E. 9 (1903) (sufficiency of a patent license).

32. Brown v. Carson, 132 Mo. App. 371, 111 S. W. 1181 (1908) (certain persons "admitted").

33. Freeman v. Macon Exch. Bank, 87 Ga. 45, 13 S. E. 160 (1891) (indorsement on note).

34. 3 Chamberlayne, Evidence, §§ 2366-2370.

35. Lozier v. Graves, 91 Iowa 482, 59 N. W. 285 (1894); Frost v. Benedict, 21 Barb. (N. Y.) 247 (1855); Ives v. Newbern Lumber Co., 61 S. E. 70 (1908).

36. Carlisle v. Humes, 111 Ala. 672, 20 So. 462 (1896).

37. National Fire Ins. Co. v. Hanberg, 215 Ill. 378, 74 N. E. 377 (1905) ("net receipts").

38. Harris v. Ansonia, 73 Conn. 359, 47 Atl. 672 (1900).

39. Lawrence v. Thompson, 26 N. Y. App. Div. 308, 49 N. Y. Suppl. 839 (1898).

40. Richard P. Baer & Co. v. Mobile Coopera-ge & Box Mfg. Co. (Ala. 1909), 49 So. 921 ("mill culls," "shipping culls"); Garrity v. Catholic Order of Foresters, 148 Ill. App. 189 (1909), judgment affirmed 243 Ill. 411, 90 N. E. 753 (1910).

CHAPTER XXXIV.

JUDGMENTS OF EXPERTS.

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§ 808. **Judgments.**¹— In passing from Conclusions to Judgments a significant change occurs. The series of progressive mental operation, which has been considered in its administrative relation to the so-called “opinion evidence rule,” Inference, Conclusion, Judgment, has witnessed the gradual evolution of the element of Reasoning. As the witness has been permitted to do more and more of this, the jury have done correspondingly less. At the same time, *pari passu*, the proportion of the element of observation, intuitive action of the mind upon the presentation of sense perception, has steadily diminished. Controlling in the intuitive inference, somewhat less so in the reasoned one, the influence of Observation has been brought to the vanishing point in case of the Conclusion. As the field of the Expert. Judgment, is reached, Observation entirely disappears. The expert observes nothing. His proper work is that of pure reasoning. Taking the facts as observed by other witnesses and enumerated by them, it is his function to present to the jury the² proper conclusion which they indicate. To the jury themselves is reserved the question of credibility, whether the facts detailed to the expert in the form of a so-called hypothetical question actually exist.

Criminal cases.— The law is the same in criminal³ as in civil cases.

§ 809. **[Judgments]; An Obvious Administrative Danger — Field of the Expert.**⁴— The plain administrative objection to employing the expert is that his reasoning has a tendency to supplant that of the jury. Each litigant is entitled to insist not only that reason should be applied to the facts of his case, but also that the application be made by the jury, so far as the latter are com-

1. 3 Chamberlayne, Evidence, § 2371.

2. Nunes v. Perry, 113 Mass. 274 (1873);
Com. v. Williams, 105 Mass. 62 (1870).

3. State v. Webb, 18 Utah 441, 56 Pac. 159
(1899).

4. 3 Chamberlayne, Evidence, §§ 2372-
2374.

petent for the work. The clear danger that a trial by jury may become one by experts is regarded with apprehension by judicial administration. A clear warrant will be required at the hands of the proponent for receiving such testimony. In general, this is found in the technical nature of the reasoning which is demanded of the witness. A *countervailing advantage*, as compared with the judicial use of conclusion, is to be placed to the credit of judgment.

An expert may be said to be a skilled witness who testifies upon the basis of assumed facts stated in a hypothetical question. The definition is confessedly arbitrary, intended to segregate witnesses who testify from assumed facts as a class by themselves.

§ 810. Admissibility a Question of Administration.⁵—Whether any subject is so far a matter of science, art or trade, as to afford reasonable ground for belief that the jury will be aided by the opinion of an expert is a preliminary question for the trial judge. Within limits prescribed by reason, the admissibility of the judgments of experts is a matter of administration. Practically, this is equivalent to saying that no uniform rule can be laid down upon the subject.

The expert witness was originally called in by the presiding judge to assist him⁶ and the court still has wide control over the number and use of experts.

An adequate forensic necessity must be found for the introduction of the expert to assist the reasoning powers of the jury,⁷ and the testimony must be relevant both objectively and subjectively.⁸ He must have adequate knowledge and suitably trained reasoning powers⁹ and he must do more than hazard a mere conjecture¹⁰ as in case of claims of speculative damages.¹¹ He may augment the force of his opinions by stating his reasons for them.¹²

§ 811. Illustrative Instances of Judgments.¹³—Among the various instances of expert testimony it may be expedient to take up for consideration certain ones which occur most frequently in practice or tend most strongly to illustrate the methods of judicial administration in dealing with the subject.

5. 3 Chamberlayne, Evidence, §§ 2375–2381a.

6. Buller v. Crips, 6 Mod. 30 (1703).

7. "In matters of science no other witness can be called." Falkes v. Chadd, 3 Dougl. 157, 26 E. C. L. 111 (1782)..

8. Turner v. Cocheco Mfg. Co. (N. H. 1910) 77 Atl. 909.

9. Mere casual observation, superficial reading or slight oral instruction is insufficient to render one competent as an expert witness on a particular subject. Conley v. Portland Gaslight Co., 99 Me. 57, 58 Atl. 61 (1904).

10. Idaho.—Kelly v. Perrault, 5 Ida. 221, 48 Pac. 45 (1897).

Missouri.—Muller v. Gillick, 66 Mo. App. 500 (1896).

New Hampshire.—Burnham v. Ayer, 36 N. H. 182 (1858).

New York.—McKerchnie v. Standish, 6 N. Y. Wkly. Dig. 433 (1878).

Wisconsin.—Nichols v. Brabazon, 94 Wis. 549, 69 N. W. 342 (1896).

11. Klernochnan v. New York El. R. Co., 130 N. Y. 651, 29 N. E. 245, 14 L. R. A. 673 (1891), reversing 57 N. Y. Super. Ct. 434, 8 N. Y. Suppl. 770 (1890).

12. Koplan v. Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183 (1900).

13. 3 Chamberlayne, Evidence, §§ 2381b–2412.

The correct test is whether, assuming no counteracting danger to be met with, the court would be aided by the knowledge of the expert.¹⁴ Even in the limited instances by which this method is illustrated, little by way of uniformity of decision is to be expected.¹⁵ Agreement upon the fundamental rules by which administration is guided seems fairly apparent. Which of them, however, shall be deemed decisive in any particular case may depend much upon considerations for which it is difficult to make specific allowance.

Experts are commonly used in cases involving technical questions concerning carpentering and building,¹⁶ commercial matters,¹⁷ engineering problems,¹⁸ even every day matters when complicated so that the expert may be helpful¹⁹ as in regard to crops,²⁰ stock²¹ or farm structures²² or operations,²³ insurance, whether fire,²⁴ life²⁵ or marine,²⁶ and problems in law,²⁷ manufacturing,²⁸ marine²⁹ or the mechanic arts.³⁰

14. *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363 (1890).

15. "It is doubtful whether all the cases can be harmonized, or brought within any general rule or principle." *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462, 473 (1873).

16. *Architects*.—*Benjamin v. Metropolitan St. R. Co.*, 50 Mo. App. 602 (1892); *Chamberlain v. Dunlop*, 5 Silv. Supreme (N. Y.) 98, 8 N. Y. Suppl. 125 (1889).

Builders.—*Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562 (1858) (mason); *Bettys v. Denver*, 115 Mich. 228, 73 N. W. 138 (1897) (bridge); *Cobb v. St. Louis, etc., R. Co.*, 149 Mo. 609, 50 S. W. 894 (1899) (bridge); *Fox v. Buffalo Park*, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 (1897).

17. *Moschowitz v. Flint*, 33 Misc. (N. Y.) 480, 67 N. Y. Suppl. 852 (1900).

18. *Egger v. Rhodes* (Cal. 1894), 37 Pac. 1037 (civil and hydraulic).

19. *Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220, 28 N. W. 873 (1886). Whether leaving a horse unhitched under given conditions is negligent, may be a fit subject for the judgment of an expert. *Stowe v. Bishop*, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569 (1886).

20. *Van Werden v. Winslow*, 117 Mich. 564, 76 N. W. 87 (1898) (celery); *Lane v. Wilcox*, 55 Barb. (N. Y.) 615 (1864).

Diseases of vegetable life.—Special skill and experience may not be required to infer the existence of a particular form of disease incident to vegetable life, e. g., the cause of the destruction of trees. *State v. Main*, 69 Conn. 123, 37 Atl. 80 (1897).

21. *Oakes v. Weston*, 45 Vt. 430 (1873)

(overloading is one of those matters of common knowledge where an expert is not needed).

22. *Armstrong v. Chicago, etc., R. Co.*, 45 Minn. 85, 47 N. W. 459 (1890) (stable's use).

23. The proper time to burn brush is a matter of common knowledge as to which the non-expert may speak. *Krippner v. Biebl*, 28 Minn. 139, 9 N. W. 671 (1881); *Wells v. Eastman*, 61 N. H. 507 (1881).

24. *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536 (1858); *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522 (1870); *Lyman v. State Mut. F. Ins. Co.*, 14 Allen (Mass.) 329 (1867); *Morris v. Farmers' Mut. F. Ins. Co.*, 63 Minn. 420, 65 N. W. 655 (1896) (steam in threshing); *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567 (1831) (inclosing a boiler previously detached).

25. The practice of the courts with regard to expert evidence as to life insurance questions is practically the same as in those relating to assurance against loss by fire. In both relations, a double reason may exist for rejecting the judgment when tendered. (1) It may relate to a matter of common knowledge which the jury are competent to handle. (2) The fact may be one of a *res gestae* or constituent nature material to the ultimate action of the jury. For example, the expert will usually be forbidden to state whether certain facts which the insured has omitted to mention were material to the risk assumed by the company. *New Era Assoc. v. Mactavish* (Mich. 1903), 94 N. W. 599.

26. *Leitch v. Atlantic Mut. Ins. Co.*, 66 N.

§ 812. [Illustrative Instances of Judgments]; **Medicine.**³¹—Medical experts are often used to help the jury in medical questions³² when properly qualified.³³ Insanity can only be shown by a witness specially skilled in mental diseases³⁴ although a practicing physician may be used where the case is one of the common variety.³⁵

A medical expert may testify as to proper human food,³⁶ as to the effect of certain occurrences on the body³⁷ or the cause of mental troubles³⁸ or the per-

Y. 100 (1876); *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170, 7 L. ed. 98 (1828).

27. *Artz v. Robertson*, 50 Ill. App. 27 (1892) (whether services of attorney necessary). *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115 (1853) (ejectment).

28. *Whitaker v. Campbell*, 187 Pa. St. 113, 41 Atl. 38 (1898) (latent danger).

29. *Ogden v. Parsons*, 23 How. (U. S.) 167, 16 L. ed. 410 (1859) (ship has a full cargo); *Beckwith v. Sydebotham*, 1 Campb. 116, 10 Rev. Rep. 652 (1807). A shipbuilder may be called as a witness to give his opinion of the seaworthiness of a ship on facts stated by others. *Thorton v. Royal Exch. Assur. Co.*, Peake 37 (1790). See *Ilfrey v. Sabine, etc.*, R. Co., 76 Tex. 63, 13 S. W. 165 (1890) (size of waves).

30. *Ouillette v. Overman Wheel Co.*, 162 Mass. 305, 38 N. E. 511 (1894); *St. Louis, etc., R. Co. v. Farr*, 56 Fed. 994, 6 C. C. A. 211 (1893).

Work.—The opinion of an expert may properly be given as to the right method of doing work and as to the tools and appliances necessary where such matters are not of common knowledge and could not readily have been made intelligible to the jury. *Morris v. Williams*, 143 Ill. App. 140 (1908). One may give his opinion as to what shell caused a wound which he has examined where he testifies that he has often used shells of this kind and has observed their effect although he has never seen one fired at a human body. *Byrd v. State*, 142 Ga. 633, 83 S. E. 513, L. R. A. 1915 B 1143 (1914).

31. 3 Chamberlayne, Evidence, §§ 2413–2429.

32. “Medical testimony is of too much importance to be disregarded. When delivered with caution, and without bias in favor of either party, or in aid of some speculation and favorite theory, it becomes a salutary means of preventing even intelligent juries from following a popular prejudice, and deciding a cause on inconsistent and unsound

principles. But it should be given with great care and received with the utmost caution, and, like the opinions of neighbors and acquaintances, should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstructions, and supported by authority of acknowledged credit.” *Clark v. State*, 12 Ohio 483, 491, 40 Am. Dec. 481 (1843).

33. *Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909). A physician testifying as an expert must first be shown to be qualified either by actual experience in similar cases to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own with reference to the matter under consideration. *Hildebrand v. United Artisans* (Or. 1907), 91 Pac. 542. On a subject as to which there is little or no general knowledge like post mortem digestion the jury must be guided by expert testimony. *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106 (1913).

34. *Arkansas*.—*Green v. State*, 64 Ark. 523, 43 S. W. 973 (1898).

Delaware.—*State v. Windsor*, 5 Harr. 512 (1851).

Missouri.—*State v. Wright*, 134 Mo. 404, 35 S. W. 1145 (1896).

New York.—*Matter of Jacott*, 2 Silv. Supreme 544, 6 N. Y. Suppl. 122 (1889); *Lake v. People*, 1 Park. Cr. 495 (1954); *People v. Thurston*, 2 Park. Cr. 49 (1852).

West Virginia.—*Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668 (1888).

35. *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783 (1887); *Koenig v. Globe Mut. L. Ins. Co.*, 10 Hun 558 (1877).

36. *Branson v. Turner*, 77 Mo. 489 (1883) (sore on neck of an ox as unfitting it for human food).

37. *O'Mara v. Com.*, 75 Pa. St. 424 (1874) (flow of blood).

38. *Bliss v. New York Cent., etc., R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504 (1894); *Anthony v. Smith*, 4 Bosw. (N.

manence of diseased conditions.³⁹ The medical witness may not, however, simply guess at his conclusions,⁴⁰ but may state probabilities based on fact and experience.

He may also state the cause of death⁴¹ or the symptoms of disease⁴² and what they mean and also of injuries⁴³ and psychological conditions.⁴⁴

The ordinary test in most cases of mental capacity is the ability to transact ordinary business.⁴⁵ The expert medical witness will not, however, be allowed to intrude on the province of the jury by stating his judgment on the legal standard of ability⁴⁶ unless the facts are simple so that the expert's judgment will not be likely to mislead the jury.

The weight of the opinion of the expert witness is likely to be much greater than that of the ordinary practicing physician⁴⁷ and in a peculiar or complicated case the latter will be excluded entirely.⁴⁸

§ 813. [Illustrative Instances of Judgments]; Mining Matters.⁴⁹—The business of mining furnishes, especially in certain sections, a prominent subject of litigation. In this connection, much use is necessarily made of the judgments of those who, in the opinion of the court, are sufficiently qualified by scientific training or practical experience⁵⁰ to aid the deliberations of the jury. Knowl-

Y.) 503 (1859); *Dejarnette v. Com.*, 75 Va. 867 (1881).

39. *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143 (1901).

40. *Huba v. Schenectady R. Co.*, 85 N. Y. App. Div. 190, 83 N. Y. Suppl. 157 (1903).

41. Where no direct evidence exists as to the actual *res gestæ* of a transaction and inexperienced persons might be misled into wrong conclusions, competent skilled witnesses may be allowed to testify as to the actual cause of death but, even here, the inquiry may properly be limited to what *might* have produced this result rather than what actually did so. *Goddard v.ENZLER*, 123 Ill. App. 108 (1905), judgment affirmed 222 Ill. 462, 78 N. E. 805 (1906).

42. *Donnelly v. St. Paul City R. Co.*, 70 Minn. 278, 73 N. W. 157 (1897); *Haviland v. Manhattan R. Co.*, 15 N. Y. Suppl. 898 (1891).

Objective and subjective symptoms.—Where the symptoms detailed to the expert are only in part subjective, his judgment on them may be received. *Eckels v. Muttschall*, 230 Ill. 462, 82 N. E. 872 (1907). *A fortiori*, where the basis of the medical opinion is entirely objective it will be admitted. *City of Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23 (1907).

43. *Galveston, etc., R. Co. v. Parrish* (Tex. Civ. App. 1897), 43 S. W. 536; *Challis v.*

Lake, 71 N. H. 90, 51 Atl. 260 (1901) (proper treatment).

44. *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072 (1895) (senile); *State v. Feltes*, 51 Iowa 405, 1 N. W. 755 (1879) (delirium tremens).

45. *Poole v. Dean*, 152 Mass. 589, 26 N. E. 406 (1891); *Torrey v. Burney*, 113 Ala. 496, 21 So. 348 (1897); *Mayville v. French*, 246 Ill. 434, 92 N. E. 919 (1910); *Curtice v. Dixon* (N. H. 1907), 68 Atl. 587.

46. *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267 (1887). An expert medical witness may be allowed to state a judgment that the testatrix was insane but not that at a given time she was incapable of executing a valid will. *Garrus v. Davis*, 234 Ill. 326, 84 N. E. 924 (1908).

47. *Mayville v. French*, 246 Ill. 434, 92 N. E. 919 (1910).

48. *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832 (1890); *Com. v. Rich*, 14 Gray (Mass.) 335 (1859); *Russell v. State*, 53 Miss. 367 (1876); *McLeod v. State*, 31 Tex. Cr. 331, 333, 20 S. W. 749 (1892).

49. 3 Chamberlayne, Evidence, §§ 2430–2434.

50. *McNamara v. Logan*, 100 Ala. 187, 14 So. 175 (1893) (miner); *Hedlum v. Holy Terror Min. Co.*, 16 S. D. 261, 92 N. W. 31 (1902).

edge "entirely theoretical"⁵¹ may not be sufficient upon which to found a satisfactory judgment. The matter is largely one of administration, that is, within the "discretion" of the trial judge.⁵²

The testimony may relate to the cause and effect of certain conditions,⁵³ to the possibilities of the situation⁵⁴ or the propriety⁵⁵ or safety⁵⁶ of certain operations.

§ 814. [Illustrative Instances of Judgments]; Railroad Matters.⁵⁷—Expert witnesses are frequently of service as to questions of railroad construction, equipment and operation.⁵⁸ The witness must be shown to have gained his experience in a department of railroad affairs involved in the pending inquiry.⁵⁹

The propriety of railroad construction⁶⁰ is a proper matter for expert testimony unless the facts are so simple that the jury needs no expert assistance.⁶¹ The railroad expert may state his inference as to the general condition of a railroad, appliances⁶² and their value⁶³ unless the matter is within the common knowledge of the jury.⁶⁴ He may also state the cause and effect of accidents,⁶⁵ the danger of certain railroad operations,⁶⁶ the ability of the operating

51. *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577 (1893).

52. *Czarecki v. Seattle, etc., R., etc., Co.*, 30 Wash. 288, 70 Pac. 750 (1902).

53. *Alabama Consol. Coal & Iron Co. v. Heald* (Ala. 1910), 53 So. 162.

54. *Hedlun v. Holy Terror Min. Co.*, 16 S. D. 261, 92 N. W. 31 (1902); *Sloss-Sheffield Steel & Iron Co. v. Sharp* (Ala. 1908), 47 So. 279 (gas explosion).

55. *McNamara v. Logan*, 100 Ala. 187, 14 So. 175 (1893) (cross entries); *Smuggler Union Min. Co. v. Roderick*, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106 (1898) (carrying up a slope); *Island Coal Co. v. Neal*, 15 Ind. App. 15, 42 N. E. 953, 43 N. E. 463 (1896) (propping and capping a roof); *Tanner's Adm'r v. W. A. Wickliffe Coal Co.* (Ky. 1908), 32 Ky. Law Rep. 1304, 108 S. W. 351 (timbering entry).

56. *McNamara v. Logan*, 100 Ala. 187, 14 So. 175 (1893) (width of cross entry in a coal mine).

57. 3 Chamberlayne, Evidence. §§ 2435-2446.

58. *Budge v. Morgan's Louisiana, etc., R., etc., Co.*, 108 La. 349, 32 So. 535 (1902); *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.) 466 (1860) (machinist); *McCray v. Galveston, etc., R. Co.*, 89 Tex. 168, 34 S. W. 95 (1896); *Ft. Worth, etc., R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742 (1889) (brake-man).

59. *Florida East Coast Ry. Co. v. Lassiter* (Fla. 1910), 52 So. 975.

60. *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701 (1891) (transporting laborers); *Galveston, etc., R. Co. v. Pitts* (Tex. Civ. App. 1897), 42 S. W. 255 (how it can be made most safe); *Guinn v. Iowa & St. L. R. Co.*, 125 Iowa 301, 101 N. W. 94 (1905) (ditching).

61. *Cattle Guards*.—*Cleveland, etc., R. Co. v. De Bolt*, 10 Ind. App. 174, 37 N. E. 737 (1894); *Pennsylvania Co. v. Lindley*, 2 Ind. App. 111, 28 N. E. 106 (1891).

62. *Atchison, etc., R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286 (1897).

63. *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710 (1888) (whipping straps); *Mobile & M. R. Co. v. Blakely*, 59 Ala. 473, 481 (1877) (stopping train).

64. *Keller v. New York Cent. R. Co.*, 2 Abb. Dec. (N. Y.) 480, 24 How. Pr. (N. Y.) 172 (1861); *Nutt v. Southern Pac. Co.*, 25 Oreg. 291, 35 Pac. 653 (1894).

65. *Brownfield v. Chicago, etc., R. Co.*, 107 Iowa 254, 77 N. W. 1038 (1899) (broken axle); *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.) 466 (1860) (derailment); *Hoyt v. R. Co.*, 57 N. Y. 678 (1874); *Missouri, etc., R. Co. v. Sherman* (Tex. App. 1899), 53 S. W. 386 (explosion of locomotive); *Ft. Worth, etc., R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742 (1889).

force⁶⁷ and their proper performance of duty⁶⁸ except that familiar railroad operations may be such that the jury will not need the help of the expert.⁶⁹

§ 815. [Illustrative Instances of Judgments]; Trolley and Street Railways.⁷⁰—

So in questions involving street railways a witness properly qualified⁷¹ may testify as to the construction,⁷² equipment⁷³ and operation⁷⁴ of such railways.

Reasonableness of regulation.—For example, the reasonable nature of the given regulation, in view of the practical dangers which it is intended to prevent, may be stated. *Freemont v. Boston & M. R. R.*, 98 N. Y. Suppl. 179, 111 App. Div. 831 (1906) (coupling cars).

66. *Goins v. Chicago, etc., R. Co.*, 47 Mo. App. 173 (1891); *Texas & N. O. R. Co. v. McCoy* (Tex. Civ. App. 1909), 117 S. W. 446.

67. *Louisville, etc., R. Co. v. Davis*, 99 Ala. 593, 12 So. 786 (1892) (one-armed brakeman).

68. *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 303, 6 Pac. 291 (1885) (firemen); *Reeves v. Chicago, M. & St. P. Ry. Co.* (S. D. 1909), 123 N. W. 498 (position of rear brakeman on approaching station); *St. Louis Southwestern Ry. Co. of Texas v. Boyd* (Tex. Civ. App. 1909), 119 S. W. 1154 (position of switchman); *Long v. Red River, T. & S. Ry. Co.* (Tex. Civ. App. 1905), 85 S. W. 1048 (brakeman).

69. *Gray v. Chicago, etc., R. Co.*, 189 Ill. 400, 59 N. E. 950 (1901); *Fordyce v. Lowman*, 62 Ark. 70, 34 S. W. 255 (1896); *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462 (1873).

70. 3 Chamberlayne, Evidence, §§ 2447–2450.

71. *Bliss v. United Traction Co.*, 75 N. Y. App. Div. 235, 78 N. Y. Suppl. 18 (1902).

72. *Carpenter v. Central Park, etc., R. Co.*, 4 Daly (N. Y.) 550, 11 Abb. Pr. N. S. (N. Y.) 416 (1872).

73. *Fisher v. Waupaca Electric Light & Ry. Co.*, 141 Wis. 515, 124 N. W. 1005 (1910); *Richmond & P. Electric Ry. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834 (1904).

74. *Koenig v. Union Depot R. Co.*, 173 Mo. 698, 73 S. W. 637 (1903) (failure to stop car); *Nolan v. Newton St. Ry. Co.*, 206 Mass. 384, 92 N. E. 505 (1910) (operating particular form of controller).

CHAPTER XXXV.

HYPOTHETICAL QUESTIONS.

The hypothetical question, 816.

Conclusion and judgment, 817.

Form of question, 818.

Must include all facts essential to some relevant hypothesis, 819.

must include all undisputed material facts, 820.

facts must be plausibly proved, 821.

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§ 816. **The Hypothetical Question.**¹— Under the nomenclature adopted in the present treatise, the expert and the Hypothetical Question are intimately connected. A skilled witness who testifies in answer to such a form of interrogatory is defined as being an expert. Conversely, the only proper form of interrogating an expert is by means of the hypothetical question. As used in the law of evidence, this form of inquiry is one which assumes the existence of certain facts to have been established by the evidence² and asks a witness skilled in the relevant science, art, trade or calling, what the proper inference from them is.³ In other words, it is admirably designed, when properly handled, to supplement the reasoning powers of the jury on matters with which they are not familiar, while leaving them entirely free to find the truth of the facts themselves.⁴ Whether the circumstances which the proponent postulates *are* actual existences, the expert makes no attempt to decide. To draw that inference is within the province of the jury alone.

The necessity which administration experiences for admitting the hypothetical question, so called, is an obvious one. To permit the witness to conclude from the evidence what facts are established as true would be to place him in the seat of the jury.

§ 817. **Conclusion and Judgment.**⁵— The distinction between Conclusions and Judgments, as these terms are employed in the present treatise, is well marked.

1. 3 Chamberlayne, Evidence, §§ 2451–2453.

2. Com v. Bubnis, 197 Pa. St. 542, 47 Atl. 748 (1901).

3. Gillman v. Media. M. A. & C. Electric Ry. Co., 224 Pa. 267, 73 Atl. 342 (1909).

4. The proper practice in examining an expert is to state hypothetically the case which it is believed has been proved, and to

ask a question based thereon, and not to ask a question in the form of a recitation of actual facts. Shaughnessy v. Holt, 236 Ill 485, 86 N. E. 256 (1908). Propriety of hypothetical questions, see note, Bender ed., 97 N. Y. 507. Sufficiency of hypothetical questions, see note, Bender ed., 121 N. Y. 250.

5. 3 Chamberlayne, Evidence, §§ 2454–2458.

In proportion as the element of observation is large, and that of reasoning small, the statement of a witness is one of fact and readily admissible. As the admixture of reasoning increases, however, the line of Conclusion is reached, the matter being one of imperceptible gradations. From the work of the expert the element of observation is eliminated. A judgment, as has been said, is an act of pure reasoning, unaffected by the intuition of sense-perception.

There is a certain loss of probative force in dropping entirely the element of observation as is done in case of Judgment and this has led in many jurisdictions to the use of the mixed hypothesis based on both observation and hypothesis,⁶ based in some cases in part on real evidence present in court,⁷ but the answer cannot be based in part on facts outside the evidence introduced.⁸

§ 818. **Form of Question.**⁹—The hypothetical question being in aid of the reasoning of the jury, its form has been largely affected by the action of the courts in individual cases. Essentially considered, the form of this species of interrogatory is a matter of administration.¹⁰ Much indulgence, not to say laxity, has been permitted in this respect.¹¹ In certain jurisdictions, however, a standard form has become established in practice, from which variations are permitted only upon good cause being shown. Speaking generally, the great weight of authority is simply to the effect that the question addressed to the expert should contain the facts proved by the evidence upon which his judgment is to be based¹² or any portion of them relied on by the proponent.¹³ It is axiomatic that only relevant facts may be enumerated in a hypothetical

6. *People v. Koerner*, 191 N. Y. 528, 84 N. E. 1117 (1908).

7. *McJuerty v. Hale*, 161 Mass. 51, 36 N. E. 682 (1894) (whether certain person in court is a suitable person to work on a certain machine).

8. *Raub v. Carpenter*, 187 U. S. 159, 23 S. Ct. 72, 47 L. ed. 119 (1902).

Observer.—Where the functions of the expert and the observer are united or, to speak more properly, where a skilled observer testifies also as an expert, he will not, as a rule, be permitted to take as part of the basis of his judgment as called for by the hypothetical question facts of observation which he is not called upon to enumerate. Such a witness, for example, will not be permitted to form his opinion "from all the evidence you had before you there at that time." *Foster v. F. & C. Co.*, 99 Wis. 447, 75 N. W. 69 (1898). The hypothetical form of interrogation may, however, be required in such cases. *Green v. Water Co.*, 101 Wis. 258, 77 N. W. 722 (1898). Expert evidence which is merely speculative inadmissible, see note, *Bender ed.*,

18 N. Y. 534. Expert not base opinion upon testimony of another witness, see note, *Bender ed.*, 136 N. Y. 12. Admissibility of expert testimony—specific instances, see note, *Bender ed.*, 108 N. Y. 60, 68.

9. 3 *Chamberlayne*, *Evidence*, §§ 2459–2463.

10. *Missouri & N. A. R. Co. v. Daniels* (Ark. 1911), 136 S. W. 651 *Scurlock v. City of Boone* (Iowa 1909), 120 N. W. 313.

Facts added.—It has been said that the administrative power of the court in regulating the form of the question does not extend so far as to permit the witness to include as part of the basis of his answer facts which he has gleaned elsewhere than from the hypothetical question itself. *Cobb v. United Engineering & Contracting Co.*, 191 N. Y. 475, 84 N. E. 395 (1908).

11. *Jones v. R. Co.*, 43 Minn. 281, 45 N. H. 444 (1890).

12. *Barber's Appeal*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90 (1893).

13. *Chicago & E. I. R. Co. v. Wallace*, 202 Ill. 129, 66 N. E. 1096 (1903).

question.¹⁴ Those whose relevancy is slight, whose bearing is remote, will seldom be received.¹⁵ For still stronger reasons, facts of no relevancy whatever are rejected.¹⁶

Substantial correctness required.—The evidence need not be precisely the same as the facts incorporated in a hypothetical question to an expert. It is sufficient if the question represents, in its enumeration of facts, the evidence with substantial correctness.¹⁷

The typical interrogatory to the expert, as to what, assuming certain facts detailed in evidence to be true, his judgment upon them would be, is readily moulded by the administrative power of the court to meet the exigencies of particular cases.¹⁸ Should no rational ground appear for believing that the jury have been misled, a wide variety of forms will be deemed permissible,¹⁹ the error, if any, involved in their use, being regarded as harmless. The hypothetical question addressed to the expert should contain such an enumeration of facts as will enable him to form them into a reasonable act of judgment.²⁰ In other words, it follows from the nature and office of the hypothetical question that sufficient facts must be placed before the expert to make it possible for him to form an opinion which will be rationally helpful to the jury.²¹ Conjecture or mere speculation must be excluded.²² Whatever may be the facts assumed in the question to be true, the answer of the witness is necessarily limited to and based upon them.²³

§ 819. [Form of Question]; Must include all facts essential to some relevant Hypothesis.²⁴—Should no rule as to the form of the hypothetical question be established in a given jurisdiction, it may fairly be said that, speaking generally, the interrogatory must include all facts essential to some aspect or part

14. *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566 (1896); *Neudeck v. Grand Lodge A. O. U. W.*, 61 Mo. App. 97 (1894); *Dilleber v. Home L. Ins.*, 87 N. Y. 79 (1881). It follows that it is not competent upon the examination of a medical expert to inquire of him with respect to the meaning of terms applicable to an injury not shown to have been sustained. *City of Chicago v. Carlson*, 138 Ill. App. 582 (1908).

15. *Carter Rice & Co. v. Aubin*, 172 Fed. 916, 97 C. C. A. 274 (1909) (too general).

16. *People v. Harris*, 136 N. Y. 423, 33 N. E. 65 (1893).

17. *Kemendo v. Fruit Dispatch Co.* (Tex. Civ. App. 1910), 131 S. W. 73.

18. *Choice v. State*, 31 Ga. 469 (1860).

19. *Kempsey v. McGinness*, 21 Mich. 139 (1870); *McCollum v. Seward*, 62 N. Y. 318 (1875).

20. *Berry v. Baltimore Safe Deposit, etc., Co.*, 96 Md. 45, 53 Atl. 720 (1902).

21. *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179 (1890).

22. *Illinois Silver Min., etc., Co. v. Raff*, 7 N. A. 36, 34 Pac. 544 (1893); *Galbraith v. Philadelphia Co.*, 2 Pa. Super. Ct. 359 (1896).

23. *Rio Grande Western R. Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76 (1894).

Practical Suggestions.—Counsel should before going to court be sure he has in mind the exact form of hypothetical questions permitted in his jurisdiction. In the celebrated Thaw murder case in New York the hypothetical question asked the medical experts amounted to a digest of the evidence and took some hours to read. The District Attorney had all his experts sworn at once and then the question was read to them all together and they were then asked to give their answer.

24. 3 Chamberlayne, Evidence, §§ 2464-2466.

of the hypothesis maintained by its proponent²⁵ or tend to prove the existence of some separate fact included in it.²⁶

In some states the question may be based on the whole or any part of the facts.²⁷

§ 820. [Form of Question]; Must include all undisputed material Facts.²⁸— To certain courts it has seemed unduly lax administration to permit a proponent to put to the expert any question which he regards as calculated to elicit the appropriate reasoning in aid of some particular branch of his hypothesis, provided only, he is able to show that there is some rational evidence in favor of the facts upon which it is based. So wide an indulgence has been thought likely to mislead the jury and to prejudice the interests of justice. In the view of the courts which entertain this opinion, a more suitable question, one better designed to make the skill of the expert conducive to the attainment of its highest usefulness, would include all material facts, not controverted, by whomever introduced into evidence regardless of the respective hypotheses of the parties.²⁹

§ 821. [Form of Question]; Facts Must Be Plausibly Proved.³⁰— In order that a fact may be admitted into the enumeration as part of a hypothetical question, it must be so far established in the evidence that a jury might³¹ rationally find that it existed.³² A tendency to prove a fact will, if exhibited by the evidence, be sufficient for admissibility.³³ The trial court cannot ar-

25. *People v. Krist*, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532 (1901).

26. *Gottlieb v. Hartman*, 3 Colo. 53 (1876); *McDonald v. Illinois Cent. R. Co.*, 88 Iowa 345, 55 N. W. 102 (1893).

27. The facts enumerated must be "within the possible or probable range of the evidence." *Harnett v. Garvey*, 66 N. Y. 641 (1876). Hypothetical questions to an expert need not cover all the undisputed facts in the case but if any are omitted the remedy is for the other side to repeat the questions with the omitted facts included. *State v. Angelina*, 73 W. Va. 146, 80 S. E. 141, 51 L. R. A. (N. S.) 877 (1913).

28. 3 Chamberlayne, Evidence, §§ 2467-2471.

29. *Levinson v. Sands*, 81 Ill. App. 578 (1898); *Smith v. Minneapolis St. R. Co.*, 91 Minn. 239, 97 N. W. 881 (1904); *State v. Thompson*, 153 N. C. 618, 69 S. E. 254 (1910).

The same rule is laid down in Kansas [*Wichita v. Coggshall*, 3 Kan. App. 540, 43 Pac. 842 (1890)] and Missouri. *Mammerberg v. Metropolitan St. R. Co.*, 62 Mo. App. 563 (1895).

In Indiana the question may assume disputed facts to be as claimed by the proponent of the question. *Nave v. Tucker*, 70 Ind. 15 (1880).

30. 3 Chamberlayne, Evidence, §§ 2472-2479.

31. Something must be left to the presiding judge. *Oliver v. R. Co.*, 170 Mass. 222, 49 N. E. 117 (1888).

32. *McLean v. Lewiston*, 8 Ida. 472, 69 Pac. 478 (1902); *Kelly v. Perrault*, 5 Ida. 221, 48 Pac. 45 (1895) ("tends to prove," "conjecture" excluded).

33. *Taylor v. McClintock* (Ark. 1908), 112 S. W. 405; *Spiers v. Hendershott* (Iowa 1909), 120 N. W. 1058; *Carr v. Locomotive Co.* (R. I. 1908), 70 Atl. 196. Technical accuracy is not required. *Long Distance Telephone & Telegraph Co. v. Schmidt* (Ala. 1908), 47 So. 731. The hypothetical question may properly contain "any state of facts which the evidence directly, fairly, and reasonably tends to establish or justify." *Denver & R. G. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738 (1900).

bitrarily exclude a question on the assumption that the facts on which it is based are not fully proved.³⁴

This rule applies at every stage of the proceedings,³⁵ although new facts may be brought out in cross-examination.³⁶ Controverted facts may be included³⁷ and the exclusion of immaterial facts is not fatal to the regularity of the proceedings.³⁸ The facts must be proved by legal evidence³⁹ whatever its weight⁴⁰ and even facts admitted *de bene* may be included.⁴¹ The witness may however be tested by asking him any questions if permitted by the court whether supported by the evidence or not.⁴²

§ 822. [Form of Question]; General Assumptions.⁴³—The temptation presented to judicial administration to permit the use of general expressions which may do away with the detailed narration of facts in a hypothetical question is undoubtedly a strong one. The enumeration of minute facts claimed by the proponent to have been established by the evidence is, in many instances, greatly consumptive of time. The presiding judge, in such cases, seldom becomes unconscious of the fact that it is an important part of his administrative duty to expedite trials. The burden of preparing and putting the hypothetical question in its unobjectionable form apparently presses at times upon counsel, as a monotonous hardship. These considerations, as well as others, lend force to the suggestion of permitting the witness to give his opinion, more or less completely, upon some general reference to the *evidence*, with which all persons connected with the trial are familiar or upon some broad assumption as to what the evidence proves.

Hence courts have sometimes permitted expert witnesses to be asked their

34. *Galveston, H. & S. A. Ry. Co. v. Powers* (Tex. Civ. App. 1909), 117 S. W. 459.

35. *Conway v. State*, 118 Ind. 482, 21 N. E. 285 (1888).

36. *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783 (1887). Where, however, the range of cross-examination is limited to testing the statements of the witness made upon direct examination the interrogation of experts will be restricted in a similar way. *Carr v. American Locomotive Co.* (R. I. 1908), 70 Atl. 196; *Hussong Dyeing Mach. Co. v. Philadelphia Drying Machinery Co.*, 173 Fed. 236 (1909).

37. *Bourbonnais v. West Boylston Mfg. Co.*, 184 Mass. 250, 68 N. E. 232 (1903).

38. *Frankfort v. Manhattan R. Co.*, 12 Misc. (N. Y.) 13, 33 N. Y. Suppl. 36 (1895); *Stearns v. Field*, 90 N. Y. 640 (1882); *Cowley v. People*, 83 N. Y. 470 (1880).

39. *In re James*, 124 Cal. 653, 57 Pac. 578, 1008 (1899); *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397 (1899); *State v. Hyde* (Mo. 1911), 136 S. W. 316 (implied hearsay);

Hagadorn v. Connecticut Mut. L. Ins. Co., 22 Hun (N. Y.) 249 (1880).

A single witness is sufficient to establish, in most cases, the existence of a fact. *Nolan v. Newton St. Ry. Co.*, 206 Mass. 384, 92 N. E. 505 (1910).

40. *Oliver v. North End St. R. Co.*, 170 Mass. 222, 49 N. E. 117 (1898).

41. As the supreme judicial court of Massachusetts says, he "in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be." *Anderson v. Alberstamm*, 176 Mass. 87, 57 N. E. 215 (1900). See also *Delaney v. Framingham Gas Fuel & Power Co.*, 202 Mass. 359, 88 N. E. 773 (1909).

42. *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897).

43. 3 Chamberlayne, *Evidence*, §§ 2480-2487.

judgment "upon the evidence."⁴⁴ in the case where the facts are few and unambiguous⁴⁵ and the witness has heard all the evidence.⁴⁶ The weight of authority however seems against the practice⁴⁷ as it is impossible to know whether the jury believes the facts detailed in the testimony and there is no way of knowing whether the case on which the opinion was given was the same as that found by the jury.⁴⁸ Other indefinite assumptions⁴⁹ as the recollection of the witness of what another witness has stated⁵⁰ cannot be used as the basis for the opinion of the expert.

§ 823. [Form of Question]; Administrative Details.⁵¹—The court should exercise its administrative powers to prevent the introduction into the evidence of irrelevant facts⁵² or questions of undue complexity and length⁵³, or which are unfair to the witness⁵⁴ or inaccurate.⁵⁵ Misleading questions are also to be avoided which overstate or understate the evidence⁵⁶ or omit material facts⁵⁷ or are ambiguous⁵⁸ or argumentative⁵⁹ or tend to give color

44. "An expert witness cannot be asked to give an opinion founded on his understanding of the evidence, against the objection of the other party, except in cases where the evidence is capable of but one interpretation." *Stoddard v. Winchester*, 157 Mass. 567, 575, 32 N. E. 948 (1893).

45. *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267 (1887).

46. *State v. Privitt*, 175 Mo. 207, 75 S. W. 457 (1903).

47. *Illinois Cent. R. Co. v. McCollum*, 130 Ill. App. 267 (1906).

48. *U. S. v. McGlue*, 1 Curtis C. C. 1 (1851).

49. What he has heard of the case.—*Champ v. Cob.*, 2 Metc. (Ky.) 27 (1859); *Connell v. McNett*, 109 Mich. 329, 67 N. W. 344 (1896); *Malynak v. State*, 61 N. J. L. 562, 40 Atl. 572 (1898); *Sanchez v. People*, 22 N. Y. 154 (1860); *Lake v. People*, 1 Park Cr. C. 557 (1854). The question has, however, been received. *Swanson v. Mellen*, 66 Minn. 486, 69 N. W. 620 (1897); *State v. Privitt* (Mo. 1903), 75 S. W. 457; *State v. Hayden*, 51 Vt. 299, 306 (1878).

50. *People v. Bowen* (Mich. 1911), 130 N. W. 706, 18 Detroit Leg. N. 201; *Bedford Belt R. Co. v. Palmer*, 16 Ind. App. 17, 44 N. E. 686 (1896); *Tibbitts v. Phipps*, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954 (1898).

51. 3 Chamberlayne, Evidence, §§ 2488–2497.

52. *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70, 61 S. W. 626 (1901).

53. *Forerth v. Doolittle*, 120 U. S. 73, 78, 7 S. Ct. 408, 30 L. ed. 586 (1887). "It might be wiser to exclude such questions al-

together, when they are very complicated or involve much detail." *Howes v. Colburn*, 165 Mass. 385, 388, 43 N. E. 125 (1896).

54. *Kahn v. Triest-Rosenberg Cap. Co.*, 139 Cal. 340, 73 Pac. 164 (1903); *Baltimore Safe Deposit, etc., Co. v. Berry*, 93 Md. 560, 49 Atl. 401 (1901); *Dallas Consol. Electric St. R. Co. v. Rutherford* (Tex. Civ. App. 1904), 78 S. W. 558; *Brown v. Third Ave. R. Co.*, 19 Misc. (N. Y.) 504, 43 N. Y. Suppl. 1094 (1897).

55. Some blending of inaccuracy in restating the effect of the evidence for the purposes of the hypothetical question may well be tolerated in the absence of proof of prejudice. *Atlanta R., etc., Co. v. Monk*, 118 Ga. 449, 45 S. E. 494 (1903); *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499 (1888); *Thompson v. Knickerbocker Ice Co.*, 6 N. Y. Suppl. 7 (1889).

56. It has even been held that where a question embraces a single material fact of which there is no evidence it should be excluded. *Northern Cent. Ry. Co. v. Green*, 112 Md. 487, 76 Atl. 90 (1910); *State v. Hanley*, 34 Minn. 433, 26 N. W. 397 (1886); *El Paso Electric Ry. Co. v. Bolgiano* (Tex. Civ. App. 1908), 109 S. W. 388.

57. *Davis v. State*, 38 Md. 40, 44 (1873); *Hand v. Brookline*, 126 Mass. 326 (1879).

58. *Horton v. U. S.*, 15 App. Cas. (D. C.) 310 (1899); *Baltimore Safe Deposit, etc., Co. v. Berry*, 93 Md. 560, 49 Atl. 401 (1901) ("misconception").

59. *Taylor v. McClintock* (Ark. 1908), 112 S. W. 405; *Houston & T. C. R. Co. v. Johnson* (Tex. Civ. App. 1909), 118 S. W. 1150.

to the evidence⁶⁰ or which state a controverted fact as if it were proved.⁶¹ The province of the jury as the final arbiters of the facts must be protected and the expert will not for example be allowed to state how far the evidence tends to prove any fact in controversy.⁶² As the receipt of hypothetical questions is an administrative matter the action of the trial court will be sustained unless it is unreasonable or an abuse of the discretion of the court.⁶³ Failure to object to the form of the question at the time will be deemed a waiver.⁶⁴

60. *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69 (1907).

61. *Chalmers v. Whitmore Mfg. Co.*, 164 Mass. 532, 42 N. E. 98 (1895).

62. *Ringlehaupt v. Young*, 55 Ark. 128, 17 S. W. 710 (1891); *Barber's Appeal*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90 (1893); *Walker v. Fields*, 28 Ga. 237 (1859); *Texas Brewing Co. v. Walters* (Tex. Civ. App. 1897), 43 S. W. 548. An expert witness may be asked to give his opinion on certain facts set

out in a hypothetical question although they involve the issues in the case as the jury are not obliged to accept as true the facts set out in the hypothetical question. *Jones v. Caldwell*, 20 Idaho 5, 116 Pac. 110, 48 L. R. A. (N. S.) 119 (1913).

63. *Pensacola Electric Co. v. Bissett* (Fla. 1910), 52 So. 367.

64. *Ragland v. State*, 125 Ala. 12, 27 So. 983 (1899); *Howland v. Oakland Consol. St. R. Co.*, 115 Cal. 487, 47 Pac. 255 (1896).

CHAPTER XXXVI.

PROBATIVE FORCE OF REASONING.

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comparison between inferences from observation and reasoning from assumptions, 835.

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§ 824. **Element of Observation.**¹— In ascertaining the probative force to be accorded to the statement of a witness based directly upon observation the court and jury will be apt to have in mind certain obvious considerations. Prominent among these, is the circumstance that the statements and other acts of a witness, indeed of anybody, are judicially regarded as trustworthy in proportion as they are involuntary. With the entrance of volition, is thought to come the operation of self-interest, reflections as to how proposed conduct will effect a certain end.

Adequate Knowledge.— In the second place the test of adequate knowledge on the part of the witness may always be applied, equally by judge or jury. "The extent of the witness's acquaintance with the subject may always be inquired into, to enable the jury to estimate the weight of his evidence."

Mental Powers.— Aside from the general confidence which administration reposes in the accuracy of intuitive observation, it may be said of statements of fact when compared to those in which the proportion of reasoning is high, that perhaps the most essential point in connection with estimating the probative force of results of perception is that the opportunities for observation are much more carefully to be scrutinized than are the mental powers of the observer. In the case of Conclusion and Judgment, the reverse is more nearly true.

1. Chamberlayne, Evidence, § 2499.

§ 825. [Element of Observation] How Weight is Tested; Detail of Preliminary Facts.²—As frequently observed in connection with the element of observation in its various aspects previously considered, a most valuable aid in determining the probative force³ properly to be accorded to the mental result lies in the enumeration by the witness of such of the facts at the basis of his inference as admit of effective individual statement.⁴ Any facts which tended to fix the attention of the witness,⁵ his opportunities for observation⁶ and his mental powers of observation⁷ can be shown and he may be tested by the inferences of other observers⁸ or by showing the possibility of different causes for the results noticed.⁹

§ 826. [Element of Reasoning; How Weight is Tested]; Qualifications of Witness.¹⁰—An unquestionably sound proposition is to the effect that the evidentiary weight of the judgment of a skilled witness is largely dependent upon qualifications possessed by him, his knowledge of the facts and principles of his art, the skill and experience which he has acquired and the experiments or researches which he has made.¹¹ The qualifications of a skilled witness may be affirmatively established and the probative force of his act of reasoning directly enhanced by the indorsements of his skill and ability given by others¹² including experts.¹³ The witness may also be tested by showing his general knowledge¹⁴ or lack of it¹⁵ and the reasoning powers of the witness, whether

2. Chamberlayne, Evidence, § 2500.

3. "The qualification that the opinion of the non-expert must be accompanied by a statement of the facts on which it is based is not very important; since, whether the witness be an expert or a non-expert, the grounds of his belief and his opportunities of observation may always be elicited; and, whether the witness be of the one class or the other, his testimony should be rejected by the Court, where it consists of a mere naked declaration of opinion with neither learning, observation, nor acquaintance to support it." *Wood v. State*, 58 Miss. 743 (1881), per Chalmers, C. J.

4. *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106 (1903).

5. "Is your recollection refreshed, or your attention called to that from any circumstance, any accident that happened there?" *O'Hagan v. Dillon*, 76 N. Y. 170, 173 (1879).

6. *Columbus & R. R. Co. v. Christian*, 97 Ga. 56, 23 S. E. 411 (1896).

7. *McGuerty v. Hale*, 161 Mass. 51, 36 N. E. 682 (1894); *Gahagan v. R. Co.*, 1 All. 190 (1861); *Frazier v. R. Co.*, 38 Pa. 104, 111 (1860).

8. *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516 (1878).

9. *People v. Knight* (Cal. 1895), 43 Pac. 6; *Com. v. Mullins*, 2 Allen (Mass.) 295 (1861); *Bathrick v. Detroit Post, etc., Co.*, 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63 (1883).

10. Chamberlayne, Evidence, § 2505.

11. *Carr v. Northern Liberties*, 35 Pa. St. 324, 78 Am. Dec. 342 (1860); *State v. Ward*, 39 Vt. 225 (1867).

12. *Tullis v. Kidd*, 12 Ala. 650 (1847) (physician).

13. *State v. Maynes*, 61 Ia. 120, 15 N. W. 884 (1883); *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813 (1899); *Laros v. Com.*, 84 Pa. St. 200 (1877).

This practice seems objectionable to some courts as being confusing and likely to confuse the issue. *Birmingham R. & F. Co. v. Ellard*, 135 Ala. 433, 30 So. 276 (1903); *De Phue v. State*, 44 Ala. 32 (1870); *Tullis v. Kidd*, 12 Ala. 648 (1847); *Forcheimer v. Stewart*, 73 Iowa 216, 35 N. W. 148 (1887); *Brabo v. Martin*, 5 La. 177 (1832) (confusing the issues).

14. *People v. Youngs*, 151 N. Y. 210, 45 N. E. 460 (1896).

15. *Washington v. Cole*, 6 Ala. 214 (1844).

unskilled or expert¹⁶ and by showing also what facts the witness is using in addition to those in evidence as the basis of his inferences or his judgments.¹⁷ Common knowledge is the basis for the inferences of the unskilled observer¹⁸ while the expert witness measures the enumerated facts in terms of his art.

§ 827. **Inferences Tested; When Tests are Applied.**¹⁹—As a matter of administration, tests are applied to probative force, occasionally at the stage of *voir dire*, more often at that of cross-examination-in-chief. The normal range of the examination is subject, in the usual way, to the administrative power of the judge²⁰ and is as extensive as is permitted by the regular rule of practice which obtains in the particular jurisdiction.²¹ Speaking generally, within these double limitations, the range permitted is a wide one.²² Thus, where this rule of practice or procedure limits the cross-examination to the points investigated or referred to in connection with the direct examination of the witness and does not allow the adverse party to cross-examine him for the purpose of eliciting facts in support of his own affirmative hypothesis, the same limitation is imposed upon counsel who cross-examine with regard to the probative force of an act of reasoning.²³ Thus cross-examination may cover the damages,²⁴ the knowledge of the witness,²⁵ provided it is not calculated to mislead the jury,²⁶ or his qualifications.²⁷ Cross-examination as to credit may go to great lengths²⁸ even using the testimony in other suits,²⁹ and the cross-examining counsel has a substantive right to test the expert by hypothetical questions based on his view of the facts³⁰ or even on imaginary facts.³¹

16. *State v. Kelly*, 77 Conn. 266, 58 Atl. 705 (1904).

17. *Batten v. State*, 80 Ind. 304 (1881); *Graham v. Pennsylvania Co.*, 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293 (1891).

18. *Chicago, etc., R. Co. v. Truitt*, 68 Ill. App. 76 (1896) (gate).

19. Chamberlayne, *Evidence*, § 2510.

20. *Carr v. American Locomotive Co.*, 26 R. I. 180, 58 Atl. 678 (1904) (valve stem).

Imaginary questions.—Expert witnesses may be cross-examined on purely imaginary and abstract questions, in order to get their opinions on all the possible theories of the case, and that the value and accuracy of their opinions may be fairly tested. *Parrish v. State*, 139 Ala. 16, 36 So. 1012 (1904).

21. *Maure v. Gould & Eberhardt* (N. J. 1905), 60 Atl. 1134 (1905).

22. *McMahon v. Chicago City Ry. Co.*, 239 Ill. 334, 88 N. E. 223 (1909) (interest).

23. *Amos v. State*, 96 Ala. 120, 11 So. 424 (1891); *Gridley v. Boggs*, 62 Cal. 190 (1882); *Rice v. Des Moines*, 40 Iowa 638 (1875).

24. *Barry v. Second Ave. R. Co.*, 1 Misc. (N. Y.) 502, 20 N. Y. Suppl. 871 (1892).

25. *Lake v. People*, 1 Park. Cr. (N. Y.) 495 (1854).

26. *McMahon v. Chicago City Ry. Co.*, 239 Ill. 334, 88 N. E. 223 (1909).

27. *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433, 33 So. 276 (1902); *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 700 (1871); *Hutchinson v. State*, 19 Nebr. 262, 27 N. W. 113 (1886).

28. *Alabama Great Southern R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65 (1890).

29. *Brooks v. Rochester R. Co.*, 10 Misc. (N. Y.) 88, 31 N. Y. Suppl. 179 (1894).

30. *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193 (1889); *Conway v. State*, 118 Ind. 482, 21 N. E. 285 (1889); *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197 (1888); *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908 (1886); *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 700 (1871); *Kearney v. State*, 68 Miss. 233, 8 So. 292 (1890); *People v. Thurston*, 2 Park. Cr. (N. Y.) 49 (1852).

31. *Bever v. Spangler*, 93 Iowa 576, 61 N.

§ 828. Probative Force of Inferences from Observation; Stage of Rebuttal.³²—

In using the tests as to the probative force of observation which are created by cross-examination, the adverse party is, as a matter of course, frequently engaged in securing material for an effective rebuttal. When this stage arrives for him, the opponent may properly follow up his attack upon the probative force of an adverse inference through the breaches which his cross-examination may be supposed to have created. In respect to the force of observation, the adverse party may show, if he can, that the witness did not, in point of fact, observe correctly. *A fortiori*, he is at liberty to establish that the alleged observer, by reason of his physical condition,³³ the position in which he was placed or the like, could not have noticed the phenomena which he says he perceived. He may seek to show that the facts detailed by the witness as the basis of his inference have no objective existence.³⁴ Clearly, in order that the inference of the observer should retain probative force, it is necessary that the proponent should maintain, at all hazards, the substantial actuality of these constituent phenomena.³⁵ The testimony of the witness may be contradicted by other witnesses.³⁶

§ 829. Probative Force of Judgments; How Enhanced; Use of Text-Books.³⁷—

As part of his original case, a proponent may be permitted to reinforce the probative weight of the judgment of his expert, even before an attack has been made on it by his adversary. In this way, the superior nature of his qualifications, the length and variety of his experience, the extent of his reading, the responsibility of the positions which he has held,³⁸ and other facts of a similar nature may properly be shown. To the same effect, evidence that the expert's mental operations are characterized by accuracy³⁹ or promptness in reaching correct conclusions may be established in the evidence. Still more natural is it that the proponent should desire to show the correctness of the reasoning adopted by his witness in the particular case.⁴⁰ Like other deliberative facts, however, much, in deciding as to whether evidence of this class should be used, is necessarily dependent upon the administrative instinct of the judge.

W. 1072 (1895); *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897); *Dilleber v. Home L. Ins. Co.*, 87 N. Y. 79 (1881); *La Beau v. People*, 34 N. Y. 223 (1866). No obligation rests on the court to receive such testimony. *Root v. Boston El. R. Co.*, 183 Mass. 418, 67 N. E. 365 (1903).

33. *Fairchild v. Bascomb*, 35 Vt. 398 (1862); *In re Mullin*, 110 Cal. 252, 42 Pac. 645 (1895).

34. *Kirsher v. Kirsher*, 120 Iowa 337, 94 N. W. 846 (1903); *Union Pac. R. Co. v. Stanwood* (Nebr. 1904), 98 N. W. 656; *Quinn v. Higgins*, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305 (1885).

35. *Frost v. Milwaukee, etc., R. Co.*, 96 Mich. 470, 56 N. W. 19 (1893); *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481 (1843); *Easton First Nat. Bank v. Wireback*, 106 Pa. St. 37 (1884); *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 255 (1891).

36. *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564 (1892).

37. Chamberlayne, *Evidence*, § 2524

38. *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552 (1889); *Laros v. Com.*, 84 Pa. St. 200 (1877).

39. *Com. v. Buccieri*, 133 Pa. St. 535, 26 Atl. 228 (1893) (promptness of testimony)

40. *O'Neill v. Beland*, 133 Ill. App. 594 (1907).

So all kinds of corroborative facts⁴¹ or the results of experiments⁴² may be put in evidence to enhance the value of the expert. The facts added by the witness to those stated in his preliminary enumeration may also be shown in testing him.⁴³

Standard text-books are inadmissible as hearsay⁴⁴ but the witness may be permitted to corroborate himself by showing that his statement is in accord with the text-books on the subject.⁴⁵ Standard treatises on matters of common knowledge however may be in a different class and like mortality tables⁴⁶ may be used to refresh the memory as to facts which are potentially known.⁴⁷ Statutes in some states have provided that standard works may be received as proof of the facts asserted.⁴⁸ In putting hypothetical questions the attorney may adopt the language of the text-books⁴⁹ which the expert may ratify⁵⁰ and the expert may even be allowed to refresh his memory by reference to the text-book⁵¹ which cannot however be used in its assertive capacity⁵² and

41. *Moyer v. New York Cent., etc., R. Co.*, 98 N. Y. 645 (1885).

42. *People v. Thompson*, 122 Mich. 411, 81 N. W. 344 (1899). The testimony of an expert with respect to a test made by reflexing the knees of the plaintiff did not refer to subjective symptoms, no words or statements of plaintiff being given, and was therefore competent in an action for personal injuries. *Hirsch v. Chicago Consol. Traction Co.*, 146 Ill. App. 501 (1909).

43. *Cobb v. United Engineering & Contracting Co.*, 191 N. Y. 475, 84 N. E. 395 (1908).

44. "The substantial objection is that they are statements wanting the sanction of an oath, and the statement thus proposed is made by one not present and not liable to cross-examination." *Ashworth v. Kittredge*, 12 Cush. 194 (1853), per Shaw, C. J.

45. *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585, 36 Pac. 125 (1894); *State v. Winter*, 72 Iowa 627, 34 N. W. 475 (1887); *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318 (1886); *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28 (1888). A contrary view has, however, been expressed. *Link v. Sheldon*, 18 N. Y. Suppl. 815 (1892).

Recorded cases.—As a practical matter, this corroboration consists in many instances in the statement by the text-book author of a number of recorded cases upon which the expert relies in aid of his opinion. *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585, 36 Pac. 125 (1894); *Brodhead v. Wiltse*, 35 Iowa 429 (1872); *Huffman v. Click*, 77 N. C. 55 (1877). Although medical books are not competent in evidence still experts may refer in giving their opinions to the medical author-

ities and state in substance the result thereof. *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493 (1912), citing text.

46. *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535, 88 N. W. 1078 (1902).

47. A civil engineer who has testified to the cause of the fall of a building may verify his results by reading from tables of recognized authority a record of the tests which show the strain-resisting capacity of various building materials. *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561 (1897).

48. *California*.—C. C. P. § 1944 (1872).

Idaho.—Rev. St. § 5990 (1887).

Montana.—C. C. P. § 3227 (1895).

Nebraska.—Comp. St. § 5916 (1899).

Oregon.—C. C. P. § 758 (1892).

Utah.—Rev. St. § 3400 (1898).

49. *Connecticut*.—*Tompkins v. West*, 56 Conn. 478, 485, 16 Atl. 237 (1888).

Illinois.—*Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516, 519 (1878).

Kentucky.—*Williams v. Nalley*, 45 S. W. 874, 20 Ky. L. Rep. 244 (1898).

South Carolina.—*State v. Coleman*, 20 S. C. 441 (1883).

Tennessee.—*Byers v. Nashville, etc., R. Co.*, 94 Tenn. 345, 29 S. W. 128 (1894).

50. *Chesapeake & O. Ry. Co. v. Wiley* (Ky. 1909), 121 S. W. 402; *Soquet v. State*, 72 Wis. 666, 40 N. W. 391 (1888).

51. *Huffman v. Click*, 77 N. C. 55 (1877); *Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221 (1873).

52. *Foggett v. Fischer*, 23 N. Y. App. Div. 207, 48 N. Y. Suppl. 741 (1898).

care must also be used to see that the rule against the use of text-books as evidence is not evaded.⁵³ One of the commonest and best methods of enhancing the value of the testimony of the skilled witness is by calling on him to explain his reasoning.⁵⁴ The counsel may also elicit from an adverse witness an admission of the eminence of his own witness.⁵⁵

§ 830. [Probative Force of Judgments]; How Tested on Cross-Examination.⁵⁶—

An appropriate field for cross-examination is as to the knowledge and experience gained by the reading and training of an adverse witness in connection with the subject as to which he claims to possess expert skill.⁵⁷ The general qualifications, however acquired, may properly be tested at this time,⁵⁸ recognizing that an unsuccessful attempt to discredit may be a most powerful method of enhancing the probative efficiency of an adverse witness.

Standard treatises may also be used, not as evidence in themselves,⁵⁹ but by reference for the purpose of testing the statements of the witness,⁶⁰ and where the expert has stated that he relies on the authorities to some extent it may be shown that the standard books are not in accord on the question,⁶¹ and the position taken by various authors on a certain point may be brought out on cross-examination,⁶² and such books provide frequent material for framing questions.⁶³

§ 831. [Probative Force of Judgments]; Stage of Rebuttal.⁶⁴—As has been seen at an earlier place, the process of testing an adversary's case may take

53. *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150 (1897); *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55 (1883); *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 345, 29 S. W. 128 (1895). The rule has been thus stated: A party calling an expert medical witness cannot read from medical works on inductive science, and ask his witness if he agrees with the statement of the authority, or if it accords with his experience. *In re Hock's Will*, 129 N. Y. Suppl. 196 (1911).

54. *Louft v. C. & J. Pyle Co.* (Del. Super. 1910), 75 Atl. 619; *State v. Collins* (Del. O. & T. 1903), 62 Atl. 224; *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816 (1907); *Cooper v. Harvey* (Kan. 1908), 94 Pac. 213; *State v. Ryno* (Kan. 1904), 74 Pac. 1114 (handwriting). Where an expert opinion is competent, the reasons upon which such reasoning is based are likewise received. *Quincy Gas & Electric Co. v. Schmitt*, 123 Ill. App. 647 (1906).

55. *Dean v. Wabash R. Co.* (Mo. 1910), 129 S. W. 953; *Sullivan v. Charlestown & W. C. Ry. Co.*, 85 S. C. 532, 67 S. E. 905 (1910).

56. Chamberlayne, *Evidence*, § 2535.

57. *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447 (1897).

58. *Birmingham R., etc., Co. v. Ellard*, 133 Ala. 433, 33 So. 276 (1902); *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 790 (1871); *Hutchinson v. State*, 19 Nebr. 262, 27 N. W. 113 (1886).

59. *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816 (1907) (state of authorities); *Dean v. Wabash R. Co.* (Mo. 1910), 129 S. W. 953; *Beadle v. Paine* (Or. 1905), 80 Pac. 903; *Egan v. Dry Dock, etc., R. Co.*, 12 N. Y. App. Div. 556, 42 N. Y. Suppl. 188 (1896).

60. *State v. Moeller* (Md. 1910), 126 N. W. 568 (credibility); *Gulf. C. & S. E. Ry. Co. v. Dooley* (Tex. Civ. App. 1910), 131 S. W. 831.

61. *New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

62. *Brodhead v. Wiltse*, 35 Iowa 429 (1872); *Sale v. Eichberg*, 105 Tenn. 333, 59 S. W. 1020 (1900).

63. *State v. Wood*, 53 N. H. 495 (1873).

64. Chamberlayne, *Evidence*, § 2541.

place not only at the stage of cross-examination but upon that of rebuttal. In other words, the deliberative or testing facts may be introduced into the case by the direct testimony of friendly witnesses or by the cross-examination of those which were originally produced by one's adversary. Possibly, the most obvious and frequent line of attack made at the stage of rebuttal upon the judgment of an opposing expert is an attempt to establish the claim that the facts assumed in the hypothetical question do not in reality exist,⁶⁵ that the phenomena said to have been observed were never actually perceived or, at least, have not been established by the evidence.⁶⁶ The result of the reasoning faculty is inevitably discredited should it appear to have operated upon an erroneous basis of fact.⁶⁷ So an adverse witness may be discredited by showing that he has at other times made inconsistent statements⁶⁸ or acted in a manner inconsistent with his present testimony.⁶⁹ So it may be established that the explanation given by the witness of the facts is not the only one⁷⁰ and facts showing that the expert is lacking in qualifications⁷¹ or is biased⁷² or has been mistaken on other occasions⁷³ are also admissible.

§ 832. **Use of Standard Treatises; Deliberative Effect.**⁷⁴—It has thus been seen that, even under modern conditions, the office of a text-book, though of the highest authority, is, in the absence of statute, *deliberative*. Such benefit as the community, represented in its courts, gains from scientific text-books, it thus acquires by indirection. Across the path to direct consultation stands the rule against hearsay. This difficulty is obviated in many cases by using these books as an aid to judicial knowledge. The hearsay rule was established before science was of importance and it has been suggested that an additional

65. *Quinn v. Higgins*, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305 (1885). An expert, for example, who testifies that, in his judgment, a train running at a certain rate of speed could have been stopped within a given distance, speaks with but little effect should it appear that the train was in point of fact, proceeding at a much higher rate of speed. *Frost v. Milwaukee, etc., R. Co.*, 96 Mich. 470, 56 N. W. 19 (1893).

Contradiction by the event may be shown on rebuttal. Thus, an event which the expert said was impossible may be affirmatively shown actually to have occurred. *Com. v. Leach*, 156 Mass. 99, 30 N. E. 163 (1892).

66. *Bristed v. Weeks*, 5 Redf. Surr. (N. Y.) 529 (1882).

67. *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481 (1843).

68. *People v. Donovan*, 43 Cal. 162 (1872); *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122 (1871); *Sanderson v. Nashua*, 44 N. H. 492 (1863).

69. *Peterson Bros. v. Mineral King Fruit Co.* (Cal. 1903), 74 Pac. 162.

70. *Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen (Mass.) 181 (1864).

71. *Carley v. New York, etc., R. Co.*, 1 N. Y. Suppl. 63 (1888). See, however, *Buckman v. Missouri, etc., R. Co.*, 100 Mo. App. 30, 73 S. W. 270 (1903); *Adams v. Sullivan*, 100 Ind. 8 (1884).

72. *New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896); *Metropolitan St. Ry. Co. v. Houghton* (Tex. Civ. App. 1911), 134 S. W. 422.

73. Papers containing false signatures which were pronounced genuine at a former trial by experts called at the second trial may be introduced in evidence for the purpose of showing the former mistake, and thereby affecting the weight of their opinions. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163 (1903).

74. *Chamberlayne*, Evidence, § 2547.

small minority of the testimony in the face of salient and irrefragible facts.⁹⁶

§ 835. [Weight of Inferences]; Comparison between Inferences from Observation and Reasoning from Assumptions.⁹⁷—To attempt any classification of the probative value of the reasoning of witnesses except in the most general way is a task as difficult as its results are valueless. In broad outline, however, certain general distinctions are to be observed. It is not, for example, questionable that on a matter essentially technical in its nature, the inference or conclusion of a skilled observer is more powerful, other things being equal, in producing belief than similar mental acts by witnesses not possessed of the appropriate skill and experience.⁹⁸ For example, the evidence of eye-witnesses that a certain event actually occurred is not readily off-set by the inference, conclusion or judgment of a witness, skilled or unskilled, that it *could not* have done so.⁹⁹ While the inference or conclusion of the ordinary or skilled observer is secondary evidence as compared to the constituent facts themselves, and the judgment of the skilled observer or expert is secondary to the judgment of the jury, no relationship of primary and secondary exists as between the various mental acts, inferences, conclusions or judgments.¹ That is to say, receiving the opinion of an expert is not, for example, to be postponed until it is made to appear that the inference or conclusion of an observer cannot be obtained.² Testimony from Judgment may be superior to Inference and Conclusion as the hypothetically stated question purports to be exact and inference and fact are thus clearly separated, but in many cases the observed phenomena cannot be placed before the expert in their entirety³ and the hypothetical question may be based on facts incompletely proved and the expert furthermore lacks the warmth and intimacy of the observer's connection with the original phenomena.⁴

§ 836. Weight of Judgments; A Field of Conjecture.⁵—The use of expert testimony is one of the weak points in the administration of justice. Judges seem intuitively to distrust it, yet scarcely to know how present difficulties can best be met and overcome. The favorite field of the expert is that of the inexact sciences, noticeably medicine. Here theory takes the place of fact

96. McMullen v. City of New York, 93 N. Y. Suppl. 772, 104 App. Div. 337 (1905).

97. Chamberlayne, Evidence, § 2563.

98. St. Louis, etc., R. Co. v. Brown, 62 Ark. 254, 35 S. W. 225 (1896).

99. Southern Ry. Co. v. Ward, 131 Ga. 21, 61 S. E. 913 (1908).

1. People v. Gonzales, 35 N. Y. 49 (1866). See also Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668 (1875).

2. Value.—In many, perhaps most, instances, the value of property is a subject upon which the jury, within reasonable lim-

its, are deemed entitled to have an opinion of their own. Andrews v. Frierson, 39 So. 512 (1905) (services of auctioneer); Denison v. Shawmut Min. Co., 135 Fed. 864 (1904).

3. Porter v. Pequonnick Mfg. Co., 17 Conn. 249, 256 (1845); Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310 (1897); Pease Furnace Co. v. Kesler, 21 N. Y. App. Div. 631, 47 N. Y. Suppl. 473 (1897); Weber v. Third Ave. R. Co., 42 N. Y. Suppl. 789 (1896).

4. Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310 (1897).

5. Chamberlayne, Evidence, § 2568.

and conjecture usurps that of reasoning.⁶ One difficulty with expert opinion is the faulty method of their selection as those only are selected whose opinions are favorable to the side which produces them so that even if their opinions are honest the result does not present to the court in most cases the real state of expert opinion of the subject but only those who are willing to testify as desired.⁷ The suggestion has been frequently made that the judge should select the experts⁸ but the practical difficulties of doing this are great as the court has neither the time or machinery to discover the unbiased expert or to test him when produced.⁹ Expert testimony is therefore subject to much criticism¹⁰ but has its warm admirers¹¹ especially in technical matters where it seems absolutely necessary.

6. *Roberts v. New York El. R. Co.*, 128 N. Y. 455, 465, 474, 28 N. E. 486, 13 L. R. A. 499 (1891).

7. *Thorn v. Worthing Skating Rink Co.*, 6 Ch. D. 415 note, 416 note (1876).

8. *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396 (1870).

9. *Thorn v. Worthing Skating Rink Co.*, 6 Ch. D. 415 note, 416 note (1876).

10. *Goodwin v. State*, 96 Ind. 550, 572 (1884).

11. *State v. Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550 (1888); *Young v. Barner*, 27 Gratt. (Va.) 96 (1876).

CHAPTER XXXVII.

UNSWORN STATEMENTS; INDEPENDENT RELEVANCY.

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§ 837. **Hearsay Rule as a Distinctive Anomaly; Scope of the Anomaly.**— The exclusionary rule which forbids the reception in evidence of unsworn statements used in their assertive capacity is the distinctive anomaly of the English law of evidence.¹ Reserving for discussion at another place² the general arguments assigned in support of the hearsay rule, which a large body of authoritative professional opinion still regards as a salutary one, it may be here stated that the mischief attendant upon the exclusion of hearsay statements is greatly limited by the narrow scope of the anomaly. Only to the unsworn statement when used *in its assertive capacity*, i.e., as proof of the truth of the facts asserted, does the rule against hearsay apply.³ Wherever the existence

1. 4 Chamberlayne, Evidence, § 2574.

2. *Infra*, §§ 866 *et seq.*; 4 Chamb., Ev., §§ 2711 *et seq.* See also discussion of reasons for the anomaly, 4 Chamb., Ev., §§ 2575, 2576, 2577.

3. *People v. Lem You*, 97 Cal 224, 32 Pac.

11 (1895); *Shaw v. People*, 3 Hun (N. Y.) 272, 5 Thomps. & C. 439 (1874); 4 Chamb., Ev., § 2578, n. 1. See *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665 (1903).

of a statement is independently relevant,⁴ i.e., by reason of its mere existence, an unsworn statement is a relevant fact; the hearsay rule, so called, has no application. All inferences which may logically be drawn from the existence of an unsworn statement, save only that the statement asserts the truth, may, if relevant, be relied upon by the proponent. The inference, that the facts asserted in an unsworn statements actually exist is placed under the ban of the rule against "hearsay,"⁵ and is accordingly rejected. Only to the unsworn statement when tendered in its assertive capacity does the hearsay rule apply.⁶ The present chapter will be devoted to the independent relevancy of unsworn statements, which may be constituent, probative or deliberate.

§ 838. **Independent Relevancy of Unsworn Statements; Meaning of Res Gestæ.**⁷—The independent relevancy of an unsworn statement may be constituent.⁸ This occurs where the extra-judicial declaration is one of the *res gestæ*, a relevancy of such facts being constituent of the right or liability asserted in the action. When so employed, the existence of a statement is treated simply as a fact, and, being relevant, is deemed admissible, in the current phrase, as relevant *per se*.⁹ In its English or restricted meaning, *res gestæ* imports the conception of action, by some person producing the effects for which liability is sought to be enforced in the action.¹⁰ In the prevailing English view, "Facts which constitute the *res gestæ* must be such, as are so connected with the very transaction or fact under investigation as to constitute a part of it."¹¹ In a marked degree, this is true of the criminal liability of a defendant.¹² In America, the phrase *res gestæ* is by no means limited in meaning, as by the better opinion in England, to actual series of world happenings out of which the right or liability necessarily arises, if at all.¹³ It goes much further and covers all relevant facts necessary to the specific proof of the *res gestæ*, properly so-called.¹⁴ The American use of the term is ap-

4. Independent relevancy may be defined as that form of relevancy which is not dependent upon the truth or falsity of the fact asserted. A statement is said to be independently relevant when the mere fact of its existence has an evidential value.

5. Hearsay may be shortly defined as an extra-judicial statement offered as proof of the facts asserted in it.

6. *People v. Hill*, 123 Cal. 571, 56 Pac. 443 (1899); *Mallery v. Young*, 94 Ga. 804, 22 S. E. 142 (1894); *Com. v. Fagan*, 108 Mass. 471 (1871); *Birge v. Bock*, 44 Mo. App. 69 (1890); *Mooney v. New York El. R. Co.*, 16 Daly 145, 9 N. Y. Supp. 522 (1890); *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397 (1878); 4 Chamb., Ev., § 2579, n. 2. A futile distinction, see 4 Chamb., Ev., § 2580.

7. 4 Chamberlayne, Evidence, §§ 2581-2587.

8. *Supra*, § 640; 3 Chamb., Ev., § 1713.

9. 4 Chamberlayne, Evidence, § 2581.

10. "It is no doubt true, as is said in 1 Phillips on Evidence, 152, 10th ed., words and declarations are properly admissible when they accompany some act, the nature, object or motives of which are the subject of inquiry." *Hyde v. Palmer*, 3 B. & S. 657, 32 L. J. Q. B. 126, 7 L. T. 823, 11 W. R. 433 (1863).

11. *Haynes v. Com.*, 28 Gratt. (Va.) 942 (1877).

12. *R. v. Bedingfield*, 14 Cox Cr. C. 341 (1879); 4 Chamb., Ev., § 2582.

13. It necessarily results that a large number of facts are classed as *res gestæ* under the American view, which are simply treated as probative facts under the English. 4 Chamb., Ev., § 2583, n. 1.

14. *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903); *Barrow v.*

parently broad enough to cover any probative, certainly any material, fact within the entire range of the evidence, where the proof is circumstantial.¹⁵ Under such circumstances, it may be held to embrace not only occurrences at the stage of action, but any relevant facts at that of preparation, such as facts, in a criminal case, showing motive, design or purpose, the procuring of the means employed in the commission of an offense,¹⁶ and the like.¹⁷ In the same way, it covers relevant acts done or events occurring at what may be called the stage of escape, the concealment,¹⁸ change of name, subornation of perjury in witnesses, and so forth.¹⁹ So comprehensive is the American use of the term that, to borrow an expression from pleading, precisely the same phrase is used to designate the alleged facts and the evidence by which they are to be circumstantially established.²⁰ Still further, it is customary for certain courts to speak of any fact which is for some procedural reason admissible, as part of the *res gestae*. Under this practice the admissions of a party,²¹ or those of an agent,²² will be received in evidence as part of the *res gestae*.

No Implication of Action.—Under this broad American definition of *res gestae* the conception or implication of action is, in large measure, eliminated. The *res gestae* fact, in the American view, may be simply an attendant cir-

State, 80 Ga. 191, 5 S. E. 64 (1887); Baird v. Jackson, 98 Ill. 78 (1881); State v. Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (1895); Nugent v. Breuchard, 91 Hun 12, 36 N. Y. Supp. 102 (1895); Crooks v Bunn, 136 Pa. 368, 20 Atl. 529 (1890); 4 Chamb., Ev., § 2583, n. 2.

15. Hall v. Connecticut River Steamboat Co., 13 Conn. 319 (1839); Place v. Baugher, 159 Ind. 232, 64 N. E. 852 (1902); Evans v. Montgomery, 95 Mich. 497, 55 N. W. 362 (1893); Faulcon v Johnston, 102 N. C. 264, 9 S. E. 394 (1889); Prentiss v Strand, 116 Wis. 647, 93 N. W. 816 (1903); Kerr v M. W. of A., 117 Fed. 593, 54 C. C. A. 655 (1902); 4 Chamb., Ev., § 2583, n. 4, and cases cited in last preceding note. In an action for assault on the plaintiff the cries of the mob at the time are clearly competent as part of the *res gestae*. Saunders v. Gilbert, 156 N. C. 463, 72 S. E. 610, 38 L. R. A. (N. S.) 404 (1911). The words of a frightened child made within thirty seconds after a crime "the bums killed pa with a broomstick" are admissible as part of the *res gestae*. The strictness of the old English rule that the words must be entirely contemporaneous has been relaxed in this country and the words will be admitted where they proceed from natural overwhelming impulse. The old English rule that a mere bystander's remark is inadmissible is also overturned in this country

as standing on no reason. Furthermore the fact that the child only four years old was too young to be a witness does not shut out his statement as the growl of a dog or the neighing of a horse would also be competent. State v. Lasecki, 90 Ohio St. 10, 106 N. E. 660, L. R. A. 1915 E 202 (1914).

16. Smith v. State, 88 Ala. 73, 7 So. 52 (1889); State v. Gainor, 84 Iowa 209, 50 N. W. 947 (1892); 4 Chamb., Ev., § 2583, n. 5.

17. State v. Lucey, 24 Mont. 295, 61 Pac. 994 (1900); State v. Thompson, 132 Mo. 301, 34 S. W. 31 (1896).

18. State v. Phillips, 118 Iowa 660, 92 N. W. 876 (1902); State v. Vinso, 171 Mo. 576, 71 S. W. 1034 (1903).

19. People v. Chin Hane, 108 Cal. 597, 41 Pac. 697 (1895); Thorpe v. Wray, 68 Ga. 359 (1892); State v. Brooks, 1 Ohio Dec. (Reprint) 407 (1851); 4 Chamb., Ev., § 2583, n. 8, and cases cited in last preceding note.

20. 4 Chamberlayne. Evidence, § 2583, n. 9

21. Keyes v State, 122 Ind. 527, 23 N. E. 1097 (1889); O'Mara v. Com., 75 Pa. 424 (1874); 4 Chamb., Ev., § 2583, n. 10.

22. Louisville, etc., R. Co. v. Landers, 135 Ala. 504, 33 So. 482 (1902); Haggart v California Borough, 21 Pa. Super. Ct. 210 (1902). Certainly the breaking down of a valuable phrase of established meaning could hardly be more complete.

cumstance in the case, exerting no influence on the actual *res gestae*, i.e., the transaction itself.²³ Thus, in a criminal case, the personal appearance of the accused,²⁴ his physical condition,²⁵ or that of some other person,²⁶ have been spoken of as part of the *res gestae*. In the same way, the condition of the ground around a given place,²⁷ or of certain articles of clothing,²⁸ has been similarly classified.²⁹ Even a purely explanatory circumstance may be designated by the courts as part of the *res gestae*.³⁰

Contemporaneity Not Demanded.—It is by no means essential, in the American view of the scope of the *res gestae*, that the probative or otherwise admissible fact so designated should bear any intimate or indeed any special relation in point of time to the *res gestae* properly so-called.³¹ Such a probative fact may precede, even by a considerable interval, the principal transaction, may, indeed, be a mere preliminary.³² On the other hand, it may follow the happening of the actual *res gestae*,³³ even by a considerable time.³⁴ Of this nature, may be said to be facts ascertained by searches instituted for the discovery of incriminating evidence.³⁵ Into the same category would seem to fall any emotion,³⁶ or lack of it,³⁷ shown by one accused of crime.³⁸ Mere

23. *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884); *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18 (1890); *Chicago, etc., R. Co. v. Kinnare*, 76 Ill. App. 394 (1898); *Com. v. Holmes*, 157 Mass. 233, 3 N. E. 6, 34 Am. St. Rep. 270 (1892); *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113 (1895); *People v. Fitzgerald*, 20 App. Div. 139, 46 N. Y. Supp. 1020 (1897); *Com. v. Twitchell*, 1 Brewst. (Pa.) 551 (1869); 4 Chamb., Ev., § 2584, n. 1.

24. *People v. Foley*, 64 Mich. 148, 31 N. W. 94 (1887); *State v. Ramsey*, 82 Mo. 133 (1884); *Clough v. State*, 7 Neb. 320 (1878); *People v. Fitzgerald*, *supra*; *Com. v. Twitchell*, *supra*; 4 Chamb., Ev., § 2584, n. 2.

25. *Com. v. Holmes*, *supra*; *Garner v. State* (Tex. Cr. App. 1901), 64 S. W. 1044; *Barbour v. Com.*, 80 Va. 287 (1885).

26. *People v. Majors*, *supra*; *People v. Robinson*, 2 Park. Cr. (N. Y.) 235 (1855); *Com. v. Mudgett*, 174 Pa. 211, 34 Atl. 588 (1896).

27. *Davidson v. State*, 135 Ind. 254, 34 N. E. 972 (1893); *State v. Fitzgerald*, *supra*; *People v. Minisci*, 12 N. Y. St. Rep. 719 (1887).

28. *People v. Majors*, *supra*.

29. It is evident, however, that no right or liability could arise out of such facts and that they are, at least, merely probative as to what were the actual *res gestae*.

30. *Jackson v. State*, 177 Ala. 12, 59 So. 171 (1912); *Welker v. Appleman*, 44 Ind. App. 699, 90 N. E. 35 (1909); *Thomas v.*

Macon County, 175 Mo. 68, 74 S. W. 999 (1903); *Hoffman v. Edison Elec. Ill. Co.*, 87 App. Div. 371, 84 N. Y. Supp. 437 (1903); *Shannon v. Castner*, 21 Pa. Super. Ct. 294 (1902); 4 Chamb., Ev., § 2584, n. 7.

31. *McMahon v. Chicago City Ry. Co.*, 239 Ill. 334, 88 N. E. 223 (1909), *aff'd* 143 Ill. App. 608 (1908).

32. *Rogers v. Manhattan L. Ins. Co.*, *supra*; *McMahon v. Chicago City R. Co.*, *supra*; *Com. v. Hayes*, 140 Mass. 366, 5 N. E. 264 (1886); *Shaefer v. Missouri, etc., R. Co.*, 98 Mo. App. 445, 72 S. W. 154 (1902); *Kenney v. South Shore Natural Gas & Fuel Co.*, 119 N. Y. Supp. 363, 134 App. Div. 859 (1909); *Kehoe v. Com.*, 85 Pa., 127 (1877); 4 Chamb., Ev., § 2585, n. 3.

33. *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390 (1897); *Mitchell v. State*, 71 Ga. 128 (1883); *People v. Stewart*, 75 Mich. 21, 42 N. W. 662 (1889); *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846 (1895); *State v. McCourry*, 128 N. C. 594, 38 S. E. 883 (1901); *Com. v. Mudgett*, *supra*; 4 Chamb., Ev., § 2585, n. 4.

34. *Stiles v. State*, 57 Ga. 183 (1876).

35. *People v. Winthrop*, *supra*; *People v. Long*, 44 Mich. 296, 6 N. W. 673 (1880); *Com. v. Mudgett*, *supra*.

36. *People v. Buchanan*, *supra*.

37. *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636 (1881).

38. These are, properly speaking, probative facts which tend to throw light backward as

narrative when not spontaneous is strictly excluded³⁹ as in case of reports of employees as to an accident⁴⁰ but statements made while the fact in issue is in progress are generally admitted.⁴¹

Contiguity, Intimate Relation, etc., Excused.—Contiguity or nearness in point of space to the *locus* of the real *res gestae* is not required under the American definition of the phrase. The acts may have been done or the events occurred at widely separated points,⁴² yet both be equally part of the *res gestae*.⁴³ The actor or declarant in the probative transaction may have taken no part whatever in the actual *res gestae*.⁴⁴ Every relevant fact is, *ipso facto*, part of the *res gestae*. This test is single and universal.⁴⁵ Not only is

it were upon the true *res gestae*. 4 Chamb., Ev., § 2555.

39. Where the plaintiff was lying on the ground and a friend bent over him and asked him how it happened and he replied that the ladder bent this is not admissible as part of the *res gestae* as it is narrative and not spontaneous. Greener v. General Electric Co., 209 N. Y. 135, 102 N. E. 527, 48 L. R. A. (N. S.) 975 (1913). The exclamation of an operator when an accident occurs "the damn thing was about wore out anyhow and they would keep running it until they killed somebody" is not admissible as part of the *res gestae* as it must be the spontaneous product of immediate sensual impressions. This declaration in question was not describing the accident but merely a condition he had previously observed. Illinois Central R. Co. v. Lowery, 184 Ala. 443, 63 So. 952, 49 L. R. A. (N. S.) 1149 (1913). Declarations merely narrative inadmissible as *res gestae*, see note, Bender ed., 17 N. Y. 131.

40. Statements by the conductor of a train made half an hour after the accident are not admissible as part of the *res gestae* as they were not spontaneous but were mere narrative. Callahan v. Chicago, Burlington & Quincy R. Co., 47 Mont. 401, 133 Pac. 687, 47 L. R. A. (N. S.) 587 (1913). Statements by the conductor of a train as to what caused the accident made two hours after the accident may be admitted as part of the *res gestae* in the discretion of the trial judge. Statements may be put in if they arise naturally without evidence of premeditation and directly tend to characterize the act in question. Walters v. Spokane International R. Co., 58 Wash. 293, 108 Pac. 593, 42 L. R. A. (N. S.) 917 (1910). The report of a station agent that a fire had been set by one of the defendant's engines is not admissible either as part of the *res gestae* or as he was performing

a duty as the defendant cannot be held bound by the reports of its agents unless it adopts them. Warner v. Maine Central R. Co., 111 Me. 149, 88 Atl. 403, 47 L. R. A. (N. S.) 820 (1913).

41. Declarations made by a woman while under treatment for abortion and before the final operation as to who was treating her and what he was doing for her are admissible against the doctor as part of the *res gestae*. State v. Hunter, 131 Minn. 252, 154 N. W. 1083, L. R. A. 1916 C 566 (1915). In an action by an employee against his fellow workmen for wrongfully obtaining his discharge a letter of recommendation written to him by his employer at the time of his discharge is admissible as part of the *res gestae*. The letter was contemporaneous with the discharge and was a part of the transaction tending to illustrate and explain it. Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224, L. R. A. 1915 D 785 (1914). In a prosecution for obtaining money on false pretences by means of a worthless check the telegram of the bank on which the check was drawn stating that the drawer had no money in the bank and that he was a fraud is not evidence as it is mere hearsay and is not a part of the *res gestae*. Rogers v. State, 97 Neb. 180, 149 N. W. 318, L. R. A. 1915 B 1125 (1914).

42. State v. McLaughlin, 149 Mo. 19, 50 S. W. 315 (1899); Com. v. Eaton, 8 Phila. (Pa.) 428 (1869).

43. State v. Sexton, 147 Mo. 89, 48 S. W. 452 (1898).

44. Oakley v. State, 135 Ala. 15, 33 So. 23 (1902); Beckham v. State (Tex. Cr. App. 1902), 69 S. W. 534.

45. People v. Henderson, 28 Cal. 465 (1865); Cox v. State, 64 Ga. 374, 37 Am. Rep. 76 (1879); State v. Hoffman, 78 Mo. 256 (1883); Stewart v. State, 19 Ohio 302, 53 Am. Dec. 426 (1850); Com. v. Mudgett, 174

it said of every relevant fact that it is part of the *res gestae*, but the statement is frequently reversed and the negative form of assertion employed, it being said of any fact deemed irrelevant that it is not part of the *res gestae*, or perhaps, that it is no part of the *res gestae*.⁴⁶ It may fairly be said therefore that *res gestae* and relevant are equivalent expressions in the usage of the American states adopting the extended scope of the phrase.⁴⁷

§ 839. [Res Gestae]; Distinct Criminal Offenses.— Whatever may be the scope of the *res gestae*, the right to establish them is unfettered in at least one direction. It is, in general, no ground for excluding proof of a legitimate *res gestae* fact that the evidence also incidentally tends to prove that the actor subjected himself to other liability.⁴⁸ In a criminal case, for example, assuming that the accused is not required to criminate himself, it is no sufficient ground for rejecting unsworn statements or other facts classified as *res gestae* that they tend to establish the commission of a distinct offense other than the one under consideration.⁴⁹ Two distinct offenses may be so inseparably connected that the proof of one necessarily involves proving the other, and in such a case on a prosecution for one evidence proving it cannot be excluded because it also proves the other.⁵⁰ An accused person is not furnished with immunity from the consequences of a crime because he has probably committed another.⁵¹ Sufficient administrative necessity for exposing the accused to being convicted of having committed one offense upon evidence that he has perpetrated another, must, however, be shown to exist, and no valid reason can well be assigned for rejecting it. Certainly this is the rule when a fact can satisfactorily be proved in no other way.⁵² Where proof of guilt is circumstantial,— and these

Pa. 211, 34 Atl. 588 (1896); 4 Chamb., Ev., § 2586, n. 4.

46. *Murphy v. People*, 9 Colo. 435, 13 Pac. 528 (1887); *Collins v. People*, 194 Ill. 506, 62 N. E. 902 (1902); *State v. Hudspeth*, 159 Mo. 178, 60 S. W. 136 (1900); *Lyon v. Lyon*, 197 Pa. 212, 47 Atl. 193 (1900); 4 Chamb., Ev., § 2586, n. 5.

47. *Webb v. State*, 135 Ala. 36, 33 So. 487 (1903); *Wood v. State*, 92 Ind. 269 (1883); *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 45, 72 S. W. 154 (1903); *Stewart v. State*, *supra*; *Com. v. Mudgett*, *supra*; 4 Chamb., Ev., § 2586, n. 6. For partial explanations of this extension in the meaning of the term *res gestae*, see 4 Chamb., Ev., § 2587.

48. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592 (1899); *Williams v. People*, 196 Ill. 173, 63 N. E. 681 (1902); *State v. Madigan*, 57 Minn. 425, 50 N. W. 490 (1894); *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274 (1898); *Shaffner v. Com.*, 72 Pa. 60, 13 Am. Rep. 649 (1872); 4 Chamb., Ev., § 2588, n. 1.

49. *People v. Ebanks*, 117 Cal. 652, 49 Pac.

1049, 40 L. R. A. 269 (1897); *Lyons v. People*, 137 Ill. 602, 27 N. E. 677 (1891); *State v. Dooley*, 89 Iowa 584, 57 N. W. 414 (1894); *Com. v. Sturtevant*, 117 Mass. 122, 19 Am. Rep. 401 (1875); *State v. Taylor*, 118 Mo. 153, 24 S. W. 449 (1893); *People v. Pallister*, 138 N. Y. 601, 33 N. E. 741 (1893); *Brown v. Com.*, 76 Pa. 319 (1874); 4 Chamb., Ev., § 2588, n. 2.

50. *People v. Marble*, 38 Mich. 117 (1878); *State v. Roberts*, 15 Or. 187, 13 Pac. 896 (1887); *Reed v. Com.*, 98 Va. 817, 36 S. E. 399 (1900); 4 Chamb., Ev., § 2588, n. 3.

51. *Johnson v. State*, 88 Ga. 203, 14 S. E. 208 (1891); *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81 (1877); *People v. Lewis*, 62 Hun 622, 16 N. Y. Supp. 881 (1891), *aff'd* 136 N. Y. 633, 32 N. E. 1014; 4 Chamb., Ev., § 2588, n. 4.

52. *State v. Sanders*, 76 Mo. 35 (1882); *Reed v. Com.*, *supra*; *State v. Craemer*, 12 Wash. 217, 40 Pac. 944 (1895); 4 Chamb., Ev., § 2588, n. 5.

are the cases in which distinct offenses are most often incidentally proved,⁵³—it would greatly impair the cogency of the incriminating proof to attempt the elimination of evidence of statements or other acts tending to show that the crime in question was not the only one committed by the accused at or about the same time.⁵⁴ But the other offenses must be connected in some logical or casual relation with the liability sought to be enforced in the proceeding itself. An entirely separate and disconnected offense is not admissible merely because it occurred at or about the same time as the *res gestae* of the offense on trial.⁵⁵ It is not, however, required that the proof of the additional offenses should be involved in the direct establishment of the crime on trial and relevant for that purpose. Should it be relevant for a legitimate collateral deliberative object, as, for example, to corroborate⁵⁶ or contradict⁵⁷ a witness, to explain an apparent conflict in the testimony,⁵⁸ or the like, it will be regarded as sufficient.

Assault.—Perhaps the most common instance of the incidental proof of an additional offense while establishing the *res gestae* of a case on trial is in connection with assault. Thus, homicide is frequently accompanied by an assault on the deceased or upon some third person.⁵⁹ Rape involves, in many cases, an assault on the injured woman or upon some one else.⁶⁰ The collateral offense may be robbery.⁶¹ Many crimes involving serious personal violence include and embrace the offense of a simple assault.⁶² Such incidentally proved crimes may be either simple or coupled with circumstances of aggravation, e.g., the use of duress,⁶³ attempt to kill⁶⁴ or the like.⁶⁵

Homicide.—To establish the *res gestae* of a particular homicide, it may be necessary to prove other homicides. This may occur either where the evidence is circumstantial⁶⁶ or direct.⁶⁷ It may happen in connection with affirmative proof of the *res gestae* of the offense⁶⁸ or where the effort of the proponent is to negative some theory advanced by the defence.⁶⁹

53. Walker v. Com., 1 Leigh (Va.) 574 (1829).

54. State v. Craemer, *supra*.

55. People v. Lane, 100 Cal. 379, 34 Pac. 856 (1893); Farris v. People, 129 Ill. 521, 21 N. E. 821 (1889); Brown v. Com., *supra*; 4 Chamb., Ev., § 2588, n. 9.

56. Toll v. State, 40 Fla. 169, 23 So. 942 (1898).

57. State v. Harris, 100 Iowa 188, 69 N. W. 413 (1896); 4 Chamb., Ev., § 2588, n. 12.

58. Reg. v. Chambers, 3 Cox C. C. 92 (1848).

59. People v. Gilmore, 17 Cal. App. 737, 121 Pac. 697 (1912); State v. Sanders, *supra*; People v. Pallister, *supra*; 4 Chamb., Ev., § 2589, n. 1.

60. Thompson v. State, 11 Tex. App. 51 (1881).

61. State v. Taylor, *supra*; Harris v. State, 32 Tex. Cr. 279, 22 S. W. 1037 (1893).

62. People v. Chin Bing Quong, 79 Cal. 553, 21 Pac. 951 (1889); State v. McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887).

63. Britt v. State, 9 Humphr. (Tenn.) 31 (1848).

64. State v. Sanders, *supra*.

65. Pritchett v. State, 92 Ga. 65, 18 S. E. 536 (1893).

66. Lyons v. People, *supra*; Com. v. Sturtivant, *supra*; People v. Foley, 64 Mich. 148, 31 N. W. 94 (1887); Brown v. Com., *supra*; 4 Chamb., Ev., § 2590, n. 1.

67. People v. Prantikos, 164 Cal. 113, 127 Pac. 1029 (1912).

68. Logston v. State, 3 Heisk. (Tenn.) 414 (1872).

69. Smart v. Com., 10 Ky. L. Rep. 1035, 11 S. W. 431 (1889).

Larceny.—In making proof of the *res gestae* of a particular larceny, it may be natural and even practically unavoidable to show that other offenses were committed at or about the same time.⁷⁰ If so the court will receive evidence of them. In like manner, proof of one burglary may involve the establishment of another.⁷¹ The crimes of obtaining property by false pretences,⁷² of embezzlement,⁷³ receiving stolen goods⁷⁴ or robbery⁷⁵ stand in the same position. So of forgery,⁷⁶ and uttering forged documents.⁷⁷

Dissimilar Offenses.—Naturally, the collateral offense, incidentally established, may be dissimilar in nature to that for which liability is claimed in the action.⁷⁸ Arson, for example, is often found in combination with robbery⁷⁹ or burglary.⁸⁰ Burglary, if successful, naturally leads to larceny;⁸¹ if discovered or opposed, to assault⁸² and even to homicide.⁸³ Homicide is frequently accompanied by larceny⁸⁴ and frequently grows out of an attempt to accomplish unlawful ends.⁸⁵ Any meeting between those whose interests are opposed, though the original object with which the interview was sought may have been a comparatively innocent one,⁸⁶ may culminate in murder or other serious crime. Robbery itself involves an assault and is frequently accompanied by a battery,⁸⁷ or by aggravated circumstances, as an attempt to kill,⁸⁸ rape,⁸⁹ or obstruction of an officer in the execution of his duty.⁹⁰ The last would occur as naturally as the gathering of a mob leads to rioting or the doing of malicious mischief.⁹¹

§ 840. [Res Gestae]; Extra-judicial Statements Part of the Res Gestae.—Using the phrase *res gestae* in its restricted or English sense,⁹² the rule with regard to unsworn statements, so far as these are not considered as proof of

70. *Starr v. State*, 160 Ind. 661, 67 N. E. 527 (1903); *Com. v. Hayes*, 140 Mass. 366, 5 N. E. 264 (1886); *Haskins v. People*, 16 N. Y. 344 (1857); 4 *Chamb., Ev.*, § 2591, n. 1.

71. *State v. Robinson*, 35 S. C. 340, 14 S. E. 766 (1892).

72. *Com. v. Eastman*, 1 *Cush. (Mass.)* 189, 48 *Am. Dec.* 596 (1848); *Com. v. Daniels*, 2 *Pars. Eq. Cas. (Pa.)* 332 (1847).

73. *People v. Van Ewan*, 111 Cal. 144, 43 *Pac.* 520 (1896).

74. *Copperman v. People*, 56 N. Y. 591 (1874).

75. *People v. Nelson*, 85 Cal. 421, 24 *Pac.* 1006 (1890); *Britt v. State*, *supra*.

76. *Cross v. People*, 47 Ill. 152, 95 *Am. Dec.* 474 (1868); 4 *Chamb., Ev.*, § 2591, n. 7.

77. *People v. Kemp*, 76 Mich. 410, 43 N. W. 439 (1889).

78. *Powers v. State*, 4 *Humphr. (Tenn.)* 274 (1843).

79. *Mixon v. State* (Tex. Cr. App. 1895), 31 S. W. 408.

80. *Id.*

81. *State v. Robinson*, *supra*.

82. *Williams v. State*, 42 Tex. Cr. 602, 61 S. W. 395, 62 S. W. 1057 (1901).

83. *People v. Rogers*, 71 Cal. 565, 12 *Pac.* 679 (1897); *State v. Wagner*, 61 Me. 178 (1873).

84. *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305, 57 *Am. Rep.* 99 (1886).

85. *State v. McCahill*, *supra*.

86. *Id.*

87. *State v. Nathan*, 5 *Rich. L. (S. C.)* 219 (1851).

88. *Richards v. State*, 34 Tex. Cr. 277, 30 S. W. 229 (1895).

89. *State v. Taylor*, 118 Mo. 153, 22 S. W. 806, 24 S. W. 449 (1893).

90. *State v. Guy*, 46 La. Ann. 1441, 16 So. 404 (1894).

91. *Gallagher v. State*, 101 Ind. 411 (1884).

92. See ante, § 838.

the fact asserted, is a very simple one. Such extrajudicial declarations are admissible, when relevant, like any other fact.⁹³ In other words, a verbal act, in this connection, differs in no essential particular from other acts.⁹⁴ No special conditions are imposed upon the statement simply because it is a statement.⁹⁵ That a given declaration was made is simply a fact which should be allowed to give rise to any relevant inference which may properly be drawn from its existence. The rule is the same in criminal cases.⁹⁶ In fine, within the range of the *res gestae*, what was said by any person including a bystander⁹⁷ may be admitted in evidence.

Constituent Facts.— Extrajudicial statements may, *a fortiori*, be proved when they are constituent⁹⁸ facts. As to their admissibility, little question can be raised. In fact, they are frequently said to be relevant *per se*.⁹⁹ Thus, on an indictment for perjury the fact that the defendant spoke the words now said to be false has no proper connection with the rule against hearsay. It is simply a verbal act which assists, with other facts, to constitute the liability with which the accused is charged.¹ As such, evidence of this character is admissible as a matter of course, a *res gestae* or constituent fact. So, in a trial of a civil action on an oral contract any material extrajudicial statement made by either of the parties during the period of negotiation in which an agreement is said to have been reached is merely a *res gestae* or constituent fact and is admissible to show the exact contract, if any, between the parties.²

§ 841. **Extrajudicial Statements Part of the Res Gestae; Existence of Statement Itself.**³— The existence of an unsworn statement may be a constituent fact. Under such circumstances, the rule against hearsay has no application—it being of little immediate consequence whether the statement as made be true or false. It is simply received as a fact.⁴ The testimony is only admissible as to the existence of the statement as a constituent fact forming part of the *res gestae*. As such it is admissible, just as any other constitutently relevant physical occurrence would be.⁵ The statements may take the connected form of a conversation. In such a case the reporting witness is debarred from stating that portion of it which he says he heard and remembers because there

93. *Commonwealth v. Bond*, 188 Mass. 91, 74 N. E. 293 (1905).

94. *Viberg v. State*, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22 (1903).

95. *Mitchell v. Colglazier*, 106 Ind. 464, 7 N. E. 109 (1886).

96. *Wood v. State*, 92 Ind. 269 (1883).

97. *State v. Lasecki*, 90 Ohio St. 10, 106 N. S. 660, L. R. A. 1915 E 202 (1914).

98. See § 844

99. *Cowen v. Bloomberg*, 69 N. J. L. 462, 55 Atl. 36 (1903).

1. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11 (1893).

2. *Green v. Crapo*, 181 Mass. 55, 62 N. E. 856 (1902).

3. 4 Chamberlayne, Evidence, § 2595.

4. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11 (1893); *Stainbrook v. Drawyer*, 25 Kan. 383 (1881); *Shaw v. People*, 3 Hun (N. Y.) 272, 5 Thomps. & C. (N. Y.) 439 (1874). See also *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665 (1903).

5. *State v. Horton*, 33 La. Ann. 289, 290 (1881).

may have been other additional conversations which he did not hear or does not recollect.⁶

§ 842. [Extrajudicial Statements Part of the Res Gestæ]; Evidence Is Primary.⁷—The evidence furnished by the independently relevant *res gestæ* declaration is primary. Where the extrajudicial unsworn statement is used as evidence of the facts asserted, a superior grade of evidence is possible, i.e., the testimony of the original declarant on the subject. No better or more convincing evidence of the existence of a statement can be given than the testimony of the reporting witness who says that he heard it made. In other words, while the reporting witness, in both cases, testifies directly to the declaration itself, he states a fact when the unsworn statement is to be used as hearsay which tends to establish the truth of the facts asserted only in a circumstantial way. Superior to this, is the direct testimony of the original observer whose statement is reported to the tribunal. The fact, however, that the statement was made is provable by the primary evidence of any person who heard it. The statement itself must be relevant⁸ and must be proved by competent evidence and not by hearsay.⁹

§ 843. [Extrajudicial Statements Part of the Res Gestæ]; Forms of Statements.¹⁰—The independently relevant statement may be that of a bystander,¹¹ or creating agency,¹² or as to the existence of a bailment,¹³ or claim¹⁴ although a narrative of past facts is incompetent¹⁵ but even a claim to real estate may be thus established¹⁶ or as to its boundaries¹⁷ by one in possession¹⁸ in any form¹⁹ if the statement possesses objective relevancy.²⁰ The extrajudicial statement may constitute a claim to personal property²¹ or disclaimer²² as

6. *People v. Daily*, 135 Cal. 104, 67 Pac. 16 (1901).

7. 4 Chamberlayne, Evidence, § 2596.

8. *Dodge v. Weill*, 158 N. Y. 346, 53 N. E. 33 (1899).

9. *Nourse v. Nourse*, 116 Mass. 101 (1874).

10. 4 Chamberlayne, Evidence, §§ 2597–2623.

11. *Weller & Co. v. Camp*, 169 Ala. 275, 52 So. 929 (1910); *State v. Lasecki*, 90 Ohio St. 10, 106 N. E. 660, L. R. A. 1915 E 202 (1914).

12. *Moore v. Machen*, 124 Mich. 216, 82 N. W. 892 (1900).

13. *Greer v. Davis Mercantile Co.*, 86 Kan. 686, 121 Pac. 1121 (1912).

14. *Lindsley v. McGrath*, 62 N. J. Eq. 478, 50 Atl. 236 (1901).

15. *Collins v. Lynch*, 167 Pa. St. 635, 31 Atl. 921 (1895).

16. *Hampe v. Sage* (Kan. 1912), 125 Pac. 53; *Allen v. Morris* (Mo. 1912), 148 S. W.

905; *Faulkner v. Rocket*, 335 R. I. 152, 80 Atl. 380 (1911).

17. *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908).

18. **Possession authorized by declarant.**—The objection that declarations as to the character of possession are admissible only from one exercising it is removed where it appears that though the property was in possession of another, such possession was authorized by the declarant. *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550 (1900).

19. *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912 (1892); *Nodle v. Hawthorne*, 107 Iowa 380, 77 N. W. 1062 (1899).

20. *Remy v. Lilly*, 22 Ind. App. 109, 53 N. E. 387 (1899); *Doe v. Jauncy*, 8 C. & P. 99, 34 E. C. L. 631 (1837); *Holden v. Cantrell*, 88 S. C. 281, 70 S. E. 815 (1911); *Stacy v. Alexander*, 143 Ky. 152, 136 S. W. 150 (1911).

21. *Traylor v. Hollis*, 45 Ind. App. 680, 91 N. E. 567 (1910). Declarations by one in possession of personal property claiming title

in case of creditors' claims.²³ In some jurisdictions such evidence has been confused with *res gestae* and such a declaration must be spontaneous.²⁴ A conspiracy²⁵ or a contract²⁶ may be proved by such statements as by letters or telegrams²⁷ when the entire correspondence must be produced²⁸ while covering the term of negotiations.²⁹ The statements to prove a contract may be those of an agent³⁰ but none of these statements are admissible when merely narrative, made after the transaction.³¹ They may prove a dedication³² or a demand³³ or a denial³⁴ or disclaimer³⁵ or a libel³⁶ or revocation³⁷ or sales³⁸ or representations³⁹ as the basis of a sale.

may be admissible when the nature of the possession is in question but according to the weight of authority they are not otherwise admissible as part of the *res gestae*. They are self-serving and hearsay and would enable a man to manufacture evidence for himself. *Freda v. Tischbein*, 174 Mich. 391, 140 N. W. 502, 49 L. R. A. (N. S.) 700 (1913); *Hopkins v. Heywood*, 86 Vt. 486, 86 Atl. 305, 49 L. R. A. (N. S.) 710 (1913).

22. *Martin v. Martin*, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290, affirming 74 Ill. App. 215 (1898).

23. Should both title and possession have been parted with, the declarations of the vendor are incompetent. *Fiske v. Small*, 25 Me. 453 (1845).

24. *Kentucky*.—*Gurley v. Starr*, 30 Ky. L. Rep. 974, 99 S. W. 972 (1907).

Maine—*Wilson v. Rowe*, 93 Me. 205, 44 Atl. 615 (1899).

Massachusetts—*Holmes v. Turners Falls Co.*, 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283 (1890).

New Hampshire.—*Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543 (1888).

New Jersey.—*Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886).

Pennsylvania.—*Bender v. Pitzer*, 27 Pa. St. 333 (1856).

Vermont.—*Child v. Kingsbury*, 46 Vt. 47 (1873).

United States.—*Hunnicut v. Peyton*, 102 U. S. 333, 363, 26 L. ed. 113 (1880).

25. *Banks v. State*, 157 Ind. 190, 60 N. E. 1087 (1901) (conversation).

26. *Sheldon v. Rigelow*, 118 Iowa 586, 92 N. W. 701 (1902) (to show that declarant was a partner).

27. *Clark v. Dales*, 20 Barb. 42 (1855).

Illinois.—*Cobb v. Foree*, 38 Ill. App. 255 (1890).

28. See *Flynn v. Kelly*, 12 O. L. R. 440 (1906). Where the evidence to show an

antenuptial contract has been destroyed by mutual mistake and declarations in favor of one have been received the other party is entitled to show declarations to the contrary. *Gordon v. Munn* (Kan. 1912), 125 Pac. 1. See *Georgia R., etc., Co. v. Smith*, 83 Ga. 626, 10 S. E. 235 (1889).

29. *Woods v. Clark*, 24 Pick. (Mass.) 35 (1834); *Hudson v. Slate*, 53 Tex. Civ. App. 453, 117 S. W. 460 (1909).

Narrative statements excluded.—*Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 689, 110 Pac. 591 (1910).

30. *Fritz v. Chicago Grain & E. Co.*, 136 Iowa 690, 114 N. W. 193 (1907); *American Pure Food Co. v. G. W. Elliott & Co.*, 151 N. C. 393, 66 S. E. 451, 31 L. R. A. (N. S.) 910 n. (1909); *Jungworth v. Chicago, M. & St. P. Ry. Co.*, 24 S. D. 342, 123 N. W. 695 (1909); *Ives v. Atlantic & N. C. R. Co.*, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732 (1906).

31. *Woods v. Clark*, 24 Pick. (Mass.) 35 (1834).

32. *Poole v. Commissioners of Rehoboth* (Del. Ch. 1911), 80 Atl. 683.

33. *Wallace v. Bernheim*, 63 Ark. 108, 37 S. W. 712 (1896); *Gracie v. Robinson*, 14 Ark. 438 (1854); *Seevers v. Cleveland Coal Co.* (Iowa 1912), 138 N. W. 793; *Glatfelter v. Mendels* (Pa. Super. Ct. 1911), 46 Pa. Super. Ct. 562 (letter); *Martin v. Ince* (Tex. Civ. App. 1912), 148 S. W. 1178. Compare *Walleston v. Fahnestock*, 116 N. Y. Suppl. 743 (1909).

34. *Clark v. Wood*, 34 N. H. 447 (1857).

35. *Beasley v. Howell*, 117 Ala. 499, 22 So. 989 (1897); *Vincent v. State*, 74 Ala. 274 (1883); *Place v. Gould*, 123 Mass. 347 (1877); *Davis v. Campbell*, 23 N. C. 482 (1841).

36. *American Pub. Co. v. Gamble*, 115 Tenn. 663, 90 S. W. 1005 (1906).

37. *Kennedy's Will*, 53 App. Div. 105, 65

§ 844. [Independent Relevancy of Unsworn Statements]; Extrajudicial Statements as Probative Facts.⁴⁰—The relevancy of an extrajudicial statement when used as the basis of some inference other than that it is true is not, however, necessarily constituent. It may equally well be probative. In other words, the existence of an unsworn statement may not only, as one of the *res gestae* properly so called, constitute or assist to constitute the right or liability asserted but it may also tend to prove, in and of itself, by reason of its very existence, some mental or bodily condition or other fact which is in its turn, one of the *res gestae*—or tends to establish the latter. For example, the mental state with which a given act was done may be a legitimate component of a defendant's liability. At some time not too remote to be relevant, the defendant is known to have made a declaration which gives a glimpse into his mind, disclosing what the mental state in question was. Whether this statement is true or false, is not the point. The hearsay rule, excluding unsworn declarations as proof of the facts which they assert, is in no way involved. The mental state is a *res gestae* fact and the unsworn statement tends logically to prove it. Or again, on a civil action, the *knowledge* of one of the parties at a given time may be a material fact. The circumstance that the party made a given statement to someone or that someone made a given statement to him may be a very enlightening fact as to what the person in question knew. As before, the rule against hearsay plays no part. Only a question of proving a material fact in the most natural way possible is apparently involved. There seems, however, to be much confusion among the decisions upon this simple matter.

§ 845. [Extrajudicial Statements as Probative Facts]; Bodily Sensation.⁴¹—Wherever the existence of a bodily condition is a *res gestae* or probative fact, the extrajudicial declarations, articulate or inarticulate, which commonly accompany, characterize or tend to establish the existence, of such a bodily condition, will be received in evidence.⁴² The statement must be one of fact, rather than of opinion.

A Matter of Necessity.—Apart from the incompetency of parties to testify, which can hardly be regarded at the present day as an important consideration, the chief necessity for relying on circumstantial evidence, including extra-

N. Y. Suppl. 879 (1900). *affirmed* 167 N. Y. 163, 60 N. E. 442 (1901).

38. *Kenney v. Phillipy*, 91 Ind. 511 (1883).

Offers to buy or sell real estate.—It has been said that any evidence of offers for the purchase or sale of real estate are hearsay, unless made by one under oath and subject to cross-examination. *Helena Power Transmission Co. v. McLean*, 38 Mont. 388, 99 Pac. 1061 (1909).

39. *John Silvey & Co. v. Tift*, 123 Ga. 804,

1 L. R. A. (N. S.) 386, 51 S. E. 748 (1905); *Smith v. Birge*, 126 Ill. App. 596 (1906).

40. 4 Chamberlayne, Evidence, § 2624.

41. 4 Chamberlayne, Evidence, §§ 2625–2636. Declarations as to bodily condition, and admissibility of. See note, Bender, ed., 63 N. Y. 196. Expression of pain. See note, Bender, ed., 144 N. Y. 137. Subsequent declarations as to past sufferings as *res gestae*. See note, Bender, ed., 151 N. Y. 282, 316.

42. *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884 (1898).

judicial statements used as facts, in proof of bodily sensation consists in the difficulty of procuring other evidence.⁴³

Who May Testify as to Statements.—The extrajudicial statement of one suffering pain or conscious of other bodily sensation may, as well as his coherent or incoherent ejaculation on the same subject, be testified to by any one who heard it.⁴⁴ Accordingly, a wife,⁴⁵ parent,⁴⁶ daughter,⁴⁷ nurse,⁴⁸ other attendant,⁴⁹ or even a mere bystander⁵⁰ is permitted to detail statements to the court. Even the declarant himself may testify as to his own statements.⁵¹ The statements may be articulate⁵² or inarticulate,⁵³ excluding inference⁵⁴ and narrative⁵⁵ and must be made by the party,⁵⁶ and their weight depends on whether they are natural or feigned⁵⁷ and consequently their evidentiary nature seems greater in proportion to the spontaneousness of the utterances.⁵⁸ Hence statements to physicians for the purpose of diagnosis and treatment are of great probative force⁵⁹ as the inducement to tell the truth is great, although in some courts such statements are received only when involuntary.⁶⁰

43. "If other persons could not be permitted to testify to them, when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them by reason of the agitation and suffering occasioned by it." *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249 (1845), per Shepley, J.

44. *Rupp v. Howard*, 114 Iowa 65, 86 N. W. 38 (1901).

45. *Geiselman v. Schmidt*, 106 Md 580, 68 Atl. 202 (1907).

46. *Western Steel Car & F. Co. v. Bean*, 163 Ala 255, 50 So. 1012 (1909).

47. *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907).

48. *Green v. Pacific Lumber Co.*, 130 Cal 435, 62 Pac. 747 (1900); *Brown v. Mt. Holly*, 69 Vt. 364, 38 Atl. 69 (1897).

49. *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287 (1896); *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644 (1882).

50. *Fondren v. Durfee*, 39 Miss 324 (1860); *Perkins v. Concord R. Co.*, 44 N. H. 223 (1862); *Northern Pac. R. Co. v. Uplin*, 158 U. S. 271, 15 S. Ct. 340, 39 L. ed 977 (1894).

51. *Alexandria v. Young*, 20 Ind. App. 672, 51 N. E. 109 (1898).

52. An exclamation of a person, when taking a dose of supposed medicine, that it burns her stomach, is admissible on the trial of a charge of poisoning such person. *State v. Buck* (Kan. 1912), 127 Pac 631.

53. *Hagenlocher v. R. Co.*, 99 N. Y. 136, 137, 1 N. E. 536 (1885), *affg.* 33 Hun 664 (1904).

54. *Southern Anthracite Coal Co. v. Hodge*, 99 Ark. 302, 139 S. W. 292 (1911); *Corbett v. St. Louis, etc., R. Co.*, 26 Mo. App. 621 (1887); *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897); *Firkins v. Chicago Great Western R. Co.*, 61 Minn. 31, 63 N. W. 172 (1895); *Louisville, etc., R. Co. v. Stacker*, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840 (1888).

55. *West Chicago St. R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992 (1897).

56. "The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect." *State v. Davidson*, 30 Vt. 377, 383, 73 Am. Dec. 312 (1858), per Redfield, C. J.

57. *Chicago Travelers' Ins. Co. v. Mosley*, 8 Wall (U. S.) 397, 19 L. ed 437 (1869).

58. *Topeka v. High*, 6 Kan. App. 162, 51 Pac. 306 (1897); *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141 (1896); *Lewke v. Dry Dock, etc., R. Co.*, 46 Hun (N. Y.) 283, 11 N. Y. St. Rep. 510 (1887); *Powers v. West Troy*, 25 Hun (N. Y.) 561 (1881); *Baker v. Griffen*, 10 Bosw. (N. Y.) 140 (1863); *Wervly v. Persons*, 28 N. Y. 344, 84 Am. Dec. 346 (1863).

59. *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N. E. 327 (1908); *affirming judgment*, 136 Ill. App. 77 (1907).

60. *Kennedy v. Rochester City, etc., R. Co.*, 130 N. Y. 654, 29 N. E. 141, 3 Silv. 591 (1891).

§ 846. [Extrajudicial Statements as Probative Facts]; Identification.⁶¹—

Among the most common uses to which an unsworn statement when employed in its independently relevant capacity, may be put, is that of *identification*.⁶² Regarded as proof of the facts asserted, the unsworn statement may possess no evidentiary value. It may, however, whenever the fact is relevant,⁶³ serve, in a circumstantial way, to identify a person,⁶⁴ place,⁶⁵ or any article of property, real⁶⁶ or personal.⁶⁷ It may segregate a particular transaction from all others.⁶⁸ Its existence may be a proper fact by which to fix a date,⁶⁹ as for example to determine the time of a payment.⁷⁰ Judicial administration may properly add the proviso that evidence of this class will be received when more cogent or conclusive proof cannot be produced.⁷¹

§ 847. [Extrajudicial Statements as Probative Facts]; Mental Condition.⁷²—

An extrajudicial statement may serve, as few other things can, to illustrate the condition of the mind of the speaker.⁷³ Distinguishing, in the present con-

61. 4 Chamberlayne, Evidence, § 2637.

62. Blodgett v. Park (N. H. 1912), 84 Atl. 42 (testimony of witness).

63. Perry v. Smith, 22 Vt. 301 (1850).

64. Maryland—See Suman v. Harvey, 114 Md. 241, 79 Atl. 187 (1911).

Rhode Island.—State v. McAndrews, 15 R. I. 30, 23 Atl. 304 (1885).

Texas.—Keck v. Woodward, 53 Tex. Civ. App. 267, 116 S. W. 75 (1909).

United States.—J. S. Toppan Co. v. McLaughlin, 120 Fed 705 (1903). Statements by the victim of a crime immediately after the crime identifying the criminal are admissible in evidence as considerable latitude is always allowed in questions of identification. State v. Findling, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. (N. S.) 449 (1913). The statement of one who has been knocked senseless by a robber as to who had hit him made immediately after he had regained consciousness is not admissible as part of the *res gestae*. Rogers v. State, 88 Ark. 451, 115 S. W. 156, 41 L. R. A. (N. S.) 857 (1908). A statement by the deceased made from five to fifteen minutes after the shooting to a witness who had gone to give the alarm and immediately returned is competent as part of the *res gestae*. State v. Laboon, 107 S. C. 275, 92 S. E. 622, L. R. A. 1917 F 896 (1917).

66. Hoffner v. Custer, 237 Ill 64, 86 N. E. 737 (1908); Simpson v. Blaisdell, 85 Me. 199, 27 Atl. 101, 35 Am. St. Rep 348 (1892); Russell v. Werntz, 24 Pa. St. 337 (1855).

67. Pool v. Bridges, 4 Pick. (Mass.) 378 (1826); People v. Dowling, 84 N. C. 478

(1881); Parratt v. Watts, 47 L. J. C. P. 79, 37 L. T. Rep. (N. S.) 755 (1878).

68. Earle v. Earle, 11 Allen (Mass.) 1 (1865); State v. Ward, 61 Vt. 153, 17 Atl. 483 (1888); Hill v. North, 34 Vt. 604 (1861).

69. Georgia.—Harris v. Central R. Co., 78 Ga. 525, 3 S. E. 355 (1887).

Michigan.—Grosvenor v. Ellis, 44 Mich. 452, 7 N. W. 59 (1880).

New Jersey.—Browning v. Skillman, 24 N. J. L. 351 (1854).

Vermont.—State v. Ward, 61 Vt. 153, 17 Atl. 483 (1888).

70. Mitchell v. Dall, 2 Harr. & G. (Md.) 159 (1828); Bewley v. Atkinson, 13 Ch. D. 283, 49 L. J. Ch. 153, 41 L. T. Rep. (N. S.) 603, 28 Wkly Rep. 638 (1880).

71. Martin v. Atkinson, 7 Ga. 228, 50 Am. Dec. 403 (1849). The suggestion has even been made that the declarant must be affirmatively shown to be dead if his unsworn statement is to be received. Nehring v. McMurrian (Tex. Civ. App. 1898), 46 S. W. 369.

72. 4 Chamberlayne, Evidence, §§ 2638–2653.

73. The probative declaration may follow, in case of a continuous mental condition, the precise time of the transaction in question. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561 (1912). This may be put into the form of saying that the illustrative declaration need not be part of the *res gestae*. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561 (1912).

nection, the actual force and power of the mind itself from proof of its contents, those mental states which are also seen to be established by the relevant utterances to which they give rise, it may fairly be said that the actual constitution of the mind is often appropriately shown by these verbal manifestations,⁷⁴ as in the case of declarations by a testator.⁷⁵ In their assertive capacity, as proof of the facts which they declare, the unsworn statements are hearsay;⁷⁶ and, in the absence of some special reason for receiving them, are to be rejected. As a general rule, narrative statements of past transactions which are without a circumstantially relevant quality are to be excluded.⁷⁷ The statement must have been made by the individual whose condition is in question⁷⁸ either before,⁷⁹ accompanying⁸⁰ or after⁸¹ the principal event. In this way may be shown the mental capacity for resistance,⁸² mental weakness,⁸³ (all of which may be shown by other modes of proof)⁸⁴ mental states⁸⁵ when relevant,⁸⁶ excluding narrative⁸⁷ as assent⁸⁸ or dissent⁸⁹ belief,⁹⁰ dis-

74. *Sargent v. Burton*, 74 Vt. 24, 52 Atl. 72 (1901). See also *Thorn v. Cosand*, 160 Ind. 566, 67 N. E. 257 (1903).

75. *In re Cooper's Will* 75 N. J. Eq. 177, 71 Atl. 676 (1909). Subsequent declarations of testator to show undue influence. See note, Bender, ed., 151 N. Y. 111. Declarations of testator to show undue influence and condition of his mind. See note, Bender, ed., 151 N. Y. 111.

76. "When such an issue (one of mental capacity) is made it is one which relates to a state of mind which was involuntary, and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity." *Throckmorton v. Holt*, 180 U. S. 573, 45 L. ed. 663, 21 Sup. Ct. 474 (1900), per Mr. Justice Peckham: quoted in *Lipphard v. Humphrey*, 209 U. S. 272, 52 L. ed. 783, 28 Sup. Ct. 561 (1907).

77. *Steel v. Shafer*, 39 Ill. App. 185 (1890): *Church of Jesus Christ, etc. v. Watson*, 25 Utah 45, 69 Pac. 531 (1902).

78. *People v. Pico*, 62 Cal. 50 (1882); *Smith v. Hickenbottom*, 57 Iowa 733, 11 N. W. 664 (1882); *Barker v. Pape*, 91 N. C. 165 (1884).

The fact of suicide may be proved by declarations of the deceased person of his intention to commit suicide when such declaration is made a short time before death. *Klein v. Knights & Ladies of Security*, 87 Wash. 179,

151 Pac. 241, L. R. A. 1916 B 816 (1915).

79. *In re Goldthorp*, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400 (1895); *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322 (1883); *Dinges v. Branson*, 14 W. Va. 100 (1878).

80. *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322 (1883).

81. *Iowa*.—*In re Goldthorp*, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400 (1895).

Minnesota.—*Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144 (1880).

82. *Shiler v. Bumstead*, 99 Mass. 112 (1868); *Herster v. Herster*, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95 (1887).

83. *Wilkinson v. Pearson*, 23 Pa. St. 117 (1854). See also *Thorn v. Cosand*, 160 Ind. 566, 67 N. E. 257 (1903).

84. *McRae v. Malloy*, 93 N. C. 154 (1885); *Rouch v. Zehring*, 59 Pa. St. 74 (1868); *Chess v. Chess*, 1 Penr. & W. (Pa.) 32, 21 Am. Dec. 350 (1829).

85. *State v. Utley*, 132 N. C. 1022, 43 S. E. 820 (1903) (intelligence notwithstanding intoxication). Plaintiff's declaration of want of affection in breach of promise case. See note, Bender, ed., 24 N. Y. 253.

86. *Mack v. Porter*, 72 Fed. 236, 18 C. C. A. 527 (1896).

87. *Flannery v. Van Tassel*, 127 N. Y. 631, 27 N. E. 393, 3 Silvernail 456 (1891).

88. Acceptance of a gift may be shown by evidence of declarations to that effect. *Supple v. Suffolk Bank*, 198 Mass. 393, 84 N. E. 432, 126 Am. St. Rep. 451 (1908).

89. *Wood v. Fiske*, 62 N. H. 173 (1882); *Brown v. State* (Tex. Cr. App. 1894), 28 S.

gust⁹¹ or annoyance,⁹² duress,⁹³ fear,⁹⁴ good⁹⁵ or bad⁹⁶ faith, hatred,⁹⁷ or impressions⁹⁸ produced on the mind of the declarant by certain occurrences.

§ 848. [Extrajudicial Statements as Probative Facts; Mental States]; Intent and Intention.⁹⁹—Pre-eminent in importance among mental states stand intent and intention. In connection with moral conduct, especially that for which criminal sanctions are invoked, intent apparently plays by far the more important rôle, while intention seems supreme in the field of intellect. However this may be, both intent and intention¹ may be shown by the use of extrajudicial statements of a person accompanying the doing by him of the act in question and which tend logically to explain or characterize it. In this way the fact that persons intended to enter upon a journey may frequently be established by their unsworn statements,² proof occasionally extending even to facts incidentally asserted.³ Statements of the intention of the testator made before or after the execution of his will are generally received in England⁴ but not in this country.⁵ The admissibility of the statements may well depend on

W. 536; *Evarts v. Young*, 52 Vt. 329 (1880).

90. *Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064 (1907).

91. *Kearney v. Farrell*, 28 Conn. 317, 73 Am. Dec. 677 (1859).

92. *Gloystine v. Com.*, 33 S. W. 824, 17 Ky. L. Rep. 1187 (1896).

93. Wills cannot be impeached by the subsequent declarations of the testator concerning duress although his contemporaneous statements may be received as this would be allowing revocation in a way not permitted by the statute. *Jackson v. Kniffen*, 2 Johns. (N. Y.) 37, 3 Am. Dec. 390 (1806); *Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40 (1901).

94. *Barney v. Quaker Oats Co.*, 82 Atl. 113 (1912).

95. *Robson v. Hamilton*, 41 Oreg. 239, 69 Pac. 651 (1902).

96. *Goldstein v. Morgan*, 122 Iowa 27, 96 N. W. 897 (1903) (fraud in execution of bill of sale).

97. "The usual expressions of such feelings are original evidence, and often the only proof of them which can be had." *Jacobs v. Whitcomb*, 10 Cush. (Mass.) 255, 257 (1852), per Bigelow, J.

98. *Kearney v. Farrell*, 28 Conn. 317, 73 Am. Dec. 677 (1859) (complaints of odors in an action for a nuisance).

99. 4 Chamberlayne, Evidence, §§ 2654-2661.

1. *People v. Conklin*, 157 N. Y. 333, 67 N. E. 624 (1903).

2. *Northwestern Redwood Co. v. Dickson*,

13 Cal. App. 689, 110 Pac. 591 (1910), per Hart, J. A statement made by one at eight o'clock in the evening as to where he intended to spend the night are not part of the *res gestae* to show his intention in leaving his home at ten o'clock as the statement is not contemporaneous, with the act. *Foster v. Shepherd*, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167 (1913).

3. *Inness v. R. Co.*, 168 Mass. 433, 47 N. E. 193 (1897); *Matthews v. Great Northern R. Co.*, 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383 (1900); *Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052 (1892). But compare *Chicago, etc., R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269 (1897).

4. "The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made—they obviously do not prove it; and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were." *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 251 (1876), per Mellish, L. J. See, however, *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. ed. 663 (1901).

5. *Gordon's Will*, 50 N. J. Eq. 397, 424, 26 Atl. 268 (1892); *Grant v. Grant*, 1 Sandf. Ch. (N. Y.) 235, 237 (1844).

Some American courts follow the English

their probative weight as whether made without motive to falsify⁶ but may have a wide scope⁷ when the mental condition at the time is relevant⁸ even in criminal cases⁹ and although self-serving¹⁰ but excluding narrative.¹¹

§ 849. [Extrajudicial Statements as Probative Facts]; Illustrative Instances.¹²—The mental state of intent or intention, being relevant in many connections to determine the nature, purpose or quality of an act,¹³ only occasional instances, illustrative of the rule now under consideration, can well be given. Wherever the psychological fact is admissible, the extrajudicial statement fairly indicative of its existence may be received as a legitimate means of proving it. But on the contrary, should the mental state itself be immaterial, as where the law affixes consequences regardless of the intent or intention with which the act was done, the unsworn declaration is rejected,¹⁴ not because the extrajudicial statement is not a proper method of proving the fact but because the latter itself cannot be proved. For admissibility, it is of course essential that the unsworn statement, oral¹⁵ or in writing¹⁶ should constitute a relevant

rule. *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336 (1895); *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591 (1895).

6. *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903); *Thorndike v. Boston*, 1 Metc. (Mass.) 242 (1840); *Hunter v. State*, 40 N. J. L. 495 (1878); *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706 (1892).

7. *Walker v. State*, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17 (1887); *Durling v. Johnson*, 32 Ind. 155 (1869); *Jones v. Brownfield*, 2 Pa. St. 55 (1845); *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085 (1891).

8. *Com. v. Felch*, 132 Mass. 22 (1882).

9. *Indiana*.—*Grimes v. State*, 68 Ind. 193 (1879).

Tennessee.—*Garber v. State*, 4 Coldw. 161 (1867).

United States.—*U. S. v. Craig*, Fed. Cas. No. 14,883, 4 Wash. C. C. 729 (1827).

10. *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52 (1878); *State v. Abbott*, 8 W. Va. 741 (1875).

11. *Flannery v. Van Tassel*, 127 N. Y. 631, 27 N. E. 393, 3 Silvernail 456 (1891). The purpose of an employee in starting a machine may not be shown by his statement made twenty minutes after the accident while he was being carried to the hospital as this is not part of the *res gestae*. It is mere narrative and not spontaneous statement. *Bernard v. Grand Rapids Paper Box Co.*, 170 Mich. 238, 136 N. W. 374, 42 L. R. A. (N. S.) 930 (1912). Statements of the plaintiff as

to why he was where he was prior to the accident are not admissible as part of the *res gestae* although made immediately after the accident as they were not part of the accident did not characterize it nor throw any light upon it, but were purely narrative giving an account of a transaction wholly past, and depending for their truth wholly upon the accuracy and reliability of the deceased and the verity of the witness who testified to it. *Hobbs v. Great Northern R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D 503 (1914). Declarations by one killed on the railroad track that he would throw himself in front of a train when he was ready to die are not admissible as evidence of suicide. *Greenacre v. Filby*, 276 Ill. 294, 114 N. E. 536, L. R. A. 1918 A 234.

12. 4 Chamberlayne, Evidence, §§ 2662–2665.

13. *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96 (1890); *State v. Cross*, 68 Iowa 180, 26 N. W. 62 (1885); *State v. Shelledy*, 8 Iowa 477 (1859).

14. *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 So. 500 (1901); *Germain v. Central Lumber Co.*, 116 Mich. 245, 74 N. W. 644 (1898); *Phoenix Mills v. Miller*, 42 Hun 654, 4 N. Y. St. Rep. 787 (1886); *Patterson v. Smith*, 73 Vt. 360, 50 Atl. 1106 (1901).

15. *Zimmerman v. Brannon*, 103 Iowa 144, 72 N. W. 439 (1897); *Haywood v. Foster*, 16 Ohio 88 (1847); *Cullmans v. Lindsay*, 114 Pa. St. 166, 6 Atl. 332 (1886).

16. *Willingham v. Sterling Cycle Works*,

manifestation of the particular intent or intention. Otherwise, the utterance is irrelevant, i.e., is not evidence at all.

Subject to these considerations statements as to intention have been received to show abandonment,¹⁷ an act of bankruptcy¹⁸ delivery¹⁹ as in case of a gift,²⁰ or domicile.²¹

§ 850. [Extrajudicial Statements as Probative Facts]; Knowledge.²²— Few mental states are of greater importance in the view of the law than that of knowledge.

Statement to A.— Extrajudicial statements containing relevant information, or capable of conveying it, which have been made to one, say A, who subsequently acts in the matter, may be received for the purpose of showing the extent of his knowledge at a given time.²³ That the statement should have been made directly to A himself is by no means required. The rule is satisfied if it is shown that an unsworn declaration covering the fact in question was in some way brought to his attention.²⁴

Statements by A.— Where the existence of the psychological fact of knowledge on the part of A is relevant it may be established not only by the extrajudicial statements made to him by others but by the unsworn declarations which he himself may make. In this way, not only may A's knowledge but his lack of it²⁵ be shown. The statement is equally competent, though shown to be false.²⁶

In the same way general knowledge on the part of A²⁷ or knowledge by others²⁸ or reputation²⁹ may be shown as evidence of A's knowledge.

113 Ga. 953, 39 S. E. 314 (1901); Sutter v. Rose, 169 Ill. 66, 48 N. E. 411 (1897); Kingsford v. Hood, 105 Mass. 495 (1870); Raymond v. Richmond, 88 N. Y. 671 (1882).

17. Union Oil Co. v. Stewart, 159 Cal. 149, 110 Pac. 313 (1910).

18. Cornelius v. State, 12 Ark. 782, 806 (1852).

19. Holcomb v. Campbell, 42 Hun 398, 4 N. Y. St. Rep. 799, affirmed 118 N. Y. 46, 22 N. E. 1107 (1886).

20. Leitch v. Diamond Nat. Bank of Pittsburgh (Pa. 1912), 83 Atl. 416; Schauer v. Von Schauer (Tex. Civ. App. 1910), 138 S. W. 145.

21. Matter of Newcomb, 192 N. Y. 238, 84 N. E. 950 (1908), affirming order 107 N. Y. Suppl. 1139, 122 App. Div. 920 (1907).

22. 4 Chamberlayne, Evidence, §§ 2666-2670.

23. State v. Grote, 109 Mo. 345, 19 S. W. 93 (1891); State v. Jones, 50 N. H. 869, 9 Am. Rep. 242 (1871); Darling v. Klock, 165

N. Y. 623, 59 N. E. 1121 (1900); Titus v. Gage, 70 Vt. 13, 39 Atl. 246 (1896).

24. Boston Woven Hose, etc., Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478 (1901).

25. Kruter v. Bomberger, 82 Pa. St. 59, 22 Am. Rep. 750 (1876).

26. Jones v. State, 103 Ala. 1, 15 So. 891 (1894).

27. Putnam v. Gunning, 162 Mass. 552, 39 N. E. 347 (1895) (circulation department of newspaper containing statement).

28. Knowledge of his family.—Covington v. Geyler, 12 Ky. L. Rep. 466 (1890); Hart v. Newland, 10 N. C. 122 (1824).

29. Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393 (1888); Stallings v. State, 33 Ala. 425 (1859); Ward v. Herndon, 5 Port. (Ala.) 382 (1837); Chase v. Lowell, 151 Mass. 422, 24 N. E. 212 (1890); Browning v. Skillman, 24 N. J. L. 351 (1854); Adams v. State, 25 Ohio St. 584 (1874).

§ 851. [Extrajudicial Statements as Probative Facts]; Illustrations.³⁰— Extrajudicial statements may be used to show motive as, love or friendship,³¹ malice,³² or other motive³³ or provocation³⁴ or the reasons assigned for certain conduct.³⁵ The existence and effect of undue influence³⁶ may also be shown by such statements or willingness to do any particular act.³⁷

Such statements may also be used to show political opinions³⁸ but moral qualities can be proved only by evidence of reputation under a rule of substantive law.³⁹

§ 852. [Independent Relevancy of Unsworn Statements]; Extrajudicial Statements as Deliberative Facts.⁴⁰— The independent relevancy of unsworn statements may, however, be not only constituent or probative in its nature but also deliberative. In other words, the extrajudicial declaration may not only constitute an element in the right or liability placed in issue by the pleadings or tend to prove the existence of a *res gestae* fact, but its office may be to assist the tribunal in weighing the probative force of more individually significant evidence. Statements or other facts employed in this deliberative way may come to the tribunal within the time or space limit of the *res gestae* or in connection with probative facts. Their relevancy, however, never, on this account becomes constituent or probative but remains at all times simply deliberative. Such statements may be used to show bias,⁴¹ or to corroborate the evidence of the witness⁴² or to fix his attention⁴³ or refresh his memory⁴⁴ or to show

30. 4 Chamberlayne, Evidence, §§ 2671–2678.

31. McKenzie v. Lautenschlager, 113 Mich. 171, 71 N. W. 489 (1897).

32. Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900).

33. White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141 (1895).

34. People v. Lewis, 3 Abb. Dec. (N. Y.) 535, 3 Transcr. App. (N. Y.) 1, 6 Abb. Pr. N. S. (N. Y.) 190, 41 How Prac. 508 (1867); Green v. Cawthorn, 15 N. C. 409 (1834).

35. Wilkinson v Service, 249 Ill. 146, 94 N. E. 50, 22 Am. & Eng. Ann. Cas. 41 (1911). Where a deed is attacked as being made in fraud of creditors the statements of the grantors at the time the deed was drawn are not admissible in evidence to show their purpose in signing it, especially when they can both testify. The statements are not part of the *res gestae*. Johnston v. Spoonheim, 19 N. D. 191, 123 N. W. 830, 41 L. R. A. (N. S.) 1 (1909).

36. Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073 (1905).

Declarations of a beneficiary which are so connected with the making of the will in

point of time and circumstance as to give color thereto will be received in evidence as part of the *res gestae* upon the issue of fraud and undue influence. James v. Fairall (Iowa 1912), 134 N. W. 608.

37. Long v. Rogers, 17 Ala. 540 (1850); Walter v. Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433 (1901); Evans v. Jones, 8 Yerg. (Tenn.) 461 (1835).

38. Extrajudicial statements indicative of political opinions may be contained in a sermon. Rosewell's Trial, 10 How. St. Tr. 214 (1864).

39. Boies v. McAllister, 12 Me. 308 (1835); Hart v. Reynolds, 1 Heisk (Tenn.) 208 (1870). Should evidence of character be irrelevant or otherwise inadmissible, proof of reputation cannot be made. Baldwin v. Western R. R. Corp., 4 Gray (Mass.) 333 (1855) (careless).

40. 4 Chamberlayne, Evidence, §§ 2679–2685.

41. Potter v. Brown, 197 N. Y. 288, 90 N. E. 812, 91 N. E. 1119, reversing 125 App. Div. 640, 109 N. Y. Suppl. 1075 (1910).

42. Gill v. Staylor, 93 Md. 453, 49 Atl. 650 (1901).

his good or bad faith⁴⁵ or to identify a date⁴⁶ or to impeach the witness.⁴⁷

§ 853. [Independent Relevancy of Unsworn Statements]; Form of Statement; Oral.⁴⁸—The independently relevant statement, i.e., the extrajudicial declaration grounding some other inference than that of its truth may be accepted by judicial administration as is abundantly seen *passim*, either in oral⁴⁹ or in written form. Included among these, may be the self-serving declarations of third persons.⁵⁰

The statement may be in any form, as in a record,⁵¹ or note⁵² or even in a newspaper.⁵³

§ 854. [Independent Relevancy of Unsworn Statements]; Reputation.⁵⁴—As reputation—the composite extrajudicial statement in which the individual voices are lost—may be treated as a form of hearsay as evidence of the facts asserted, so equally it may be, in certain connections, regarded as an extrajudicial statement independently relevant. For example, the existence of a given reputation with regard to a certain person's habits of drunkenness may be admissible—as bearing upon the reasonable nature of the conduct of another in employing him or continuing to employ him in a position of responsibility⁵⁵ reposing confidence in him,⁵⁶ as shown by entrusting him with property.⁵⁷ In much the same way, the existence of a reputation may be an independently relevant fact bearing on the question as to whether proper judgment was exercised in the selection of a trustee⁵⁸ or the like. In short, in many connections the existence of a given reputation, while not probative as to its truth, is of evidentiary value in deciding as to whether one who knew of it acted with due and proper care in doing as he actually did.⁵⁹

§ 855. [Independent Relevancy of Unsworn Statements]; Libel, etc.⁶⁰—In

43. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (affirmed 164 U. S. 705, 17 S. Ct. 997, 41 L. ed. 1183 (1893)).

44. *Howser v. Com.*, 51 Pa. St. 332 (1865).

45. *Cowen v. Bloomberg*, 69 N. J. L. 462, 55 Atl. 36 (1903).

46. *McNitt v. Henderson*, 155 Mich. 214, 118 N. W. 974, 15 Detroit Leg. N. 987 (1908).

47. *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 784 (1910).

48. 4 Chamberlayne, Evidence, §§ 2686, 2687.

49. *Dodge v. Weill*, 158 N. Y. 346, 53 N. E. 33 (1899).

50. *South Hampton v. Fowler*, 54 N. H. 197 (1874).

51. *Darmitzer v. German Sav. etc., Soc.*, 23 Wash. 132, 62 Pac. 862 affirmed 192 U. S. 125, 24 Sup. Ct. 221, 48 L. ed. 373 (1900).

In its assertive capacity, such a statement is merely hearsay. *Melancon v. Phoenix Ins.*

Co., 116 La. 324, 40 So. 324 (1906) (inventory).

52. *McCann v. Preston*, 79 Md. 223, 28 Atl. 1102 (1894).

53. *Jewell v. Jewell*, 1 How. (U. S.) 219, 11 L. ed. 108 (1843).

54. 4 Chamberlayne, Evidence, § 2688.

55. *Fitch v. Woodruff, etc., Iron Works*, 29 Conn. 82 (1860); *Plummer v. Ossipee*, 59 N. H. 55 (1879).

56. *Monahan v. Worcester*, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226 (1890).

57. *Ficken v. Jones*, 28 Cal. 618 (1865).

58. *Holmberg v. Dean*, 21 Kan. 73 (1878).

59. *People v. Anderson*, 39 Cal. 703 (1870); *Wormsadorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453 (1889); *Williford v. State*, 36 Tex. Cr. 414, 37 S. W. 761 (1896).

60. 4 Chamberlayne, Evidence, § 2689.

cases involving injury to reputation like libel and slander⁶¹ it may be proved as a fact both to show libel and to prove damage⁶² and the defendant in such cases may mitigate the damages by showing the absence of a good reputation⁶³ or that it was already impaired by unfavorable rumors.⁶⁴

The court presumes in the absence of evidence that parties have a good reputation.⁶⁵ Reputation may be a probative fact as in cases of malicious prosecution⁶⁶ or prosecutions for running a house of ill-fame.⁶⁷

§ 856. [Independent Relevancy of Unsworn Statements]; Administrative Details.⁶⁸— There is great danger that unsworn statements of this character may be misused by the jury as evidence of the facts stated, and therefore the court may well refuse to admit them even in cases where they seem to be logically proper.⁶⁹ The court must also see before admitting the statement that it is objectively⁷⁰ and subjectively relevant. The reporting evidence must also be competent, made by one with adequate knowledge⁷¹ with no motive to misrepresent.⁷²

61. The reputation is the general standing of the person affected in the community devoid of limitations to any particular trait of character. *Leonard v. Allen*, 11 Cush. (Mass.) 241 (1853).

62. *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189 (1820); *Adams v. Lawson*, 17 Gratt. (Va.) 250, 260, 94 Am. Dec. 455 (1867); *Shroyer v. Miller*, 3 W. Va. 158 (1869).

63. *Leonard v. Allen*, 11 Cush. (Mass.) 241 (1853).

64. *Holley v. Burgess*, 9 Ala. 728 (1846).

Contra. It is not material that the rumors are to the same effect as the words alleged to be slanderous. *Proctor v. Houghtaling*, 37 Mich. 41 (1877).

65. *O'Brien v. Frasier*, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170 (1885).

66. *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135 (1884).

67. *State v. Smith*, 29 Minn. 193, 12 N. W. 524 (1882).

68. 4 Chamberlayne, Evidence, §§ 2694-2697.

69. *R. v. Bedingfield*, 14 Cox Cr. C. 341 (1879).

70. *Brannen v. U. S.*, 20 Ct. Cl. 219 (1885).

71. *Brannen v. U. S.*, 20 Ct. Cl. 219 (1885).

72. *Powell v. Henry*, 96 Ala. 412, 11 So. 311 (1892); *Nourse v. Nourse*, 116 Mass. 101 (1874); *Crounse v. Fitch*, 1 Abb. Dec. 45, 6 Abb. Pr. (N. S.) 185 (1868).

CHAPTER XXXVIII.

UNSWORN STATEMENTS; HEARSAY.

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§ 857. **Unsworn Statements; Hearsay.**¹— Having considered in the preceding chapter the use in evidence of the unsworn statement in its independently relevant capacity, we are better prepared to examine the action of judicial administration in dealing with the Rule against Hearsay, the employment of the extrajudicial declaration as proof of the facts asserted in it. No rule of procedure in connection with the law of evidence is more familiar or more frequently invoked than that which excludes, as evidence of the facts alleged, the reported statement of a person not sworn as a witness.

Independently Relevant Statements and Hearsay Declarations Contrasted.— The true distinction between the two seems to lie in the manner in which the subjective relevancy of the extrajudicial statement is viewed in the respective

1. 4 Chamberlayne, Evidence, § 2698.

connections. In other words, as to the degree of trust and confidence which we are called upon to repose in the speaker himself, a necessary line of demarcation is presented. In case of the independently relevant statement, this trust in the speaker may be very little. The question, for example, being as to whether A knew a given fact, it may properly be shown that a particular statement was made to him. Whether the declarant knew anything as to the truth of the matter is not material. Reading from a newspaper by one utterly ignorant on the subject would be entirely sufficient. When, however, an effort is made to show that the assertion made to A is true in point of fact, a different situation is at once presented. We are asked to believe the declarant, to feel that an assertion is true because the speaker declares it to be so. If this mental reliance is to come into being, we must feel confident on at least two points. (1) The speaker knows what he is talking about. (2) He is truly stating the fact as he understands it to be.

§ 558. [Unsworn Statements; Hearsay]; Antiquity of Rule.²— Until a comparatively recent period, the reception of extrajudicial statements in proof of the facts asserted was a matter of course.³ This was conspicuously true of the early jurors who customarily used their own knowledge drawn in part from common reputation, rumors, and extrajudicial declarations of all kinds submitted by the parties⁴ or gathered by the jurors themselves.⁵

Practically, in its modern form, the rule excluding hearsay dates from the early part of the 18th century⁶ although occasional rulings to the same effect may be found somewhat earlier.⁷

Corroboration.— The true administrative position of hearsay, when relevant as secondary evidence, was early recognized in English practice, that when a case had been established by the use of less objectionable evidence, hearsay statements could be received for purposes of corroboration or confirmation.⁸

2. 4 Chamberlayne, Evidence, § 2699.

3. The judicial opinion that the formation of the rule against hearsay extends "back to Magna Charta, if not beyond it," seems hardly justified by facts. *Anderson v. State*, 89 Ala. 12, 14, 7 So. 429 (1889), per Stone, C. J.

4. "It was regarded as the right of the parties to 'inform' the jury, after they were empanelled and before the trial." Thayer, *Prelim. Treat. on Ev.*, p. 92.

5. "Some of the verdicts that are given must be founded upon hearsay and floating tradition. Indeed it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony: they must weigh it and state the net result in a verdict." 2 Pollock & M., *Hist. of Eng. Law*, 622.

6. *Canning's Trial*, 19 How. St. Tr. 283, 383 (1754); *L. C. Macclesfield's Trial*, 16 How. St. Tr. 767 (1725); *Bishop Atterbury's Trial*, 16 How. St. Tr. 323 (1723); *Earl of Wintoun's Trial*, 15 How. St. Tr. 805 (1716); *Captain Kidd's Trial*, 14 How. St. Tr. 147 (1701).

Hearsay is excluded "on the principal reason, that hearsay evidence ought not to be admitted, because of adverse party's having no opportunity of cross-examining." *Annesley v. Anglesea*, 17 How. St. Tr. 1139, 1161 (1743).

7. *Busby's Trial*, 8 How. St. Tr. 525 (1681); *Anderson's Trial*, 7 How. St. Tr. 811 (1680); *Samaon v. Yardly & Tottill*, 2 Keb. 223 (1668); *Ireland's Trial*, 7 How. St. Tr. 79 (1678).

8. *Fenwick's Trial*, 13 How. St. Tr. 537 (1696); *Cole's Trial*, 12 How. St. Tr. 875 (1692); *Lord Russell's Trial*, 9 How. St. Tr. 577 (1683). See, also, *Braddon's Observa-*

Depositions.— The use, in England, of extrajudicial sworn statements, declarations under oath as to which the person against whom they were offered had had no opportunity of cross-examination, continued, as is seen elsewhere, principally in the form of depositions, somewhat later than the judicial employment of hearsay statements where neither oath nor cross-examination served as a guaranty for truth.⁹

§ 859. **Hearsay Rule Stated.**¹⁰— The rule against hearsay, though thus seen to be of but comparatively recent origin, is the characteristic anomaly of the English law of evidence. Except when covered by some recognized exception, no extrajudicial statement can be received as proof of the facts asserted in it.¹¹

Official Duty.— In the absence of special circumstances,¹² an unsworn statement does not become admissible merely because made in the course of official duty.¹³

Opinion.— That the unsworn statement takes the form of an opinion does not insure its admissibility.¹⁴

Understanding.— A person's understanding in regard to a certain matter¹⁵ as, for instance, who owns certain land¹⁶ or the cause of another's illness¹⁷ will not be received.

Telephone Communications.— Evidence as to what a person holding a conversation over the telephone told the witness was said by the person at the

tions on the *Early of Essex's Murder*, 9 How. St. Tr. 1229 (1684). "The use you make of this is no more, but only to corroborate what he hath said, that he told it him while it was fresh, and that it is no new matter of his invention now." *Knox's Trial*, 7 How. St. Tr. 763 (1679), per Seroggs, L. C. J.

9. *Fenwick's Trial*, 13 How. St. Tr. 537 (1696).

10. 4 Chamberlayne, Evidence, § 2700.

Hearsay evidence is incompetent to establish any specific fact which is susceptible of being proved by witnesses who speak from their own knowledge. *Hirshberg, Hollander & Co. v. Robinson & Son*, 75 N. J. L. 256, 66 Atl. 925 (1907).

Negative facts may be as objectionable to the rule excluding hearsay as positive ones. *Pelly v. Denison & S. Ry. Co.* (Tex. Civ. App. 1904), 78 S. W. 542. Thus a partner will not be allowed to testify that neither his partner nor the firm had ever been notified of a certain fact. *Dunn & Lallande Bros. v. Gunn*, 149 Ala. 583, 42 So. 686 (1906).

11. *Home Building & Loan Ass'n v. McKay*, 217 Ill. 551, 75 N. E. 569, 108 Am. St. Rep. 263 (1905), reversing judgment 118 Ill. App. 586. *Hyslop v. Boston & M. R. R.*, 208 Mass. 362, 94 N. E. 310, 21 Am. & Eng. Ann.

Cas. 1121 (1911); *Pennsylvania Iron Works v. Mackenzie*, 190 Mass 61, 76 N. E. 228 (1906); *Roche v. Nason*, 93 N. Y. Suppl. 565, 105 App. Div. 256 (1905), affirmed 185 N. Y. 128, 77 N. E. 1007 (1906).

12. Official reports made to an administrative board in pursuance of a legal duty may be received in evidence upon being properly authenticated to the tribunal. *Chicago, R. I. & G. Ry. Co. v. Risley Bros. & Co.*, 55 Tex. Civ. App. 66, 119 S. W. 897 (1909).

13. *German American Ins. Co. v. New York Gas Co.*, 185 N. Y. 581, 78 N. E. 1103 (1906) affirming 93 N. Y. Suppl. 46, 103 N. Y. App. Div. 310 (1905) (unverified certificates).

14. *Pratt v. Hamilton*, 161 Mich. 258, 126 N. W. 196, 17 Detroit Leg. N. 288 (1910).

15. *Combs v. Combs*, 130 Ky. 827, 114 S. W. 334 (1908); *Roe v. Versailles Bank*, 167 Mo. 406, 67 S. W. 303 (1902); *Spande v. Western Life Indemnity Co.* (Or. 1911), 117 Pac. 973.

16. *Waldroof v. Ruddell*, 96 Ark. 171, 131 S. W. 670 (1910); *Rockcastle Min. L. & O. Co. v. Isaacs*, 141 Ky. 80, 132 S. W. 165 (1910).

17. *Mo. K. & T. Ry. Co. v. Williams* (Tex. Civ. App. (1911), 133 S. W. 499

other end of the line is hearsay¹⁸ and the statement is not rendered competent by a declaration by such other person that he has received the information which was telephoned him at the time such conversation took place.¹⁹

§ 860. [Hearsay Rule Stated]; **A Controlling Rule, An Absolute Bar.**²⁰—The anomalous feature of the rule against hearsay is that, unless the conditions of a recognized exception are presented, the bar of the rule is absolute. No forensic necessity on the part of a litigant suffices to bring into operation the administrative power of a presiding judge. The fundamental administrative duty of the court to protect a litigant in the substantive right to prove his case by permitting him to use secondary evidence where the primary is practically unattainable is forced to yield at this point. The case proposed for proof may be absolutely dependent upon the establishment of a fact which can only be shown by an extrajudicial assertion. The declarant may be unavailable, by reason of his having left the jurisdiction²¹ or even the country itself.²² He may be too sick to attend the trial²³ or, if present, he may not be permitted to testify²⁴ or the proponent may be without the power of compelling him to do so.²⁵ He may even be affirmatively shown to be dead.²⁶

Even the suggestion that remote or collateral facts, e.g., those deliberative in their nature, might properly be treated as beyond the operation of the rule,²⁷ has failed to commend itself to the favorable action of the courts.²⁸ There is, however, a distinction taken between its operation in civil and criminal cases. In the former should the hearsay statement be admitted without objection it becomes evidence in the case,²⁹ subject, of course, to any infirmative sugges-

18. *Millner v. Silverman*, 109 Md. 341. 71 Atl. 962, 24 L. R. A. (N. S.) 895 (1909); *Texas & P. Ry. Co. v. Felker*, 44 Tex. Civ. App. 420, 99 S. W. 439 (1907); *Jacobs v. Cohn*, 91 N. Y. Suppl. 339, 46 Misc. Rep. 115 (1904).

19. *Texas & P. Ry. Co. v. Felker*, 44 Tex. Civ. App. 420, 99 S. W. 439 (1907).

Telephone conversation.—On a question whether an insurance company had notice of a transfer of a policy a witness may testify that he heard the insured go to the telephone and call for the company and talk over the telephone and return saying that the company agreed to the transfer. It seems that when the fact of a real conversation is proved there is no objection to such testimony. *Northern Assurance Co. v. Morrison* (Tex. Civ. App.), 162 S. W. 411.

20. 4 Chamberlayne. Evidence, §§ 2702, 2703.

21. *Johnson v. State*, 59 Ala. 37 (1877).

22. *Pearson v. Darrington*, 32 Ala. 227 (1858); *Brown v. Steele*, 14 Ala. 63 (1848).

23. *Gaither v. Martin*, 3 Md. 146 (1852).
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Lack of time in which to take a deposition does not confer admissibility. Though the sickness of a witness has come to the attention of the proponent only the day before the trial, the unsworn statement will not be received. *Gaither v. Martin*, 3 Md. 146 (1852).

24. *Blann v. Beal*, 5 Ala. 357 (1843); *Churchill v. Smith*, 16 Vt. 360 (1844).

25. *State v. Yanz*, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780 (1901); *Braddon v. Speke*, 9 How. St. Tr. 1127 (1684).

26. *Georgia*.—*Dozier v. McWhorter*, 117 Ga. 786, 45 S. E. 61 (1903).

27. *Justus' Succession*, 47 La. Ann. 302, 16 So. 841 (1895).

28. **Surprise.**—The existence of surprise and the threatened prejudice of the party caused thereby does not justify ignoring the rule as to hearsay evidence, or bring the same within any exception to the rule. *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860 (1909).

29. *State Bank v. Wroddy*, 10 Ark. 638

tions due to its inherent weakness. In criminal actions, on the contrary, the hearsay statement is to be rejected, unless the defendant actively assents to its reception.³⁰

It may fairly be said that, speaking generally, the exception excluding hearsay is the only procedural rule of evidence which excludes testimony for the admission of which a sound administrative reason exists. As a matter of principle, not only does the hearsay rule mar any scientific symmetry to which the law of evidence might otherwise lay claim but it inflicts serious injury upon the successful administration of justice.³¹

The rule seems as applicable to preliminary as to final issues.³² Where a jury is present, the use of hearsay is none the less objectionable because elicited by questions asked by the judge.³³

Even confessions by third persons to having committed the crime with which the defendant is charged cannot be proved by hearsay.³⁴

§ 861. [Hearsay Rule Stated]; Statutory Exceptions.³⁵—It is not surprising to find that the hardship and injustice of excluding a relevant unsworn statement which is essential to the contention of its proponent should have attracted the attention of the law-making body. A specific instance where this intolerable situation was found to be of frequent occurrence has been in connection with claims by or against the estates of deceased persons. The administrative expedient has been adopted of admitting the statements of the decedent as evidence on actions for or against his estate³⁶ or of forbidding the reception of self-serving testimony from the surviving party to the transaction. Under appropriate circumstances, the extrajudicial statements of the deceased will be received in evidence.³⁷

§ 862. [Hearsay Rule Stated]; Hearsay Memoranda Refreshing Memory.³⁸—Memoranda to refresh memory of a witness cannot, in the absence of special

(1858). See *Nunn v. Jordan*, 31 Wash. 506, 72 Pac. 124 (1903). See, however, *Laughlin v. Inman*, 138 Ill. App. 40 (1907).

³⁰. *Phillips v. State*, 29 Ga. 105 (1859).

³¹. "If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence." *Sugden v. St. Leonards*, 1 P. D. 154, 250, 45 L. J. P. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876), per Mellish, L. J.

³². *Early v. Oliver*, 63 Ga. 11 (1879).

³³. *Bornheimer v. Baldwin*, 42 Cal. 27 (1871).

³⁴. *People v. Schooley*, 149 N. Y. 99, 43 N. E. 536 (1896).

³⁵. 4 Chamberlayne, Evidence, § 2704.

³⁶. *Foote v. Brown*, 81 Conn. 218, 70 Atl. 699 (1908) (title to land); *Mooney v. Mooney*, 80 Conn. 446, 68 Atl. 985 (1908). In order that the declaration of the decedent should be competent under such a statute, it is essential that the action should have been brought directly by or against his legal representatives. *Mooney v. Mooney*, 80 Conn. 446, 68 Atl. 985 (1908).

³⁷. *Mulcahy v. Mulcahy*, 84 Conn. 659, 81 Atl. 242 (1911); *Pixley v. Eddy*, 56 Conn. 336, 15 Atl. 758 (1888); *Hamilton v. Lamphear*, 54 Conn. 237, 7 Atl. 19 (1886).

³⁸. 4 Chamberlayne, Evidence, § 2705.

circumstances, be based upon the hearsay statements of others. In general, a witness must know of his own knowledge that the statements of a memorandum are true.³⁹

§ 863. [Hearsay Rule Stated]; Implied Hearsay.⁴⁰—Where the sole relevancy of an act consists in the extrajudicial assertion which it implies, its reception in evidence is felt to be contrary to the rule excluding hearsay.⁴¹ Under the circumstances, judicial administration is justified in rejecting the covering or containing fact. The question of much greater administrative nicety is presented where this latter fact itself possesses a logical relevancy or bearing upon the issue. Upon sound and recognized administrative principles, the risk of evading the hearsay rule will be encountered should the fact itself seem fairly necessary to proof of the proponent's case, the paramount right in this connection. Thus it may be shown that the officials of a given town decline to allow a certain individual to vote, although the fact carries an implication of a declaration that the person is not, in their opinion, a qualified voter.⁴²

§ 864. [Hearsay Rule Stated]; Knowledge Based on Reputation.⁴³—Testimony based on no personal knowledge or observation on the part of the witness but resting upon a *reputation* prevalent through the community, is objectionable as hearsay.⁴⁴ As established by scandal and gossip, local reputation may constitute a peculiarly objectionable form of hearsay. It is not under oath nor are the tests of cross-examination applied to it.

§ 865. [Hearsay Rule Stated]; Testimony Based on Hearsay.⁴⁵—A hearsay statement cannot be employed in whole⁴⁶ as the basis of the testimony of the witness to the effect that a certain fact exists.⁴⁷ Nor can it be used in part for such purpose.⁴⁸ The witness is required to speak as to his own knowledge. A present conviction of the truth of a fact which has been reached by weighing the extrajudicial statements of others does not satisfy the requirements of this rule.⁴⁹

39. *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354 (1894). Use of memorandum to refresh recollection, see note. *Bender ed.*, 183 N. Y. 195. Right to use memorandum to refresh recollection, see note, *Bender ed.*, 90 N. Y. 309. Use of memorandum as, see note, *Bender ed.*, 22 N. Y. 462.

40. 4 Chamberlayne, Evidence, § 2706.

41. *In re Louck's Estate*, 160 Cal. 551, 117 Pac. 673 (1911) (belief of by-standers).

42. *Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926 (1889).

43. 4 Chamberlayne, Evidence, § 2707.

44. *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (1907).

45. 4 Chamberlayne, Evidence, §§ 2706-2710.

46. *Grimme v. General Council of Fraternal Aid Ass'n*, 167 Mich. 240, 132 N. W. 497 (1911).

47. *Cornish v. Chicago, etc., R. Co.*, 49 Iowa 378 (1878). And see *Ramsey v. Smith*, 138 Ala. 333, 35 So. 325 (1903).

48. *Patrick v. Howard*, 47 Mich. 40, 10 N. W. 71 (1881); *Levy v. J. L. Mott Iron Works*, 127 N. Y. Suppl. 506, 143 App. Div. 7 (1911) (hospital records not shown to be true); *Robeson v. Schuylkill Nav. Co.*, 3 Grant Cas. (Pa.) 186 (1855); *Monk v. State*, 27 Tex. App. 450, 11 S. W. 460 (1889). But compare *Hornum v. McNeil*, 80 N. Y. Suppl. 728, 80 N. Y. App. Div. 637 (1903).

49. *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892).

Joint Knowledge.—Should the sanction of an oath be given to the statement of an informant the objection that the second witness is testifying from hearsay may be removed. Thus, where a witness testifies that he has informed a given person of a fact which the speaker has himself forgotten, he has been regarded as rendering the evidence of a person so informed competent as to what the fact is.⁵⁰

Where testimony is taken through an interpreter the objection from hearsay is obviated by taking the oaths of the witness and the interpreter.⁵¹

An entirely different question is presented where a person who subsequently testifies as a witness has examined a set of documents, public or private, and is asked to state the effect of these papers. This the witness is at perfect liberty to do,⁵² the administrative advantage of thus expediting the trial being obvious. No infraction of the hearsay rule is involved. Such knowledge may readily be acquired by the witness in the course of public⁵³ or official duty.⁵⁴ The testimony is not objectionable as being based upon hearsay. The witness is not giving the contents of the documents as such. He is merely stating what he has found out and knows of his own knowledge, what the writings are about, what they are seeking to effect, what position the persons concerned assume in them and the like. An administrative question of some nicety arises in view of the danger that a witness may, in reality, be basing his testimony on hearsay. Can a rule of procedure or practice be formulated as to this matter of preliminary examination? The question as to the advisability of holding a preliminary examination into the personal knowledge of the witness would appear to be a purely practical one most wisely left to be determined by the circumstances of each individual case. It may sufficiently appear, for exam-

50. *Shear v. Van Dyke*, 10 Hun (N. Y.) 528 (1877) (number of loads of hay); *Hart v. Atlantic Coast Line R. R.* (N. C. 1907), 56 S. E. 559.

51. *Com. v. Storti*, 177 Mass. 339, 58 N. E. 1021 (1901).

Interpreter.—One taking part in a conversation through an interpreter may not generally testify to the interpretation of what was said by the other speaker. But such evidence may be put in by one party to the suit when the person interpreted is an opposing party, as the interpreter is regarded as an agent of the party who has availed himself of this method of communication and his statements are regarded as admissions. This is to be sure a fictitious agency but as a practical matter a necessary step and should really be recognized as an exception to the hearsay rule. *Groc v. Delaware & Hudson Cl.*, 161 N. Y. Supp. 117; *Miller v. Lathrop*,

50 Minn. 91, 52 N. W. 274; *People v. Randazzo*, 194 N. Y. 147, 87 N. E. 112.

52. *California.*—*San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410 (1898); *Fidelity & Deposit Co. of Maryland v. Champion Ice Mfg., etc., Co.*, 133 Ky. 74, 117 S. W. 393 (1909).

53. An administrator who has learned in the course of his discharge of the trust that a given claim was made by or against the estate may properly testify to that effect. *Stewart v. Chadwick*, 8 Iowa 463 (1859).

54. An expert on cattle diseases who has ascertained from the records and correspondence of the national department of agriculture, with which he is connected, the localities in the State of Texas where "cattle fever" is prevalent, may state, as a result of his investigations which districts of the State are so affected, although he has never visited them. *Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 (1895).

ple, from the statement itself that it is made by one who has no personal knowledge on the subject.⁵⁵

§ 866. **Reasons for Hearsay Rule; Inherent Weakness.**⁵⁶— In treating hearsay statements, unsworn declarations employed in proof of the facts asserted, as secondary evidence, the judicial administration of the earlier English law of evidence acted in a wise and scientific spirit. Even when relevant at all, which seems by no means to occur so frequently as the state of the authorities would apparently indicate, the evidence of an extrajudicial statement, when employed as hearsay, to prove the fact which it asserts, is of a distinctly inferior grade. So much greater by comparison is the probative force of the testimony of the original percipient witness, the maker of the unsworn statement, given in court under the sanction of an oath and subject to the test of cross-examination as to constitute it in this connection a primary grade of proof.

In addition to the practical danger that the statement may have been misunderstood⁵⁷ or misreported⁵⁸ there is also the further objection that it is given without oath⁵⁹ and without the privilege of cross-examination,⁶⁰ the latter being by far the stronger objection, as the statement comes to the court untested.⁶¹ This objection applies equally to affidavits⁶² or depositions taken in proceedings between third parties.⁶³ Therefore where the statement was subjected to cross-examination it may be received⁶⁴ and where it was given in a tribunal which did not require cross-examination it will be excluded;⁶⁵ as in case of coroner's inquests⁶⁶ or justices courts⁶⁷ unless the person affected had an opportunity of examining the declarant.

55. *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892).

56. 4 Chamberlayne, *Evidence*, §§ 2711–2719.

57. *Louisville & N. R. Co. v. Murphy* (Ky. 1912), 150 S. W. 79 (mistake and deception). Hearsay is excluded because the probabilities of falsehood and misrepresentation, either willful or unintentional, being introduced into a statement, are greatly multiplied every time it is repeated. The original statement, even if correctly reported, is not under the safe-guards of the personal responsibility of the author as to its truth or the tests of a cross-examination as to its accuracy. *Shepard v. Austin*, 159 Ala. 361, 48 So. 696 (1909).

58. *Mima Queen v. Hepburn*, 7 Cranch (U. S.) 290, 295, 3 L. ed. 348 (1813).

59. *Diel v. Kellogg*, 163 Mich. 162, 128 N. W. 420, 17 Detroit Leg. N. 891 (1910).

60. *Com. v. Trefethen*, 157 Mass. 180, 185, 31 N. E. 961, 24 L. R. A. 235 (1892).

61. *Marshall v. Chicago & G. E. R. Co.*, 48 Ill. 475, 476 (1868).

62. *Holliday v. Roxbury Distilling Co.*, 115 N. Y. Suppl. 383, 130 App. Div. 654 (1909).

63. *Waterson v. Leat*, 10 Fla. 326 (1863).

64. *Minneapolis Mill Co. v. R. Co.*, 51 Minn. 304, 315, 53 N. W. 639 (1892); *Bradley v. Mirick*, 91 N. Y. 293, 296 (1883); *Wright v. Tatham*, 1 A. & E. 3 (1834).

65. *Attorney-General v. Davison*, McCl. & Y. 160, 167 (1825); *Jackson v. Bailey*, 2 Johns. (N. Y.) 17 (1806); *R. v. Paine*, 5 Mod. 163 (1696); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496 (1907).

The offer made to a defendant that he may cross-examine, if he sees fit, is sufficient to safeguard his rights. *State v. Hill*, 2 Hill S. C. 607, 27 Am. Dec. 406 (1835); *R. v. Smith*, Holt N. P. 614 (1817); *Trials at Nisi Prius*, 240 (1763).

66. *Pittsburgh C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439 (1885).

In England depositions taken at coroners'

§ 867. [Reasons for Hearsay Rule]; Distrust of the Jury; Hearsay in Other Judicial Systems.⁶⁸—Hearsay is employed in other systems of law, as the civil⁶⁹ and ecclesiastical law, but its strict exclusion by the common law is caused by the general distrust of the jury and the effect of such statements on the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose.⁷⁰

§ 868. Scope of Hearsay Rule.⁷¹—Applying equally to civil and criminal cases, embracing oral, printed, written or composite statements, indifferently affecting declarations which are implied as well as those more fully expressed, the rule against hearsay statements has evidently a wide range of influence, even when restricted to its normal scope.⁷² As the term is commonly employed, the application of the rule is still wider being made to cover two large classes of extrajudicial statements which must carefully be excluded before the true juridical value of the rule can be satisfactorily estimated. The first of these classes, the instances in which the unsworn statement is circumstantially relevant, constituent or probative by reason of its bare existence, has already been considered in the preceding chapter. It remains to place on one side, as not properly within the scope of the hearsay rule which excludes extrajudicial statements when used as proof of the facts asserted a second and very large class of unsworn statements, those which are logically *irrelevant*.

Courts frequently give as a reason for excluding evidence logically irrelevant that it is hearsay and this practice has caused some confusion.

§ 869. Relevancy of Hearsay.⁷³—The absence of cross-examination in case

inquests are admissible. *R. v. Eriswell*, 3 T. R. 707 (1790).

67. *R. v. Ferry Frystone*, 2 East 53 (1801).

68. 4 Chamberlayne, Evidence, § 2720.

69. "In Scotland, and most of the Continental States, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment, on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." *Berkeley's Case*, 4 Campb. 401. 415 (1811), per Mansfield, C. J.

70. *Wright v. Tatham*, 7 A. & E. 313, 375, 2 N. & P. 305, 34 E. C. L. 178 (837).

71. 4 Chamberlayne, Evidence, §§ 2721-2724.

72. Administrative Boards.—It seems that

administrative tribunals should not be confined to the strict rules of evidence. They are composed of experts and not subject to the suspicion to which juries are subject and are better able to weigh the evidence of all kinds. So it has been held that a board under the Workmen's Compensation Act may consider hearsay evidence. *Carroll v. Knickerbocker Ice Co.*, 155 N. Y. Supp. 1. See *contra*, *Englebreton v. Industrial Accident Commission*, 170 Cal. 793, 151 Pac. 421; *Employers' Assurance Corporation v. Industrial Accident Commission*, 170 Cal. 800, 151 Pac. 423.

State of Mind of Declarant.—The House of Lords has recently gone far in abrogating the hearsay rule by admitting contemporaneous declarations to show the intention or state of mind of the declarant. *Lloyd v. Powell Duffryn Steam Coal Co.* (1914). A. C. 733.

73. 4 Chamberlayne, Evidence, §§ 2725, 2726.

of an extrajudicial statement employed as hearsay, or, more properly, the difficulty of mentally affixing any determinate, evidentiary value to a declaration not so tested, has led judicial administration, as is most clearly seen in connection with the "exceptions" to the hearsay rule, to require that a clear and unmistakable relevancy, objective and subjective, should be established if such a declaration is to be received in evidence.

§ 870. [Relevancy of Hearsay]; Objective Relevancy.⁷⁴—Applying more specifically to hearsay declarations, the familiar general propositions that seem to be essential to the probative force of all statements which are to be judicially used, the rule may fairly be deduced that no extrajudicial statement when used as proof of the facts asserted will be admitted unless it would, if believed, logically establish, mediately or immediately, the existence of some fact in the *res gestae*, properly so called. The declaration which, if true, lacks this objective correlation with some ultimate *factum probandum* is to be rejected. This is properly done, not by virtue of any rule peculiar to hearsay but under the general administrative duty of the court to keep from the attention of the jury matters upon which they cannot rationally act.

Common examples of this rule are the rejection of disconnected statements where a link in the chain of evidence is missing,⁷⁵ or the rejection of the statements of the agent⁷⁶ or privy⁷⁷ until agency or privity is shown.

§ 871. [Relevancy of Hearsay]; Subjective Relevancy.⁷⁸—If the objective relevancy of a hearsay statement is tacitly assumed as a matter of course, the question of subjective relevancy stands in quite a different position. The inquiry no longer is as to whether the declaration, if believed, would establish the *res gestae* fact, properly so called. The question is, Shall the statement be believed, credited as proving the fact, the existence of which it asserts.

The statement should appear to be made by one with adequate knowledge,⁷⁹ with no motive to misrepresent⁸⁰ and therefore self-serving statements are excluded whether oral⁸¹ or in writing⁸² and although the declarant is dead.⁸³

74. 4 Chamberlayne, Evidence, §§ 2727–2730.

75. *Hard v. Ashley*, 63 Hun 634, 18 N. Y. Suppl. 413, 44 N. Y. St. Rep. 792, *affirmed* 136 N. Y. 645, 32 N. E. 1015 (1892).

76. *Enneking v. Woebkenberg*, 88 Minn. 259, 92 N. W. 932 (1903).

77. *Evans v. McKee*, 152 Pa. St. 89, 25 Atl. 148 (1892).

78. 4 Chamberlayne, Evidence, §§ 2731–2736.

79. Circumstantial evidence.—Proof of actual knowledge may be made by circumstances. *McDonald v. McCaskill*, 53 N. C. 158 (1860); *Coats v. Speer*, 3 McCord (S. C.)

227, 15 Am. Dec. 627 (1825); *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896 (1899).

80. *Lavender v. Hall*, 60 Ala. 214 (1877).

81. *Africa v. Trexler*, 232 Pa. 493, 81 Atl. 707 (1911).

82. *Troy v. Rudnick*, 198 Mass. 563, 85 N. E. 177 (1908).

83. *Gunter v. Gunter*, 174 Fed. 933, 98 C. C. A. 545 (1909).

Declarations of a deceased partner as to his being the sole owner of the business are inadmissible. *Letson v. Hall* (Ala. App. 1912), 58 So. 740.

For the same reason statements by agents,⁸⁴ or privies⁸⁵ in favor of their principals or representatives are excluded.

§ 872. **Form of Hearsay.**⁸⁶—In respect to form, hearsay statements may properly be regarded in one of two ways. The rule of exclusion applies indifferently to them all. As distinguished from each other by the nature of their source, unsworn statements in their assertive capacity may be treated as composite or individual.

Composite hearsay may be defined as a compound or blended extrajudicial declaration of an indeterminate number of people so mingled that the separate voices can no longer be distinguished.

Individual hearsay, on the contrary, may be regarded as an extrajudicial statement shown to have been made by a particular person or set of persons. So far as classified by means of the vehicle through which the utterance is presented to the tribunal they may be conveniently considered as being oral, printed or written.⁸⁷

§ 873. [**Form of Hearsay**]; **Composite Hearsay.**⁸⁸—Composite hearsay, as above defined, usually presents itself to the tribunal, with increasing vagueness as Reputation, Rumor or Tradition.

§ 874. [**Form of Hearsay**]; **Reputation.**⁸⁹—It is necessary to consider under what circumstances the existence of a given reputation is probatively relevant to the truth of the facts which it asserts? Apparently, this is exhibited whenever the nature of the subject matter and the other circumstances attending the formation and promulgation of the reputation are such as to make it probable that by thorough discussion and the prevalence of an interest vigorously to combat any mistake on the subject, the truth has presumably been reached. The inference apparently is that the reputation never would have continued in its ultimate form had it failed to state the actual reality.⁹⁰

Like hearsay in many other forms, reputation in its assertive capacity is considered, from an administrative point of view, as secondary evidence. The direct testimony of witnesses, cognizant of their own knowledge as to the existence of the facts asserted being primary evidence, the existence of a reputation to the same effect may be shown when evidence of the higher grade is unattain-

84. *Franklin County v. Bunting*, 111 Ind. 143, 12 N. E. 151 (1887).

85. *Healy v. Malcolm*, 77 App. Div. 69, 78 N. Y. Suppl. 1043 (1902) (assignor of contract).

86. 4 Chamberlayne, Evidence, § 2737.

87. **Affidavits.**—It is error to allow affidavits to be read to the jury in a disbarment case. *Lenihan v. Commonwealth*, 165 Ky. 93, 176 S. W. 948, L. R. A. 1917 B 1132 (1915).

Telegrams.—In a *habeas corpus* proceed-

ing the court may consider telegrams from the governor of the state demanding the extradition of the applicant. *Massee, ex parte*, 95 S. C. 315, 79 S. E. 97, 46 L. R. A. (N. S.) 781 (1913). Telegrams as evidence, see note, Bender ed., 100 N. Y. 455.

88. 4 Chamberlayne, Evidence, § 2738.

89. 4 Chamberlayne, Evidence, §§ 2739-2751.

90. *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476 (1883).

able⁹¹ and proof of the fact is reasonably essential to the case of the proponent.

Thus reputation may be used to corroborate other evidence where primary evidence fails⁹² or to prove any matter of public or general interest⁹³ as the existence of public rights.⁹⁴

The actual declarants in case of a reputation regarding matters of public and general interest being unidentified, administration cannot well demand that the proponent show that they possessed adequate knowledge and were free from a controlling motive to misrepresent. No showing need even be made to the effect that the speakers were not personally interested in establishing the fact that they were assisting to create.

The probative force of reputation is greatly increased should it appear to have arisen *ante litem motam*.⁹⁵ Common customs⁹⁶ or municipal incorporation⁹⁷ or boundaries⁹⁸ may be proved in this way, and other facts affecting the community as the habits⁹⁹ and morals¹ of the citizens, or the existence of a place as a liquor nuisance.² However, private rights³ or facts of per-

91. *Stevens v. San Francisco, etc., R. Co.*, 100 Cal. 554, 35 Pac. 165 (1893).

92. *Rizer v. James*, 26 Kan. 221 (1881). Where direct proof of a fact is accessible, it cannot ordinarily be proved by showing the reputation in a community to that effect. Thus, that a given person resides at a particular place cannot be established by reputation. *Abel v. State*, 90 Ala. 631, 8 So. 760 (1890).

93. *Morse v. Whitcomb*, 54 Oregon 412, 102 Pac. 788, rehearing denied, 103 Pac. 775, 135 Am. St. Rep. 832 (1900).

94. *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732 (1885).

95. *Reid v. Reid*, 17 N. J. Eq. 101 (1864).

96. *Carr v. Mostyn*, 5 Exch. 69, 19 L. J. Exch. 249 (1850).

A custom may be put in evidence if it is general and uniform and not contrary to law or to reason. *Rains v. Weiler*, 101 Kan. 294, 166 Pac. 235, L. R. A. 1917 F 571 (1917).

97. *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857).

98. *Drury v. Midland R. Co.*, 127 Mass. 571 (1879) (county).

99. *Newdeck v. Grand Lodge A O U. W.*, 61 Mo. App. 97 (1894).

1. It has, on the contrary, been held that reputation is not admissible to determine whether an insured person had become intemperate, or had been intoxicated within a certain period. *Knapp v. Brotherhood of American Yeomen* (Iowa 1910), 126 N. W. 336. To the contrary effect, see *Stevens v. San*

Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165 (1893).

Reputation may be in itself relevant.—For example, in an action for slander the reputation of the plaintiff for honesty may be put in evidence as bearing on the amount of the damages. *Deitchman v. Bowles*, 166 Ky. 285, 179 S. W. 249. In a trial for homicide for killing a man who was attempting to break into the defendant's house to get deceased's wife the defence may put in evidence of the reputation of the defendant as being quarrelsome and dangerous. *Bailey v. People*, 54 Colo. 337, 130 Pac. 832, 45 L. R. A. (N. S.) 145 (1913). Where a master voluntarily employs a physician to treat his employees the doctor's general reputation for drunkenness may be shown as evidence that the master knew or should have known that he was incompetent. *Guy v. Lanark Fuel Co.*, 72 W. Va. 728, 79 S. E. 941, 48 L. R. A. (N. S.) 536 (1913). In an action on an insurance policy where it becomes material to show that the defendant was addicted to the use of intoxicating liquors his reputation is not admissible as being a man addicted to the use of intoxicants as this is pure hearsay. *Smith v. Prudential Ins. Co.*, 83 N. J. L. 719, 85 Atl. 190, 43 L. R. A. (N. S.) 431 (1912).

2. *Ostendorf v. State* (Okla. Cr. App. 1912) 128 Pac. 143. In a prosecution for keeping a bawdy house the reputation of the house as being one of ill fame may be shown by the prosecution although its reputation is not put in evidence by the defence. *Putnam v. State*,

sonal interest⁴ as the skill of a physician⁵ or the financial,⁶ mental,⁷ or physical⁸ condition of individuals or their business relations⁹ cannot be proved in this way.

§ 875. [Form of Hearsay]; Rumor.¹⁰— Passing from reputation to rumor, a downward step, in proving capacity, is taken. Should the relevant fact be the existence of the rumor itself; in other words, should the evidentiary fact be independently relevant rather than employed as proof of the thing asserted, it is, of course, admissible.¹¹ To prove, however, the true existence of the fact which it alleges, a rumor will not be received by judicial administration.¹²

§ 876. [Form of Hearsay]; Tradition.¹³— Among composite forms of hearsay, tradition would seem to be as far above rumor, in a probative sense, as it is below reputation. However this may be, and such generalizations are rather misleading than helpful, tradition is seldom received by judicial administration as proving the truth of the fact which it asserts.¹⁴ In case, however, of matters of public and general interest,¹⁵ e.g., the location of an ancient public boundary¹⁶ for administrative reasons the evidence is received.

§ 877. [Form of Hearsay]; Printed.¹⁷— A hearsay statement, an extrajudi-

9 Okla. Crim. Rep. 535, 132 Pac. 916, 46 L. R. A. (N. S.) 593 (1913). Evidence of bad reputation alone may not be enough to prove that a house is a bawdy house but it is admissible together with other evidence. King v. Comm., 154 Ky. 829, 159 S. W. 593, 48 L. R. A. (N. S.) 253 (1913).

3. Cox v. Brookshire, 76 N. C. 314 (1877). General reputation in the neighborhood cannot be used to show that a certain piece of land is within the boundaries of a tract named in a deed as the "Grant Mill Place." McAfee v. Newberry 87 S. E. 392, Ga.

4. Middlesworth v. Nixon, 2 Mich. 425, 57 Am. Dec. 136 (1852) (elected to office); Litchfield Iron Co. v. Bennett, 7 Cow. (N. Y.) 234 (1827) (elected to office); Ferguson v. Wright, 113 N. C. 537, 18 S. E. 691 (1893) (residence).

5. Clark v. Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029 (1901).

6. Watterson v. Fuelhart, 169 Pa. St. 612, 32 Atl. 597 (1895).

Insolvency.— A fact so interesting and notorious as insolvency may in some cases be proved by reputation. Downs v. Rickards, 4 Del. Ch. 416 (1872); Griffith v. Parks, 32 Md. 1 (1869).

7. Walker v. State, 102 Ind. 502, 1 N. E. 856 (1885).

8. Mosser v. Mosser, 32 Ala. 551 (1858);

Chicago, etc., A & R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381 (1886).

9. Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353 (1884); Trowbridge v. Wheeler, 1 Allen (Mass.) 162 (1861); McGregor v. Hudson (Tex. Civ. App. 1895), 30 S. W. 489.

10. 4 Chamberlayne, Evidence, § 2752.

11. Governor v. Campbell, 17 Ala. 566 (1850).

12. Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232, 53 Am. Rep. 883 (1885).

13. 4 Chamberlayne, Evidence, §§ 2753-2755.

14. Coughlin v. Poulson, 2 MacArthur (D. C.) 308 (1875) (mental state); McKinnon v. Bliss, 21 N. Y. 206 (1860); Houston, etc., R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808 (1881); Cline v. Catron, 22 Gratt. (Va.) 378 (1872).

Ownership of land.— Family tradition as to the ownership of land is inadmissible to establish title to it. Cline v. Catron, 22 Gratt. (Va.) 378 (1872).

15. Wooster v. Butler, 13 Conn. 309 (1831); Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489 (1857); McKinnon v. Bliss, 21 N. Y. 206 (1860).

16. De Loney v. State, 88 Ark. 311, 115 S. W. 138 (1908).

17. 4 Chamberlayne, Evidence, §§ 2754, 2755.

cial declaration used as proof of the facts asserted, is none the less objectionable to the rule under consideration because it is in printed form. In its statement, the rule excluding hearsay makes no exception in favor of books,¹⁸ however meritorious, or of standard treatises of recognized authority. Its exclusion is applied equally as rigorously to such a learned treatise on a medical¹⁹ or other scientific²⁰ or technical subject as to a newspaper,²¹ magazine or periodical, or other ephemeral publication of a less learned character.²²

§ 878. [Form of Hearsay]; Written.²³— Considered as hearsay, an unsworn statement which is in writing is as much within the rule under consideration as one which is oral.²⁴ Nor is the formality or deliberate character of the writing administratively considered of consequence in this connection. Temporary, ephemeral writings such as letters,²⁵ are as fully subject to the rule against hearsay as are also telegrams²⁶ or loose memoranda.²⁷

Hence extrajudicial self-serving statements²⁸ or even judicial statements under oath²⁹ as in affidavits³⁰ or pleadings³¹ or statements contained in mercantile transactions³² or official statements,³³ aside from the relevancy of regularity, are excluded as hearsay.

§ 879. [Form of Hearsay]; Official Statements; Admissions.³⁴— Under ordinary administrative principles, while the declarant, his privies or representatives may not be able to use the declarations of a public or private entry in his behalf, these assertions may be used against them. Should it appear, for ex-

18. *Brown v. Newell*, 116 N. Y. Suppl. 965, 132 App. Div. 548 (1909), *affirmed* 200 N. Y. 501, 93 N. E. 1117 (1910).

19. *Fox v. Peninsular White Lead, etc., Works*, 84 Mich. 676, 48 N. W. 203 (1891).

20. *Kreuziger v. Chicago, etc., R. Co.*, 73 Wis. 158, 40 N. W. 657 (1888).

21. *Child v. Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26 (1849); *Gettins v. Hennessey* (Or. 1912), 120 Pac. 369; *Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 50 Tex. Civ. App. 420, 110 S. W. 978 (1908).

22. *Stagg & Conrad v. St. Jean*, 29 Mont. 288, 74 Pac. 740 (1903) (catalogue); *Norfolk & W. Ry. Co. v. Bell*, 104 Va. 836, 52 S. E. 700 (1906).

23. 4 Chamberlayne, Evidence, §§ 2756-2760.

24. *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515 (1903) (consideration stated in deed).

25. *Rice v. James*, 193 Mass. 458, 79 N. E. 807 (1907).

26. *Woods v. Toledo, St. L. & W. R. Co.*, 159 Ill. App. 209 (1910).

27. *Merritt v. Westerman*, 165 Mich. 535, 131 N. W. 66 (1911).

28. *Hunter v. Harris*, 131 Ill. 482, 23 N. E. 626 (1890) (affidavit).

29. *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 572, 16 N. E. 197 (1887).

30. An affidavit, speaking generally, fails to remove the bar of the hearsay rule. *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775 (1909).

31. *Kann v. Bennett*, 223 Pa. 36, 72 Atl. 342 (1909).

32. *Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 So. 452 (1893); *Mellhargy v. Chambers*, 117 N. Y. 532, 23 N. E. 561 (1889); *Crease v. Parker*, 6 Fed. Cas. No. 3376, 1 Cranch. C. C. 448 (1807). See also, *International, etc., R. Co. v. Startz*, 97 Tex. 167, 77 S. W. 1, *reversing* (Tex. Civ. App. 1903) 74 S. W. 1118.

33. *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12 (1885); *Lynn v. Troy*, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 594, 32 N. Y. St. Rep. 497 (1890).

34. 4 Chamberlayne, Evidence, § 2761.

ample, as has been said, that the party against whom a hearsay statement is offered has authorized the making of it³⁵ or is otherwise connected with its existence in some way which the substantive law recognizes³⁶ it may be received against him as his admission.

~~XXXX~~ HEARSAY

35. *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. N. Y. Suppl. 594, 32 N. Y. St. Rep. 497
12 (1885). (1890).

36. *Lynn v. Troy*, 57 Hun (N. Y.) 590, 10

CHAPTER XXXIX.

HEARSAY AS SECONDARY EVIDENCE; DECLARATIONS AGAINST INTEREST.

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§ 880. *Hearsay as Secondary Evidence*.¹—The sound administrative principle, that hearsay, when shown to be necessary and relevant, should be received as secondary evidence, had already, on the advent of a more rigidly procedural treatment of the subject, obtained considerable recognition by the courts of the United States. The influence of such a judicial feeling is still manifest.² In this view, while the testimony, under oath, of the declarant is admittedly a primary grade of proof,³ the reception of a report of his unsworn statement is permitted as a secondary grade of evidence. In these jurisdictions should the court become satisfied that the primary evidence is unattainable⁴ because the declarant is dead⁵ outside the jurisdiction,⁶ or that the evidence cannot, for some other reason, be procured⁷ the report of his extrajudicial statement may be received.⁸

¹ 4 Chamberlayne, Evidence, §§ 2762–2768.

² “It is objected that, however impressive the declaration of a man of character may be, even without his oath, yet the law admits the word of no one in evidence without oath. The general rule certainly is so; but subject to relaxation, in cases of necessity, or extreme inconvenience.” Garwood v. Dennis, 4 Binn. (Pa.) 314, 328 (1811), per Tilghman, C. J.

³ Printup v. Michell, 17 Ga. 558, 63 Am. Dec. 258 (1855).

⁴ Gould v. Smith, 35 Me. 513 (1853); Peterson v. Ankrom, 25 W. Va. 56 (1884).

⁵ Maryland.—Smith v. Wood, 31 Md. 293 (1869).

Massachusetts.—Townsend v. Pepperell, 99 Mass. 40 (1868); Barrett v. Wright, 13 Pick. 45 (1832).

Michigan.—Stockton v. Williams, Walk. Ch. 120 (1843).

Texas.—Pimm v. Stewart, 7 Tex. 178 (1851).

Canada.—Lyons v. Laskey, 5 Montreal Q. B. 5 (1889).

⁶ Udall's Case, 1 How. St. Tr. 1271 (1590).

⁷ Furman v. Coe, 1 Caines Cas. (N. Y.) 96 (1804) (could not have testified before); Griffith v. Sauls, 77 Tex. 630, 14 S. W. 230 (1890) (physically incapacitated).

⁸ “Hearsay is uniformly holden incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who can speak from their own knowledge.” Page v. Parker, 40 N. H. 47, 60 (1860), per Fowler, J.

§ 881. **Declarations against Interest; Rule Stated.**⁹— Among recognized exceptions to the rule excluding hearsay is that which, under the conditions of necessity and relevancy receives the declarations made against interest. Treating the statement as secondary evidence of the facts asserted, the rule is announced that where the primary evidence, the testimony of the declarant, is unavailable owing to the latter's death or other sufficient reason, proof will be received of his extrajudicial statement if against his pecuniary or proprietary interest when made.¹⁰ The extrajudicial statement against interest may be either oral or in writing.¹¹

Whether the term *res gestae* be taken in its restricted or English meaning or, on the other hand, be accorded its broad American significance, in neither case is it required that the declaration against interest should be part of it.¹²

§ 882. **[Declarations against Interest]; Distinguished from Admissions.**¹³— The declaration against interest, forming the subject of an exception to the rule against hearsay, is broadly distinguished from an *admission*, with which it has at times been confused. The points of essential difference in main are four: (1) The admission is a creature of procedure; the declaration against interest is entirely a matter of evidence, i.e., of reasoning. (2) Admissions are primary evidence of the facts stated; the declaration against interest is a secondary grade of proof, received only when shown to be necessary to the case of the proponent, the primary evidence being unavailable. (3) The admission is receivable in evidence only when the declarant or some one identified with him in legal interest is a party to the suit and the admission is offered against him; the declaration against interest may be made by anyone, and is receivable in suits between third persons¹⁴ and though made in favor of the present proponent¹⁵ or one in privity with the declarant.¹⁶ (4) The admission is received although it was not considered by the declarant, at the time it was made, as being opposed to his interest; in the declaration against interest, the declarant must have been distinctly conscious, at the time of making his assertion, that it was directly opposed to his pecuniary or proprietary interest.¹⁷

§ 883. **[Declarations against Interest]; Administrative Requirements; Necessity.**¹⁸— As in other cases involving the use of secondary evidence, it is essential to the admission of the hearsay declaration against interest that the exist-

9. 4 Chamberlayne, Evidence, § 2769. Declarations against interest, see note, Bender ed., 34 N. Y. 307.

10. Kresling v. Powell, 149 Ind. 372, 49 N. E. 265 (1898).

11. Rand v. Dodge, 17 N. H. 343 (1845).

12. Mentzer v. Burlingame, 85 Kan. 641, 118 Pac. 698 (1911); White v. Choteau, 1 E. D. Smith (N. Y.) 493 (1852); Ivatt v. Finch, 1 Taunt. 141, 9 Rev. Rep. 716 (1808)

13. 4 Chamberlayne, Evidence, § 2770.

14. Rand v. Dodge, 17 N. H. 343 (1845).

15. Currier v. Gale, 14 Gray (Mass.) 504, 77 Am. Dec. 343 (1860).

16. Rand v. Dodge, 17 N. H. 343 (1845); Turner v. Dewan, 41 U. C. Q. B. 361 (1877).

17. Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989 (1908).

18. 4 Chamberlayne, Evidence, § 2771.

ence of a satisfactory necessity for using it be shown to the court.¹⁹ The proponent's right to prove his case being regarded as paramount, he must do at least two things: (1) He must show that a particular fact is fairly essential to the establishment of his case.²⁰ (2) He must affirmatively prove²¹ that he is practically prevented from producing the primary evidence of it. In case of hearsay, the extrajudicial statement offered in proof of the facts asserted, this is the testimony of the percipient as a witness. In this connection, as in others, the proponent may show the unavailability of the witness in a very conclusive manner by proving that the declarant is dead.²² Should he be able to establish the fact that he has no means of compelling the declarant to testify²³ and that the latter declines to do so voluntarily, as where the person whose extrajudicial statement is offered is outside the jurisdiction of the court²⁴ or has the benefit of a privilege and proposes to avail himself of it, or that by reason of interest he is incompetent,²⁵ a sufficient case of forensic necessity is established. Incapacity to testify, due to some physical or mental²⁶ infirmity, may constitute a satisfactory necessity to warrant the court in receiving the secondary evidence.

§ 884. [Declarations against Interest]; Subjective Relevancy.²⁷— Adequate knowledge on the part of the declarant must be shown sufficient to warrant the jury as reasonable men in acting on it.²⁸ An absence of a motive to misrepresent must also appear²⁹ but it need not be made *ante litem motam*³⁰ and it

19. *Manning v. Lechmere*, 1 Atk. 453, 26 Eng. Reprint 288 (1737). See, also, *Warren v. Greenville*, 2 Str. 1129 (1773). "The general rule of evidence excludes all hearsay. From necessity and from the impracticability in some instances, of other proof, exceptions to this rule have been made." *Westfield v. Warren*, 8 N. J. L. 251 (1826).

20. It has even been required that no other method of proving the fact should exist. Lord Hardwicke, for example, suggested that the reason of the rule is that "no other [evidence] can be had." *Manning v. Lechmere*, 1 Atk. 453, 26 Eng. Reprint 288 (1737). See, also, *Warren v. Greenville*, 2 Str. 1129 (1740).

21. *Wilson v. Simpson*, 9 How. 109, 13 L. ed. 66 (1850).

22. *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910).

23. *Harriman v. Brown*, 8 Leigh (Va.) 697 (1837).

24. *Walnut Ridge Mercantile Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413 (1906); *Shearman v. Atkins*, 4 Pick. (Mass.) 283, 293 (1826); *South Omaha v. Wrzensinski* (Nebr. 1902), 92 N. W. 1045; *Alter v. Berghaus*, 8 Watts (Pa.) 77 (1839). But see, *Mahaska Co. v.*

Ingalls, 16 Iowa 81 (1864); *Stephens v. Gwenap*, 1 M. & Rob. 120 (1831).

25. *Pugh v. McRae*, 2 Ala. 393, 394 (1841); *Fitch v. Chapman*, 10 Conn. 8, 11 (1833).

26. *Mahaska Co. v. Ingalls*, 16 Iowa 81 (1864); *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181 (1825). But see, *Harrison v. Blades*, 3 Campb. 457 (1813). See also, *Jones v. Henry*, 84 N. C. 320, 324 (1881).

27. 4 Chamberlayne, Evidence, §§ 2772, 2773.

28. *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910).

29. "The admissibility of the evidence rests upon the improbability that one will admit that which it is for his pecuniary interest to deny." *Mentzer v. Burlingame*, 85 Kan. 641, 118 Pac. 698 (1911), per Benson, J.

30. *Chandler v. Mutual L. I. Assn.*, 131 Ga. 82, 61 S. E. 1036 (1908); *Halvorsen v. Moon, etc., Lumber Co.*, 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669 (1902); compare *Mahaska Co. v. Ingalls Ex'r*, 16 Iowa 81 (1864); *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910).

need not be spontaneous.³¹ The burden of proving that it was against interest lies on the proponent,³² and whether a sufficient foundation for it is laid is a question for the judge.³³

§ 885. **Nature of Interest; Pecuniary.**³⁴—As embodied in the statement of the rule the interest in derogation of which the declarant speaks may be either pecuniary or proprietary. In other words, the statement must have antagonized the direct material interest of the speaker as owner of money or other property.

Pecuniary Interest.—The declaration against interest is admissible when the nature of that interest is pecuniary.³⁵

The declarant, for example, may acknowledge himself legally indebted to some other person.³⁶ On the other hand, he may state that nothing or something less than the *prima facie* sum is due to himself from a third person on a particular account.³⁷

§ 886. **[Nature of Interest]; Proprietary.**³⁸—An equal guarantee of trustworthiness is furnished where the extrajudicial statement is opposed to the *proprietary* interest of the declarant.³⁹

The interest may be either in personal property⁴⁰ or in real estate⁴¹ or may relate to the question of a boundary.⁴²

§ 887. **[Nature of Interest]; Interest other than Pecuniary or Proprietary.**⁴³—There are many other kinds of interest which a sane declarant may well regard as of equal or even greater value than his money or tangible possessions, and declarations as to such matters ought on principle to be admissible as much as declarations against material interest, but such is not the law.⁴⁴ Even a declaration against the reputation of the declarant or subjecting him to legal liability⁴⁵ is not admissible.

31. *Doe v. Turford*, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388 (1832).

32. *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 Pac. 560 (1906).

33. *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910).

34. 4 Chamberlayne, Evidence, § 2774.

35. *McCarthy v. Stanley*, 151 App. Div. 358, 136 N. Y. Suppl. 386 (1912).

36. *Swan v. Morgan*, 88 Hun 378, 34 N. Y. Suppl. 829, 68 N. Y. St. Rep. 768 (1895).

37. *Scammon v. Scammon*, 33 N. H. 52 (1856); *Sparling v. Wells*, 24 N. Y. App. Div. 584, 49 N. Y. Suppl. 321 (1898); *Scott v. Crouch*, 24 Utah 377, 67 Pac. 1068 (1902).

38. 4 Chamberlayne, Evidence, §§ 2775-2778.

39. *Helm v. State*, 67 Miss. 562, 7 So. 487 (1890); *Powers v. Silsby*, 41 Vt. 288 (1868);

Bowen v. Chase, 98 U. S. 254, 25 L. ed. 47 (1878).

40. **Bank deposits.**—Declarations by a wife will be received to the effect that bank deposits belonged to the husband. *Moore v. Fingar*, 138 App. Div. 920, 122 N. Y. Suppl. 851 (1910).

41. *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906).

42. *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463 (1907).

43. 4 Chamberlayne, Evidence, §§ 2779, 2780.

44. *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (1897).

45. *Ayer v. Colgrove*, 81 Hun (N. Y.) 322, 30 N. Y. Suppl. 788 (1894); *Penner v. Cooper*, 4 Munf. (Va.) 458 (1815) (trespass); *Helm v. State*, 67 Miss. 562, 7 So. 487 (1890).

§ 888. [Nature of Interest]; General Requirements.⁴⁶—Judicial administration and, later on, procedure, has imposed certain general requirements as to the nature of the interest which the proponent must show, regardless of whether the statement be opposed to the pecuniary interest of the declarant or taken to be in derogation of his estate in chattels or land. To establish the degree of relevancy or probative force upon which this exception of the hearsay rule rests, it is essential that the speaker should possess a present, rather than be expecting to acquire a future interest.⁴⁷ Furthermore the interest must be known to the declarant⁴⁸ and be substantial.⁴⁹ Oral declarations are as admissible as written⁵⁰ unless the substantive law requires the production of a writing⁵¹ and the declaration may be in any form.⁵² Such declarations are admissible not only in proof of facts directly asserted but also of facts incidentally stated⁵³ as the amount of rent⁵⁴ or the source of title.⁵⁵ Such a declaration is by no means conclusively binding upon the declarant. He may explain⁵⁶ or modify it, but is not permitted to rebut it by evidence of other declarations.⁵⁷ In pursuance of the same line of thought, the declaration against interest has been spoken of as having but slight evidentiary weight as against documentary evidence.⁵⁸

46. 4 Chamberlayne, Evidence, §§ 2781–2789.

47. *California*.—Thaxter v. Inglis, 121 Cal. 593, 54 Pac. 86 (1898).

48. Taylor v. Witham, 3 Ch. D. 605, 45 L. G. Ch. 798, 24 Wkly. Rep. 877 (1876).

49. That the entire declaration should be against the pecuniary or proprietary interest of the declarant is not required. Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906).

50. Bowen v. Chase, 98 U. S. 254, 25 L. ed. 47 (1878).

51. Marsh v. Ne-ha-sa-ne Park Assoc., 18 Misc. (N. Y.) 314, 42 N. Y. Suppl. 996, reversed 25 App. Div. 34, 49 N. Y. Suppl. 384 (1896).

52. Hall v. Insurance Co., 3 Phila. 331 (1859) (enrolment of vessel).

53. Taylor v. Gould, 57 Pa. St. 152 (1868).

54. Reg. v. Exeter, L. R. 4 Q. B. 341, 10 B. & S. 433, 38 L. J. M. C. 126, 20 L. T. Rep. (N. S.) 693, 17 Wkly. Rep. 850 (1869).

55. Sly v. Dredge, 2 P. D. 91, 46 L. J. P. & Adm. 63, 25 Wkly. Rep. 463 (1877).

56. Phipps v. Martin, 33 Ark. 207 (1878); Raymond v. Cummings, 17 N. Brunsw. 544 (1877).

57. Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042 (1907).

58. Pargoud v. Amberson, 10 La. 352 (1830).

CHAPTER XL.

HEARSAY AS SECONDARY EVIDENCE; DECLARATIONS AS TO MATTERS OF PUBLIC OR GENERAL INTEREST.

Declarations as to matters of public and general interest, 889.

Administrative requirements; necessity, 890.

subjective relevancy; adequate knowledge, 891.

absence of controlling motive to misrepresent, 892.

Form of declaration, 893.

Scope of rule; boundaries, etc., 894.

§ 889. **Declarations as to Matters of Public and General Interest.**¹—Matters of public and general interest, those of such relation to the general life of the community or of the public at large as to lead to a rational assumption that they have been widely and understandingly discussed, are the subject of another “exception” to the rule excluding hearsay.² In other words, the proponent being unable to produce, in the exercise of his paramount right to prove his case, the primary evidence of these important facts is permitted, under fixed conditions, to introduce extrajudicial statements as a secondary grade of proof.

§ 890. **Administrative Requirements; Necessity.**³—Before secondary evidence of unsworn statements can be received, as proof of the facts asserted, it is essential, here, as in other instances of the use of secondary evidence, that the primary proof of the oral testimony of the declarant⁴ should be shown to be unavailable, and that, in consequence, a sufficient administrative necessity to procure secondary evidence has been placed on the proponent.⁵ A declaration of this nature is said to be admissible “where no better evidence can be had.”⁶ In general, administration requires that the declarant should be shown to be dead,⁷ although other facts showing unavailability have occa-

1. 4 Chamberlayne, Evidence, § 2790.

2. *Inhabitants of Enfield v. Woods*, 212 Mass. 547, 99 N. E. 331 (1912). Hearsay declarations, to be admissible concerning matters of general or public interest, must refer to a public or general right and not to a particular exercise of it. *Inhabitants of Enfield v. Woods*, 212 Mass. 547, 9 N. E. 331 (1912).

3. 4 Chamberlayne, Evidence, § 2791.

4. That another declarant on the point can be procured as a witness is not a necessary ground for excluding the hearsay state-

ment of the unavailable person. *Beard v. Talbot*, 2 Fed. Cas. No. 1,182. Even that a surveyor testifies to the same effect does not exclude the evidence. *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782 (1904).

5. *Scroggins v. Dalrymple*, 52 N. C. 46 (1859); *Birmingham v. Anderson*, 40 Pa. St. 506 (1861); *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896 (1899).

6. *King v. Watkins*, 98 Fed. 913 (1899).

7. *Lay v. Neville*, 25 Cal. 545 (1864).

sionally been deemed to establish a necessity warranting the reception of the evidence.⁸ It can scarcely be said, however, that this very rational indulgence is in accordance with the general rule, under which absence from the jurisdiction⁹ is not treated as a sufficient ground for failing to produce the declarant as a witness.

IN PETITION

§ 891. [Administrative Requirements]; Subjective Relevancy; Adequate Knowledge.¹⁰— Unless the situation presented to a presiding judge is such that knowledge on the part of a given declarant as to the existence of a fact of public and general interest may rationally be assumed, affirmative proof to the satisfaction of the court must be offered on the subject.¹¹ The court will assume knowledge by the witness residing in the community¹² of any public boundary but where a private boundary of quasi-public concern is in question the witness must be shown to have actual knowledge¹³ which may be assumed in a neighbor¹⁴ or one owning adjoining land¹⁵ or a surveyor who has surveyed the land¹⁶ or his assistants.¹⁷

§ 892. [Administrative Requirements]; Absence of Controlling Motive to Misrepresent.¹⁸— Essential to the subjective relevancy of an extrajudicial statement relating to a matter of public and general interest as secondary evidence of the facts asserted, is not only the requirement that the declarant was possessed of adequate knowledge but also that the latter was not, at the time of making his statement, under a controlling motive to misrepresent. The declarant must be disinterested.¹⁹ Should an interest in the speaker to misrepresent be exhibited to the court his declaration may properly be rejected.²⁰ The influence of bias²¹ or of the partisan warmth of feeling developed by the

Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543 (1888).

8. Hartford v. Maslen, 76 Conn. 599, 615, 57 Atl. 740 (1904), per Hall, J. (strip of land claimed as part of public parks).

9. Tracy v. Eggleston, 108 Fed. 324, 47 C. C. A. 357 writ of certiorari denied 183 U. S. 699, 22 S. Ct. 935, 46 L. ed. 396 (1901).

10. 4 Chamberlayne, Evidence, §§ 2792-2797.

11. Lay v. Neville, 25 Cal. 545 (1864); Cornwall v. Culver, 16 Cal. 423 (1860); Adams v. Stanyan, 24 N. H. 405 (1852); Keystone Mills Co. v. Peach River Lumber Co. (Tex. Civ. App. 1906), 96 S. W. 64.

12. Bow v. Allenstown, 34 N. H. 351, 366, 69 Am. Dec. 489 (1857).

13. Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543 (1888).

14. Brenstein v. North American Realty Co., 119 N. Y. Suppl. 1 (1909); Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340 (1906) (half a mile).

15. Keefe v. Sullivan County R. R., 75 N. H. 116, 71 Atl. 379 (1908).

16. Simpson v. De Ramirez, 50 Tex. Civ. App. 25, 110 S. W. 149 (1908). The surveyor's knowledge of the names and relations of landmarks may be shown by the survey itself. Smith v. Headrick, 93 N. C. 210 (1885).

17. Overton v. Davisson, 1 Gratt. (Va.) 216, 42 Am. Dec. 544 (1844); Hill v. Proctor, 10 W. Va. 59 (1877).

18. 4 Chamberlayne. Evidence, §§ 2798-2799.

19. Hathaway v. Goslant, 77 Vt. 199, 59 Atl. 835 (1905).

20. Corbleys v. Ripley, 22 W. Va. 154, 46 Am. Rep. 502 (1883).

21. Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240 (1886). "Those declarations which are liable to the suspicion of bias from interest" are always to be excluded. Harriman v. Brown, 8 Leigh (Va.) 697, 713 (1837), per Tucker, P.

arising of a controversy²² have been deemed to render the statement untrustworthy.²³ It has, therefore, been required that the declaration should have been made *ante litem motam*.²⁴ Statements made *post litem motam* may, however, be used in corroboration of those made before any controversy on the subject arose.²⁵ The fact that the declaration is self-serving does not necessarily exclude it but affects its weight only.²⁶

§ 893. **Form of Declaration.**²⁷—The declaration may be in any form, oral or written,²⁸ circumstantial²⁹ or by proof of reputation.³⁰ Declarations as to boundaries may take the form of deeds, surveyors' notes,³¹ plans³² and the like.

§ 894. **Scope of Rule; Boundaries, etc.**³³—The admissibility of the extrajudicial statement extends to facts directly but not to those incidentally³⁴ asserted. Facts of the latter nature, such as dates,³⁵ and the like, are not apt to be the subjects of extended discussion and mutual correction³⁶ upon which the relevancy of this species of evidence rests. For the purposes of the present rule, the test of what is public is as to whether the subject in question is calculated to excite such a general, sustained, and, as it were, spirited discussion as will be apt to result in the establishment of a correct opinion. The rule may cover municipal boundaries³⁷ or incorporation³⁸ and

22. *Dancy v. Sugg*, 19 N. C. 515 (1837).

23. *Royal v. Chandler*, 83 Me. 150, 21 Atl. 842 (1891).

24. *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884 (1902).

25. *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166 (1890); *Martyn v. Curtis*, 68 Vt. 397, 35 Atl. 333 (1896).

26. *Child v. Kingsbury*, 46 Vt. 47 (1873); *Tracy v. Eggleston*, 108 Fed. 324, 47 C. C. A. 357 (1901).

27. 4 Chamberlayne, Evidence, § 2800.

28. *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857).

29. *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857).

30. *Attorney General v. Antrobus*, 74 Law J. Ch. 599, 2 Ch. 188, 92 Law T. 790, 3 Local Gov. R. 1071, 21 Times Law R. 471 (1905).

31. *Morton v. Folger*, 15 Cal. 275 (1860). See *Weld v. Brooks*, 152 Mass. 297, 25 N. E. 719 (1890); *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857); *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300, 35 S. W. 38 (1896).

32. *Birmingham v. Anderson*, 40 Pa. St. 506 (1861); *Cottingham v. Seward* (Tex. Civ. App. 1894), 25 S. W. 797. See, also, *Mineral R. & M. Co. v. Auten*, 188 Pa. St. 568, 41 Atl.

327 (1898) (draft of a survey over a hundred years old held admissible).

33. 4 Chamberlayne, Evidence, § 2741 *et seq.*; 4 Chamberlayne, Evidence, §§ 2801–2810.

34. *Smith v. Cornett*, 38 S. W. 689, 18 Ky. L. Rep. 818 (1897) (date); *Peck v. Clark*, 142 Mass. 436, 8 N. E. 335 (1886); *Van Deusen v. Turner*, 12 Pick. (Mass.) 532 (1832).

35. *Bolton Southwest School Dist. v. Williams*, 48 Conn. 504 (1881).

36. *Southwest School Dist. of Bolton v. Williams*, 48 Conn. 504, 507 (1881).

37. *Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773 (1853).

38. *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857).

39. *Dawson v. Town of Orange*, 78 Conn. 96, 61 Atl. 101 (1905) (town common).

40. *Thomas v. Jenkins*, 6 A. & E. 525, 1 Jur. 261, 6 L. J. K. B. 163, 1 N. & P. 587, 33 E. C. L. 285 (1837).

In America, however, the necessities of a new country have generally resulted in the admission of such evidence of a deceased person [*Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273, 134 Am. St. Rep. 603-n (1909)] even

whether lands are public³⁹ but not (in England) private boundaries⁴⁰ unless ancient⁴¹ or coinciding with public boundaries.⁴²

to prove facts incidentally stated. *Hamilton v. Menor*, 2 Serg. & R. (Pa.) 70 (1815); *Murray v. Spencer*, 88 N. C. 357 (1883). Statements of the nature of the claim made are not, however, admissible under this rule.

⁴¹ *McKineron v. Bliss*, 31 Barb. 180, *affirmed* 21 N. Y. 206 (1860).

⁴² *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886); *McKinnon v. Bliss*, 21 N. Y. 206 (1860).

CHAPTER XLI.

HEARSAY AS SECONDARY EVIDENCE; DYING DECLARATIONS.

Hearsay as secondary evidence; dying declarations, 895.

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§ 895. **Hearsay as secondary Evidence; Dying Declarations.**¹— A unique form of extrajudicial statement, often full of dramatic interest, employed by judicial administration as secondary proof of the facts asserted, is the dying declaration. On an indictment for the homicide of the declarant his statement covering the details of the fatal encounter is admissible, *provided* that it be shown, to the satisfaction of the presiding judge, to have been made under a conscious sense of impending death. The relevancy upon which its admissibility was originally predicated and since maintained, although with apparently decreasing confidence, is the solemnity of the occasion on which the statement is made. Its probative force is closely related to that created by the presence of an oath. At the time when the present exception took its rise immediate consequences were thought to attend perjury in undergoing the oath ordeal. In a later age, the false taking of an oath was thought to be punished by an offended God after the death of the offender. Under this conception, it was

1. 4 Chamberlayne, Evidence, § 2811. Dying declarations, see note, Bender ed., 192 N. Y. 470. 491. Admissibility of dying declarations, see note, Bender ed., 56 N. Y. 96.

not surprising that the immediate prospect of impending death should be thought to impose upon the mind of a declarant a feeling of the presence of the Divine Being which would clear it of all motive to misrepresent the truth, and, being practically equivalent to the sanction of an oath, might fairly be regarded as a satisfactory substitute for it. Relevancy being thus established, extrajudicial statements by the victim of a homicide giving the circumstances attending the occurrence will be received in evidence as secondary proof of the facts asserted if made in the fixed belief of immediately impending death.² Such statements may be received at the instance of the defense³ as well as that of the prosecution.⁴ This may occur where the dying declaration absolves the accused from responsibility, laying the blame upon another person.⁵

Presence of Accused.—It is not required for the admissibility of such a statement that the accused should have been present or represented by counsel when it was made.⁶

§ 896. **Administrative Requirements; Necessity.**⁷—The administrative ground for receiving secondary evidence of the *res gestae* of a homicide in the form of a dying declaration is a recognition of the necessity under which the prosecution as proponent often labors in proving its case.⁸ The injured person being dead, he is no longer available as a witness. The primary proof, the testimony of the declarant, is inaccessible. Under these circumstances the charge could scarcely be made out except by the use of the declarations of the deceased concerning the facts of the transaction. Frequently, only he and the accused are cognizant of the real facts. The extrajudicial declarations of the injured person must be received⁹ unless there is to be a failure or miscarriage of justice.

§ 897. **[Administrative Requirements]; Relevancy.**¹⁰—As in other instances of the reception of secondary evidence, not only must the proponent show that it is fairly necessary to the proof of his case but also that the evidence is relevant, objectively and subjectively considered. The question of the objective relevancy of dying declarations seldom presents much difficulty. Even if the secondary evidence should be in part irrelevant, the dying declaration will still be received if otherwise competent.¹¹

2. *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911).

3. *Mattox v. U. S.*, 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917 (1902).

4. To refuse this privilege has been held to be error. *Green v. State*, 89 Miss. 331, 42 So. 797 (1907).

5. *People v. Southern*, 120 Cal. 645, 53 Pac. 214 (1898).

6. *Shenkenberger v. State*, 154 Ind. 630, 57 N. E. 519 (1900); *State v. Brynnetto*, 13 La. Ann. 45 (1858); *State v. Foot You*, 24

Oreg. 61, 32 Pac. 1031, 33 Pac. 537, *affirmed* 24 Oreg. 61, 33 Pac. 537 (1893).

7. 4 Chamberlayne, Evidence, § 2812.

8. *Morgan v. State*, 31 Ind. 215 (1869); *State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904); *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911); *State v. Watkins* (N. C. 1912), 75 S. E. 22.

9. *Rhea v. State*, 75 S. E. 22 (1912).

10. 4 Chamberlayne, Evidence, § 2813.

11. *State v. Privas*, 32 La. Ann. 1086, 36 Am. Rep. 293 (1880).

§ 898. [Administrative Requirements]; Subjective Relevancy.¹²—The declarant must be shown to have adequate knowledge of the facts stated especially of the identification of the accused,¹³ and the dying man is presumed to have no motive to misrepresent.¹⁴ That the statement is self-serving affects merely its probative force¹⁵ while the fact that the declarant asserts himself responsible for his own death adds to its weight.¹⁶ With the change in modern views as to the future life there is much doubt often expressed as to the reliability of this species of testimony.

§ 899. [Administrative Requirements]; Completeness demanded.¹⁷—In respect to that which it purports to cover, a dying declaration must be complete.¹⁸ Administration by no means requires that the extrajudicial statement must, in order to be admissible, be a full account of the entire *res gestae*, properly so-called, of the fatal meeting.¹⁹ What is demanded is that the declarant should be shown, or rationally assumed, to have said all which he intended to say on the topic which he has spoken about. No modification which the speaker regarded as essential to the accuracy of his statement can properly be omitted. Should there be reasonable ground for believing that some such qualification has failed to appear, the dying declaration will be rejected as incomplete.²⁰ The declaration need not however be presented in the exact words of the declaration²¹ but the substance is enough.²²

§ 900. [Administrative Requirements]; Rule strictly construed.²³—Distrust of the soundness of the judicial reasoning, upon which the admissibility of this particular exception to the hearsay rule was established and is still maintained, has naturally led to the formulation of an extremely restricted rule on the subject of dying declarations. It is said that they should be received with great caution.²⁴ Extension by interpretation and intendment is not favored. Unless an extrajudicial statement can be brought strictly within the rule, the

12. 4 Chamberlayne, Evidence, §§ 2814-2819.

13. Com. v. Roddy, 184 Pa. 274, 39 Atl. 211 (1898).

14. Donnelly v. State, 26 N. J. L. 507, 620 (1857); R. v. Perkins, 9 C. & P. 395 (1840).

15. Mattox v. U. S. 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

16. Beaty v. Com., 140 Ky. 230, 130 S. W. 1107 (1910); Com. v. Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. Rep. 505 (1889). Compare Kearney v. State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344 (1897).

Friendship for another may induce the declarant to falsely accuse himself of having been the aggressor in the encounter from the effects of which he is suffering. See Boyd v. State, 84 Miss. 414, 36 So. 525 (1904).

17. 4 Chamberlayne, Evidence, §§ 2820-2821.

18. State v. Cronin, 64 Conn. 293, 29 Atl. 536 (1894).

19. State v. Nettlebush, 20 Iowa 257 (1866); State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200 (1873).

20. Cooper v. State, 80 Miss. 351, 42 So. 666 (1907).

21. Park v. State, 126 Ga. 575, 55 S. E. 489 (1906).

22. Murphy v. People, 37 Ill. 447 (1865).

23. 4 Chamberlayne, Evidence, §§ 2822-2826.

24. Gardner v. State, 55 Fla. 25, 45 So. 1028 (1908); Smith v. State, 9 Ga. App. 403, 71 S. E. 606 (1911); Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1897).

judicial impulse is to reject it.²⁵ In brief, a dying declaration is received only in criminal actions for homicide, where the death of the declarant is the subject of the charge and the circumstances of the killing form the basis of the declaration, the latter having been made under a sense of immediately impending death. The evidence is not received, according to the course of the common law, in civil actions,²⁶ illegal acts implying an assault even in case of those which, like abortion, result in death. Although the earlier law admitted the evidence in case of other crimes,²⁷ it is now settled that the dying declaration is admissible only in cases for homicide.²⁸ Where a *conspiracy* is shown, the dying declarations of deceased will be received as against a defendant who did not fire the fatal shot, but was present on the scene actively assisting in the perpetration of the crime.²⁹

§ 901. [Administrative Requirements]; Who are competent as Declarants.³⁰—Speaking generally, any person is a competent declarant who would be received as a witness. In other words, anyone who would, if living, be competent to testify, may be the declarant in a dying declaration.³¹ Conversely, in case the maker of the dying statement would, if alive, be incompetent as a witness,³² his dying declaration would be rejected.³³ Included in this general statement is the fact that where the declarant, by reason of infancy,³⁴ insanity,³⁵ or other cause,³⁶ would have been incompetent to have testified as a witness, his declaration made *in extremis* will not be received. As an ex-convict is a competent witness, his dying declaration is admissible.³⁷ The court may

25. *State v. Belcher*, 13 S. C. 459 (1880).

26. *Thayer v. Lombard*, 165 Mass. 174, 42 N. E. 563, 52 Am. St. Rep. 507 (1896). It is well settled in this country that dying declarations are admissible in homicide cases only. The Supreme Court of Kansas has, however, in a learned opinion declared that there is no basis for the distinction and holds that they are admissible in civil cases. The theory on which they are admitted is that the realization of impending death operates on the mind and conscience of the declarant with strength equal to that of an ordinary oath administered in a judicial proceeding, and this reason applies equally in civil cases. This was formerly the rule in England and such declarations were not limited to homicide cases until after 1830 and then the limitation was made by the courts under the old theory that a criminal wrong was more worthy of attention of the courts than a civil wrong but as this idea has been discarded the rule itself should also be dropped. *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625, 50 L. R. A. (N. S.) 1167 (1914).

27. *R. v. Drummond*, Leach Cr. L. 4th ed. 337 (1784) (robbery).

28. "Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations." *People v. Davis*, 56 N. Y. 95, 103 (1874), per Grover, J.

29. *People v. Moran*, 144 Cal. 48, 77 Pac. 777 (1904).

30. 4 Chamberlayne, Evidence, §§ 2827, 2828.

31. *North v. People*, 139 Ill. 81, 28 N. E. 966 (1891).

32. *R. v. Drummond*, 1 Leach Cr. L. 4th ed. 337 (1784) (convict).

33. *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

34. *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910) (10 years).

35. *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

36. *Jackson v. Vredenburg*, 1 Johns. 159, 163 (1806) (interest).

37. *State v. Blount*, 124 La. 202, 50 So. 12 (1909).

make various judicial assumptions as that one who thought himself *in extremis* had the mental feelings appropriate to that situation³⁸ or that an infant of tender years was incompetent as a witness.³⁹

§ 902. [Administrative Requirements]; Function of the Court.⁴⁰— The dying declaration is not permitted by judicial administration to go directly to the jury.⁴¹ Whether the conditions essential to its admissibility have been shown to exist in a particular case is an administrative question⁴² and frequently, in view of the momentous consequences to the defendant, one of difficulty and nicety. The court cannot, it is said, properly leave to the jury the question of the admissibility of a dying declaration.⁴³ Where, however, the court as a matter of law passes upon the competency of dying declarations and admits them, but the evidence is conflicting regarding a fact which determines the admissibility of the statement, the presiding judge may reasonably regard the administrative expedient of again submitting the question of the competency of the declarations to the jury under appropriate alternative instructions.⁴⁴ The appellate courts will not under the prevailing rule reverse the action of the trial court in these matters if reason has been employed.⁴⁵

§ 903. Expectation of Death.⁴⁶— The subjective sense of impending dissolution on the part of the deceased at the time of making his statement, must be proved to the satisfaction of the presiding judge, if the dying declaration is to be received.⁴⁷ It is not sufficient to render the statement admissible that the declarant should be aware that he is certain ultimately to die of his injury.⁴⁸ He must be conscious⁴⁹ that the hand of death rests upon him, that the grim visitor has arrived, that there is absolutely no chance of anything for him but immediate death.⁵⁰ All hope and expectation of living must have been abandoned.⁵¹ The declarant should be possessed by a fixed feeling that he must die at once.⁵² Dying declarations should not be confused with ad-

38. *Lambeth v. State*, 23 Miss. 322, 358 (1852); *People v. Craft*, 148 N. Y. 631, 43 N. E. 80 (1896).

39. *State v. Frazier*, 109 La. Ann. 458, 33 So. 561 (1903); *Rex v. Pike*, 3 C. & P. 598, 14 E. C. L. 735 (1829) (four years).

40. 4 Chamberlayne, Evidence, §§ 2829, 2830.

41. *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893).

42. *State v. Kuhn*, 117 Iowa 216, 90 N. W. 733 (1902).

43. *Roten v. State*, 31 Fla. 514, 12 So. 910 (1893); *State v. Zorn*, 202 Mo. 12, 100 S. W. 591 (1907); *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893); *Willoughby v. Territory*, 16 Okla. 577, 86 Pac. 56 (1906); *State v. Center*, 35 Vt. 378 (1862).

44. *Willoughby v. Territory*, 16 Okla. 577, 86 Pac. 56 (1906).

45. *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (1906).

46. 4 Chamberlayne, Evidence, §§ 2831–2834.

47. *People v. Governale*, 193 N. Y. 581, 86 N. E. 554 (1908).

48. *People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (1911).

49. *State v. Brumo*, 153 Iowa 7, 132 N. W. 817 (1911).

50. *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908).

51. *Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907).

52. *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560 (1896). A dying declaration is not admissible unless it is made at a time when

missions by conduct as where the deceased makes statements in the presence of the accused under such circumstances that silence may be taken as proof of acquiescence⁵³ or where the statement is spontaneous and part of the *res gestae*,⁵⁴ in which case it need not appear that the deceased then entertained a present expectation of death. If the declarant thought that he was under the shadow of death his statement is admissible although his attendants regarded him as having a chance of recovery⁵⁵ and even so assured him⁵⁶ but should it appear that he entertained the least hope of recovery⁵⁷ even without reason⁵⁸ his statement is not receivable. The fact that death does not occur at once is immaterial.⁵⁹

§ 904. [Expectation of Death]; Modes of Proof.⁶⁰—That the declarant, believing himself to be *in extremis*, made his statement under the solemn sense of inevitable and impending death can be shown in any of several ways. The only requirement imposed by judicial administration is that the presiding judge should be reasonably satisfied that the declaration was made under the sanction required by law.⁶¹ The fact to be established being psychological, the difficulty of proof authorizes, if not requires, an extended range of evidence. This proof may consist in the conduct of the declarant,⁶² as where he calls for prayers,⁶³ or may be found in his declarations⁶⁴ made before or after the statement⁶⁵ or an inference may be drawn from his physical condition at the time⁶⁶ or from statements made to him at the time as to his condition.⁶⁷

§ 905. Form of Declaration.⁶⁸—Most statements are oral and may be in any

the declarant had abandoned all hope of recovery. A sentence added to a dying declaration of a Chinaman that "I make the same under the fear and belief that I will die" which statement was inserted before signature at the request of the district attorney as it was not his voluntary statement is not admissible. *State v. Fong Loon*, 29 Idaho 248, 158 Pac. 233, L. R. A. 1916 F 1198 (1916).

53. *Donnelly v. State*, 26 N. J. L. 463 (1857).

54. *Healy v. People*, 163 Ill. 372, 45 N. E. 230 (1896); *Goodall v. State*, 1 Oreg. 333, 80 Am. Dec. 396 (1861).

55. *People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882); *State v. Bradley*, 34 S. C. 136, 13 S. E. 315 (1890).

56. *Pitts v. State*, 140 Ala. 70, 37 So. 101 (1904).

57. *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30 ("realizing that I may not recover") (1880).

58. *Com. v. Roberts*, 108 Mass. 296 (1871).

59. *Johnson v. State*, 102 Ala. 1, 16 So. 99 (1893).

60. 4 Chamberlayne, Evidence, §§ 2835-2840.

61. *People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902).

62. *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908).

63. *White v. State*, 111 Ala. 92, 21 So. 330 (1896); *Ward v. State*, 85 Ark. 179, 107 S. W. 677 (1908) (prayed); *Lyens v. State*, 133 Ga. 587, 66 S. E. 792 (1909) (prayed); *State v. Spencer*, 30 La. Ann. 362 (1878).

64. *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 111 (1893).

65. Remoteness.—The declarations as to apprehension of death must be made sufficiently near the time of the dying declaration to be relevant. Where a considerable length of time intervenes the evidence may be rejected. *Phillips v. State*, 3 Ala. App. 218, 57 So. 1033 (1912) (several days).

66. *State v. Sullivan*, 20 R. I. 114, 37 Atl. 673 (1897).

67. *People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911).

68. 4 Chamberlayne, Evidence, §§ 2841-2846.

language.⁶⁹ or form⁷⁰ and need not be spontaneous⁷¹ but may be in reply to questions⁷² or by signs⁷³ if it is clear what the intention was.⁷⁴ The statement is often written⁷⁵ but need not be signed⁷⁶ and if written its contents must be proved by production of the paper itself.⁷⁷ It is immaterial whether the statement is sworn to or not⁷⁸ and it may be used merely as a memorandum to refresh the memory of the witness who heard the statement made.⁷⁹

§ 906. **Number of dying Declarations.**⁸⁰—Where statements are made by the deceased at different times, all may be proved as his dying declarations if all are made under a sense of impending death.⁸¹ Should the original statement have been made while the declarant was not in the required mental condition, his subsequent affirmance of it, while under the sense of impending dissolution, admits the earlier declaration, provided that there is no uncertainty as to what statements are referred to.⁸²

§ 907. **Privilege of Husband and Wife.**⁸³—Under the well-known principle of the common law that husband and wife are permitted to testify as to acts of violence committed by one against the person of the other, it is not questioned in any quarter that the dying declarations of a wife may be admissible upon the trial of an indictment brought against her husband for killing her or *vice versa*.⁸⁴ In other words, the relation of husband and wife does not affect the

69. Daughdrill v. State, 113 Ala. 7, 21 So. 378 (1896) (as message to wife).

70. State v. Ashworth, 50 La. Ann. 94, 27 So. 270 (1898); Brande v. State (Tex. Cr. App. 1898), 45 S. W. 17 (1898) (statement may be given at different times with interruptions).

71. *Supra*, § 903.

72. Smith v. State, 9 Ga. App. 403, 71 S. E. 606 (1911) (bystander).

73. People v. Madras, 201 N. Y. 349, 94 N. E. 857 (1911).

74. McHugh v. State, 31 Ala. 317 (1858).

75. Com. v. Birriolo, 197 Pa. St. 371, 17 Atl. 355 (1900).

76. State v. Carrington, 15 Utah 480, 50 Pac. 526 (1897).

77. Gardner v. State, 55 Fla. 1025, 45 So. 1028 (1908) (copy rejected).

78. Jackson v. State (Ark. 1912), 145 S. W. 559; State v. Byrd, 41 Mont. 585, 111 Pac. 407 (1910); State v. Talbert, 41 S. C. 526, 19 S. E. 852 (1894). See, also, State v. Clark, 64 W. Va. 625, 63 S. E. 402 (1908).

79. Sailsberry v. Com., 32 Ky. L. Rep. 1085, 107 S. W. 774 (1908); Com. v. Haney, 127 Mass. 455 (1879); State v. Whitson, 111 N. E. 695, 697; 16 S. E. 332 (1892); Turner v. State, 89 Tenn. 547, 15 S. W. 838 (1891). Where a dying declaration is taken through

an interpreter by a stenographer the stenographer cannot himself testify to what the interpreter told him as this is hearsay. State v. Fong Loon, 29 Idaho 248, 158 Pac. 233, L. R. A. 1916 F, 1198 (1916). The use of a printed form in obtaining a dying declaration containing questions as to knowledge of impending death is to be discouraged as tending to cause the questions to be asked in a perfunctory manner. If the questions are slurred over or answered by a perfunctory nod or a careless assent there is an utter absence of the clear and unequivocal expression of the certain conviction of impending death which the law has always demanded as an essential prerequisite to the admission of unsworn declarations of fact, which may be used to deprive a human being of his life. But the mere use of the printed form will not of itself cause the rejection of the declaration. People v. Kane, 213 N. Y. 260, 107 N. E. 655, L. R. A. 1915 F 607 (1915).

80. 4 Chamberlayne, Evidence, § 2847.

81. Dunn v. People, 172 Ill. 582, 50 N. E. 137 (1898).

82. State v. Peacock, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702 n. (1910).

83. 4 Chamberlayne, Evidence, § 2848.

84. Moore v. State, 12 Ala. 764, 42 Am. Dec. 276 (1848); People v. Green, 1 Den. (N. Y.)

admissibility of the statement. It will be received if otherwise admissible.⁸⁵ Still more clearly, no impediment would arise on this score where the accused was merely an *accomplice* with the husband of the declarant.⁸⁶

§ 908. **Scope of Declaration.**⁸⁷— In general, the dying declaration may properly cover whatever the declarant might legally have stated as a witness,⁸⁸ and nothing further.⁸⁹ Primarily, it should cover the *res gestae* of the fatal encounter,⁹⁰ using the very elastic Latin term not in the extended American sense but in its English or restricted meaning. The extrajudicial statement should not be so extended as to include facts remotely⁹¹ or only incidentally⁹² connected with the main occurrence.⁹³ Within the proper meaning of the phrase may be included any relevant facts, preliminary or subsequent, which have a causal relation to the happening of the *res gestae*.⁹⁴ The declaration may include such facts as tend to explain the *res gestae*⁹⁵ but not the effects of the crime.⁹⁶ The statement if essentially one of fact may take the *form* of inference⁹⁷ and the declarant may even be allowed to state that the accused “poisoned” him.⁹⁸ The emotions of the declarant must be excluded⁹⁹ but the identification of the person who did the killing is one of the most valuable offices of a dying declaration.¹ The declaration must not contain inference

614 (1845); *State v. Belcher*, 13 S. C. 459 (1880).

85. *People v. Beverly*, 108 Mich. 509, 66 N. W. 379 (1896).

86. *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065, *affirmed* 56 Minn. 226, 57 N. W. 1065 (1894).

87. 4 Chamberlayne, *Evidence*, §§ 2849–2857.

88. *Tibbs v. Com.*, 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665n. (1910).

89. *People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902).

90. *State v. Wright*, 112 Iowa 436, 445, 84 N. W. 541 (1900).

91. *State v. Spivey*, 191 Mo. 81, 90 S. W. 81 (1905); *Wakefield v. State*, 50 Tex. Cr. App. 124, 94 S. W. 1046 (1906).

92. *State v. Horn*, 204 Mo. 528, 103 S. W. 69 (1907); *State v. Eddon*, 8 Wash. 292, 36 Pac. 139 (1894) (deceased unarmed).

93. *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904).

94. *People v. Cyty*, 11 Cal. App. 702, 106 Pac. 257 (1909). Where a dying declaration is introduced by the State it is error to limit an admission in it that the deceased had threatened the defendant to its use as impeaching the dying declaration. This is itself a dying declaration which the defendant can

use. *Tittle v. State*, 188 Ala. 46, 66 So. 10, 52 L. R. A. (N. S.) 910 (1914).

95. *People v. Glover*, 141 Cal. 233, 74 Pac. 745 (1903); *State v. Betsch*, 43 S. C. 132, 20 S. E. 993 (1895).

96. *Johnson v. State*, 63 Miss. 313 (1885).

97. *Pennington v. Com.*, 68 S. W. 451, 24 Ky. L. Rep. 321 (1902); *Luker v. Com.*, 5 S. W. 354, 9 Ky. L. Rep. 385 (1887) (he and defendant had no difficulty).

98. *Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Shankenberger v. State*, 154 Ind. 630, 57 N. E. 519 (1900) (“poisoned by my mother-in-law”); *State v. Kuhn*, 117 Iowa 216, 90 N. W. 733 (1902); *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 230 (1898) *Contra*: *Berry v. State*, 63 Ark. 382, 38 S. W. 1038 (1897) (whiskey was poisoned); *Mathedy v. Com.*, 19 S. W. 977, 14 Ky. L. Rep. 182 (1892); *Orner v. State* (Tex. Cr. App. 1912), 143 S. W. 935). A dying declaration to the effect that the defendant had killed him “on purpose” is admissible although objected to on the ground that it is opinion evidence. *Pippin v. Commonwealth*, 117 Va. 919, 86 S. E. 152 (1915).

99. *State v. Evans*, 124 Mo. 397, 28 S. W. 8 (1894) (forgiveness).

1. *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911).

or the use of reasoning.² The declaration may summarize various phenomena and state them as a collective fact³ as the absence of provocation⁴ or may state psychological facts⁵ as the belief of the declarant⁶ when an ordinary witness would have been permitted to do so⁷ but facts occurring before the *res gestae* of the killing itself cannot be included.⁸ Where the statement contains some valid and some immaterial evidence its admission may depend on whether it seems necessary.⁹

§ 909. **Weight for the Jury.**¹⁰—The preliminary ruling of the judge admitting the dying declaration goes no farther than to decide that the jury may rationally consider it as evidence.¹¹ What probative force it shall have in deciding the issues raised in the case is absolutely for them to determine.¹² In deciding as to its credibility the jury should consider all the evidence in the case, including any which may have come to their attention during the preliminary hearing on *voir dire*.¹³ The credit which the jury may be disposed to give may properly vary as they regard a dying declaration as being one of fact, on the one hand, or as stating opinion or inference on the other.¹⁴ So, as to whether a dying declaration has been voluntarily made, or was extorted by duress¹⁵ is a question for them. As to the presence of a sense of impending death, the jury may find that it does or does not exist.¹⁶ To assume, in instructions, therefore, that the statements admitted are, in fact, dying declarations, has been said to be error.¹⁷ Even should the jury be convinced that the utterances placed before them are properly entitled to the legal status of dying declarations, they are by no means constrained to credit them. They may believe that the declarant has spoken the truth and so credit his state-

2. *People v. Alexander*, 161 Mich. 645, 126 N. W. 837 (1910).

3. *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889).

4. *Washington v. State*, 137 Ga. 218, 73 S. E. 512 (1911) ("he shot me for nothing").

5. The government cannot show, as part of its original case, that the accused had threatened violence against the deceased *State v. Perigo*, 80 Iowa 37, 45 N. W. 309 (1890); *Hackett v. People*, 54 Barb. 370 (1866).

Vermont.—*State v. Wood*, 53 Vt. 560 (1881).

Washington.—*State v. Moody*, 18 Wash., 165, 51 Pac. 356 (1897).

6. *Doolin v. Com.*, 95 Ky. 29, 23 S. W. 663, 15 Ky. L. Rep. 408 (1893).

7. *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624 (1903).

8. *People v. Alexander*, 161 Mich. 645, 126 N. W. 837, 17 Detroit Leg. N. 408 (1910); *Still v. State*, 125 Tenn. 80, 140 S. W. 298 (1911).

9. *Collins v. Com.*, 12 Bush (Ky.) 271 (1876).

10. 4 Chamberlayne, Evidence. § 2858.

11. *Com. v. Roberts*, 108 Mass. 296 (1871).

12. *Meno v. State*, 117 Md. 435, 83 Atl. 759 (1912) (sufficient intelligence).

13. *People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911); *Gurley v. State* (Miss. 1912), 57 So. 565; *State v. Gow*, 235 Mo. 307, 138 S. W. 648 (1911); *Jackson v. State*, 55 Tex. Cr. App. 79, 115 S. W. 262, 131 Am. St. Rep. 792 (1908).

14. *State v. Washington*, 13 S. C. 453 (1880); *State v. Quick*, 15 Rich. L. (S. C.) 342 (1867).

15. *Jackson v. State*, 55 Tex. Cr. App. 79, 115 S. W. 262, 139 Am. St. Rep. 792 (1908) (abortion).

16. *California*.—*People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905).

17. *People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905).

ment, although they fail to find that he spoke with a sense of impending death¹⁸ and they may, on the other hand, disbelieve his utterance, though made in expectation of immediate dissolution.

§ 910. [Weight for the Jury]; **A discredited Rule.**¹⁹—The administrative treatment judicially accorded to the admission of this exception to the hearsay rule as secondary evidence of the facts asserted is intelligible only upon the theory that the rule which admits it is a discredited one. It is both too strictly and too loosely construed. Since the ground for receiving the statement is that of necessity, its reception, upon sound administrative principles, should end when the necessity no longer exists. Yet even where the government is able to prove a perfect case by direct evidence, the dying declaration continues to be received. Such declarations are not always fair to the accused as usually made by one surrounded by his friends with a natural desire to exculpate himself²⁰ and therefore the prosecution is allowed to corroborate them by showing prior consistent statements by the declarant²¹ and will give the accused the widest latitude in his defence.²²

§ 911. [Weight for the Jury]; **Impeachment.**²³—The declarant in a dying declaration may be impeached in any manner which would be proper in case of a witness.²⁴ This may be done by disproving the statements of the declaration²⁵ or showing inconsistent statements²⁶ of the declarant or that he has a bad moral character²⁷ or is irreligious.²⁸

§ 912. [Weight for the Jury]; **Mental state of Declarant.**²⁹—To enable them properly to judge of the probative force of a dying declaration, the jury are entitled to be fully informed of the circumstances under which it was made.³⁰ Prominent among these is the mental condition of the declarant.³¹ This they are entitled to view from all angles, reaching a conviction of their own as to an actual sense of impending death experienced by the declarant at the time of

18. See *Donnelly v. State*, 26 N. J. L. 463, affirmed 26 N. J. L. 601 (1857).

19. 4 Chamberlayne, Evidence, §§ 2859-2864.

20. *Lipscomb v. State*, 75 Miss. 559, 580, 23 So. 210 (1897) (the mind of the declarant may be impaired or confused).

21. *State v. Craine*, 120 N. C. 601, 27 S. E. 72 (1897) (affidavit).

22. *Com. v. Roberts*, 108 Mass. 296 (1871).

23. 4 Chamberlayne, Evidence, §§ 2864-2866.

24. *Carver v. U. S.*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1896).

25. *White v. State*, 30 Tex. App. 652, 18 S. W. 462 (1892).

26. *Carver v. United States*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1897).

27. *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904).

28. *Nesbit v. State*, 43 Ga. 238 (1871); *State v. Elliott*, 45 Iowa 486 (1877); *Gambrell v. State*, 92 Miss. 728, 46 So. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549 (1908).

29. 4 Chamberlayne, Evidence, § 2867.

30. *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908); *State v. Crawford*, 31 Wash. 260, 71 Pac. 1030 (1903).

31. *Allen v. Com.*, 134 Ky. 10, 119 S. W. 795 (1909) (rational); *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

making his statement and its influence over him in inhibiting falsehood.³² Evidence should be received as to the memory³³ or sanity³⁴ of the declarant.

§ 913. [Weight for the Jury]; Rule Constitutional.³⁵— That the admissibility of dying declarations is not in violation³⁵ of the right of confrontation frequently secured to all persons on trial by express constitutional provisions is well settled.³⁶

32. *State v. Yee Gueng*, 57 Oreg. 509, 112 Pac. 424 (1910).

33. *Mockabee v. Com.*, 78 Ky. 380 (1880); *Brown v. State*, 32 Miss. 433 (1856); *Vass' Case*, 3 Leigh (Va.) 786, 24 Am. Dec. 695 (1831).

34. *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

35. 4 Chamberlayne, Evidence, §§ 2868, 2869.

36. *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024 (1898).

CHAPTER XLII.

HEARSAY AS SECONDARY EVIDENCE; ENTRIES IN COURSE OF BUSINESS.

Declarations in course of business, 914.

English rule, 915.

American rule, 916.

Administrative requirements; necessity, 917.

subjective relevancy; adequate knowledge, 918.

absence of controlling motive to misrepresent, 919.

contemporaneousness required, 920.

regularity, 921.

Form of statement, 922.

written, 923.

Nature of occupation, 924.

§ 914. **Declarations in Course of Business.**¹— Another exception to the hearsay rule which substantive law has placed at the service of judicial administration in its effort to elicit truth is that which admits, as proof of the facts asserted, oral declarations or written entries made by deceased persons in the usual course of professional or official business, or in discharge of some duty.²

Relevancy of Regularity.— At the present day the chief importance of the exception to the hearsay rule under consideration is a historical one. Together with the rule relating to shop books, it constitutes one of the confluent currents of authority which have blended under the influence of modern conditions into the broad general principle of the *Relevancy of Regularity*. This may broadly be defined as a judicial recognition of the probative force as primary evidence of hearsay statements contemporaneously made in the regular course of private or official duty or business by one having no motive to misrepresent. This principle is perhaps most firmly established in legislative enactments passed in most jurisdictions of the English-speaking world.

§ 915. **English Rule.**³— In connection with the present exception, the rule early established in England presents points of difference to that later formulated in the United States. The present "exception," as it is called, to the hearsay rule, as established in England has been spoken of as covering all

1. 4 Chamberlayne, Evidence, § 2870.

2. "We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are

admissible evidence of the acts and matters so done" *Nicholls v Webb*, 8 Wheat (U. S.) 326, 337, 5 L. ed. 326 (1823), per Mr Justice Story.

3. 4 Chamberlayne, Evidence, §§ 2871-2875.

entries "made by a person since deceased, in the ordinary course of his business,"⁴ "in the usual course or routine of business,"⁵ "in the exercise of his business and duty"⁶ and in other similar expressions.⁷ In this connection, it is not material whether the entrant is a party, the clerk of a party, or a stranger to the proceedings in which the evidence is offered. The distinction between the English and the American rule is that in England the declarant must not only have made the entry in the course of business but also in discharge of his duty⁸ which must not be self-imposed.⁹ The duty must be to make the entry at the exact time when it was actually recorded.¹⁰ A further peculiarity of the English rule is that it cannot be invoked for the proof of collateral facts mentioned in the entry.¹¹

§ 916. **American Rule.**¹²—The requirement that the declarant should not only be acting in the course of his duty or business in doing the very act stated but it should also be a duty imposed upon him by some superior authority to make an entry of it at the exact time when it was made, does not obtain in the United States. It is, on the contrary, sufficient if the making of an entry or the doing of the act was a natural and usual accompaniment of the doing of the act itself in case either of a private individual,¹³ or of a public official.¹⁴ Under the American rule, though not pursuant to the English, a contemporaneous entry regularly made in the course of private or official business will be received not only as evidence of the facts directly asserted, for the sake of stating which the declaration may fairly be regarded as having been made, but also of those collaterally or, as it were, incidentally, mentioned. Indeed, any fact which the declarant is proved to have known or which can fairly be assumed to have been within his knowledge¹⁵ may, if stated by him under the conditions prescribed by the rule be evidence, after his decease or when he is unavailable as a witness, in proof of the facts asserted.

§ 917. **Administrative Requirements; Necessity.**¹⁶—The conditions of admissibility for this species of evidence, originally administrative in their nature,

4. *Doe v. Turford*, 3 B. & Ad. 890 (1832). To the same effect, see *Rawlins v. Rickards*, 28 Beav. 370, 373 (1860).

5. *Poole v. Dicus*, 1 Bing. N. C. 649 (1835), per Tindal, C. J.

6. *Rawlins v. Rickards*, 28 Beav. 370, 373 (1860), per Romilly, M. R.

7. *Mercer v. Denne* (Eng. 1905), 74 Law J. Ch. 723 [1905] 2 Ch. 538, 93 Law T. 412, 3 Local Gov. R. 1293, 21 Times Law R. 760.

8. *Smith v. Blakey*, L. R. 2 Q. B. 326, 333 (1867); *Canada C. R. Co. v. McLaren*, 8 Ont. App. 564 (1883).

9. *R. v. Worth*, 4 Q. B. 132 (1843).

10. *Polini v. Gray*, L. R. 12 Ch. D. 411 (1879).

11. *Chambers v. Bernasconi*, 1 Crompt. M. & R. 347, 368, 1 Crompt. & J. 451 (1831), per Denman, C. J.

12. 4 Chamberlayne, Evidence, §§ 2876, 2877.

13. *Fisher v. Mayor*, 67 N. Y. 73, 77 (1876).

14. *Little v. Downing*, 37 N. H. 355, 364 (1858).

15. *Massee-Felton Lumber Company v. Sirmans*, 122 Ga. 297, 50 S. E. 92 (1905). *Contra*: *Estate of Ward*, 73 Mich. 220, 225, 41 N. W. 431 (1889), per Campbell, J.; *Sitler v. Gehr*, 105 Pa. St. 577, 600, 51 Am. Rep. 207 (1884).

16. 4 Chamberlayne, Evidence, §§ 2878-2883.

but at present largely procedural¹ in character, are those customary in case of any species of secondary evidence Necessity and Relevancy. Absence of the witness from the jurisdiction,¹⁷ his death¹⁸ or sickness¹⁹ and even the practical inconvenience of withdrawing from business many persons to prove small items²⁰ are ordinarily deemed a sufficient necessity for the introduction of this evidence.

§ 918. [Administrative Requirements]; Subjective Relevancy; Adequate Knowledge.²¹— For the subjective relevancy of the extrajudicial statement made in the course of business and its consequent admissibility, it is essential that the declarant be shown or reasonably assumed to have been possessed of such adequate knowledge on the subject as to make his declaration helpful to the jury.²² Should several persons possess individual knowledge covering the separate parts of a transaction which forms the subject of a given entry, the evidence of all such persons will be required in certain jurisdictions. Where its effect is to establish a complete chain of proof as to the existence of the fact in question, the judicial or extrajudicial statements of all the persons involved are to be submitted to the court,²³ any break in the line of proof being fatal to the admissibility of the remainder. Should A. testify to the existence of a fact, and that he correctly reported it to B., B.'s entry, in the usual course of business, is admissible in connection with A.'s testimony, although B. is not shown to have possessed any independent knowledge on the subject.²⁴ On the other hand, by certain authorities, it has been held unnecessary to call any witness other than the entrant. In these jurisdictions, testimony by the entrant that he received the report upon which he has acted, in the regular course of business, will, if reinforced by evidence of the entrants having entered the fact correctly, admit the book as evidence of the facts stated in the entry.²⁵ It is felt by many courts that in a multiplicity of small transactions, the existence of a contemporaneous record is far more cogent in compelling belief than the memory of the witness could possibly be and therefore that the books should be regarded as the best evidence of the facts.²⁶

17. *Cameron Lumber Co. v. Somerville*, 129 Mich. 552, 89 N. W. 346 (1902).

18. *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377, 562 (1889).

19. *Beattie v. McMullen*, 82 Conn. 404, 74 Atl. 767 (1909); *Bridgewater v. Robery*, 54 Conn. 217, 6 Atl. 415 (1886); *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181 (1825); *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873).

20. *Schaefer v. Georgia R. R. Co.*, 66 Ga. 39, 43 (1880); *Fielder Bros. & Co. v. Collier*, 13 Ga. 495, 499 (1853); *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N. E. 796

(1896); *Dohmen Co. v. N. F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69 (1897).

21. 4 Chamberlayne, Evidence, §§ 2884, 2887.

22. *Leask v. Hoagland*, 205 N. Y. 171, 93 N. E. 395 (1912).

23. *Cameron Lumber Co. v. Somerville*, 129 Mich. 552, 89 N. W. 346 (1902).

24. *Mayor, etc., of N. Y. v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886).

25. *Architects & Builders v. Stewart*, 68 W. Va. 506, 508, 50 So. 166, 36 L. R. A. (N. S.) 899n (1911).

26. *Mississippi River Logging Co. v. Rob-*

§ 919. [Administrative Requirements]; Absence of Controlling Motive to Misrepresent.²⁷— As in case of all statements, judicial or extrajudicial, it is required in the event of their use as secondary evidence of the facts asserted, not only that the declarant was possessed of adequate knowledge but that he was free from controlling motive to misrepresent.²⁸ This lack of motive to misrepresent, upon which the subjective relevancy of the evidence is based, is taken or assumed to be established by the automatism of habit, the regular doing of an act where the declarant has no motive to misrepresent but has every reason, in discharge of his business, professional, or official duty, to assert the truth. So strong is the probative force of an automatic habitual statement that it is by no means insisted by judicial administration that the extrajudicial declaration in course of business should be against the interest of the declarant. On the contrary, such utterances may properly be admitted, although distinctly self-serving.²⁹

§ 920. [Administrative Requirements]; Contemporaneity Required.³⁰— Judicial administration, whose work has been hardened by the doctrine of *stare decisis* into the procedural requirements of the rule under consideration, demands not only that the entry or declaration should have been made in the *regular* course of business or official duty, but also that it should have been customary to make these declarations or entries substantially *contemporaneous* with the happening of the events to which they refer.³¹

Absolute contemporaneity is, naturally, not required. It is sufficient if the statement be made at practically or substantially the same time as the act is done.³²

§ 921. [Administrative Requirements]; Regularity.³³— It is recognized that the duty of keeping books is entirely inconsistent with any attempt to record error as anything less than accuracy involves a large amount of trouble for the bookkeeper.³⁴ Affirmative proof should be offered that the books are regularly and accurately kept.³⁵ Declarations in course of business should be carefully distinguished from mere memoranda not kept regularly or in course of duty.³⁶

son, 69 Fed. 773, 782, 16 C. C. A. 400 (1895); Continental Nat. Bank v. First Nat. Bank, 108 Tenn. 374, 68 S. W. 497 (1902).

27. 4 Chamberlayne, Evidence, §§ 2888, 2889.

28. Lassone v. B. & L. R. Co., 66 N. H. 345, 354, 24 Atl. 902, 17 L. R. A. 525 (1890).

29. Bland v. Warren, 65 N. C. 372, 373, 374 (1871).

30. 4 Chamberlayne, Evidence, §§ 2890-2892.

31. McKnight v. Newell, 207 Pa. St. 562, 57 Atl. 39 (1904).

32. R. R. Co. v. Henderson, 57 Ark. 402, 415 (1893); Kennedy v. Doyle, 10 Allen (Mass.) 161 (1865); Chaffee v. U. S., 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873).

33. 4 Chamberlayne, Evidence, §§ 2893-2896.

34. Poole v. Dicus, 1 Bing. N. C. 649, 653 (1835).

35. Patterson & Co. v. Gulf, etc., Ry. Co. (Tex. Civ. App. 1910), 126 S. W. 336.

36. Lassone v. Boston & Lowell R. Co., 66 N. H. 345, 358, 24 Atl. 902, 17 L. R. A. 525 (1890).

The fact that no entry at all appears where one should had the transaction taken place is a negative fact from which an inference may be made.³⁷

§ 922. **Form of Statement; Oral.**³⁸— The form of statement is important on the question of weight rather than on that of admissibility where the other conditions exist for receiving the evidence. With the exceptions hereafter to be noticed, the declaration in course of business may properly be oral as well as in any written form. The admissibility of the oral declaration, e.g., the report of a constable,³⁹ is well established in England.⁴⁰ The application of the rule to oral statements is not, however, frequently referred to in the American cases;⁴¹ though there is no apparent reason for making any distinction between oral and written statements in this connection.⁴² In mercantile and business houses oral reports are regularly made and a duty undoubtedly exists for making them and with correctness. No element of trustworthiness is, therefore, lacking.

§ 923. [**Form of Statement**]; **Written.**⁴³— Among the more frequently used forms of making written declarations in regular course of business are book entries, endorsements, official registers, reports and the like. Naturally, the carefully kept books of account where the item in question is intimately woven into the "warp and woof" of a day's business stand in a somewhat different probative position from endorsements on separate and often fugitive sheets of paper or even from a loosely kept baptismal record. Any form of written statement which is intelligible or interpretable is, however, competent⁴⁴ if made under the required conditions. Such entries are commonly made in account books⁴⁵ and are admissible when the entry is proved to be the work of the person by whom it purports to be made as where it is shown to be in his handwriting.⁴⁶ The book itself must be produced.⁴⁷ The statement may take the form of endorsements on notes⁴⁸ or other written memoranda⁴⁹ or reports.⁵⁰

37. *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am St Rep. 341 (1896); *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164 (1901).

38. 4 Chamberlayne, *Evidence*, § 2897.

39. *R. v. Buckley*, 13 Cox Cr. C. 293 (1873).

40. A declaration by word of mouth or by writing made in the course of the business are alike admitted. *Sussex Peerage Case*, 11 Cl. & F. 85, 113 (1844), per Lord Campbell.

41. *Fennerstein's Champagne*, 3 Wall. (U. S.) 145, 18 L. ed. 121 (1865).

42. *Western Maryland Co. v. Manro*, 32 Md. 280, 283 (1870); *McNair v. Nat. Life Ins. Co.*, 13 Hun (N. Y.) 144 (1878) (statement of physician as to cause of death).

43. 4 Chamberlayne, *Evidence*, §§ 2898–2904.

44. *North Bank v. Abbot*, 13 Pick. (Mass) 465, 471, 25 Am. Dec. 334 (1883).

45. *Kibbe v. Bancroft*, 77 Ill 18 (1875).

46. *Welsh v. Barrett*, 15 Mass 380 (1819); *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873). Only the original entry is provable in this way. *St. L. etc., R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878 (1893); *Cresswell v. Slack*, 68 Iowa 110, 26 N. W. 42 (1885); *James v. Wharton*, 13 Fed. Cas. No. 7,187, 3 McLean (U. S.) 492 (1844). See also § 2901.

47. *New Jersey Zinc & I. Co. v. Lehigh Zinc & I. Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

48. *Lilly v. Larkin*, 66 Ala. 110 (1880).

49. *Walker v. Curtis*, 116 Mass. 98, 101 (1874).

§ 924. **Nature of Occupation.**⁵¹— No limitation or restriction has been placed as to the nature of the occupation to which the rule admitting declarations of deceased persons in the course of business shall apply. Any line of human activity, professional or lay, in which work is done and a record of it regularly kept, whether voluntary or under requirement of law, is within the rule, as formulated in America. It covers any form of commercial business⁵² or mechanical⁵³ or professional⁵⁴ work or even the service of process by officers.⁵⁵

50. *Culver v. Alabama M. R. Co.*, 108 Ala. 330, 18 So. 827 (1895).

51. 4 Chamberlayne, *Evidence*, §§ 2905-2909.

52. *Sasscer v. Farmers' Bank*, 4 Md. 409 (1853); *Halliday v. Martinet*, 20 Johns. (N. Y.) 163, 11 Am. Dec. 262 (1822); *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237 (1898); *Perk-*

ins v. Augusta Ins. & B. Co., 10 Gray (Mass.) 312, 324, 71 Am. Dec. 654 (1858).

53. *Dickens v. Winters*, 169 Pa. St. 126, 135, 32 Atl. 289 (1895).

54. *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415 (1886).

55. *R. v. Cope*, 7 C. & P. 720 (1835).

CHAPTER XLIII.

HEARSAY AS SECONDARY EVIDENCE; DECLARATIONS CONCERNING PEDIGREE.

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§ 925. **The Pedigree Exception.**¹—The family is looked upon by judicial administration as a miniature community. In case of the general community the interest of the inhabitants affected by the matter in question to reach the truth and the guaranty of trustworthiness which results from the general discussion concerning so interesting a topic is regarded as insuring a satisfactory degree of probative force. So in the smaller circle of the family, the self-interest of the members to reach the truth, the mutual correction implied in family discussions of topics relating to the common interest are thought to be safely trusted to promote justice.²

1. 4 Chamberlayne, Evidence, § 2910.

2. "This rule rests upon the principle that natural effusions of those who talk over fam-

ily affairs, when no special reason for bias or passion exists, are fairly trustworthy, and should be given weight by judges and juries,

§ 926. Rule Stated; Unsworn Statements as to Pedigree.³—The unsworn statement of a deceased⁴ member of the family⁵ or of the husband or wife of such member will, under certain minor conditions, be received, as an exception to the rule against the admission of hearsay⁶ in proof of the facts directly⁷ or incidentally asserted as to pedigree.⁸ The declarations of the party concerning whom a pedigree fact is sought to be established are admissible under the same conditions as those of any other member of the family.⁹

Necessity that the relationship of declarant be legitimate.—That an illegitimate member of a family is not a competent declarant of genealogical facts concerning the family was held in an early English case and seems never to have been directly questioned.¹⁰

§ 927. Administrative Requirements; Necessity; General and Special.¹¹—As to the necessity for receiving the evidence it will be required by judicial administration that a reason, satisfactory to the presiding judge, be shown as to why the primary evidence, the testimony of the declarant, is not produced.¹²

as they are in the ordinary affairs of life" *Gorham v Settegast*, 44 Tex. Civ. App. 254, 262, 98 S. W. 665 (1906), per Neill, J. As to pedigree. See note, Bender, ed., 126 N. Y. 568

3. 4 Chamberlayne, Evidence, § 2911.

4. *In re Hurlburt*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

5. It is only necessary to show that a declarant, since deceased, was a member of a family to which it is sought to attach a third person, to render proofs of the statements of the declarant with respect to the pedigree of the third person admissible in evidence. *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26 (1906). If it is not shown that a declaration was made by a member of the family it will be excluded. *Northern Pacific R. Co. v. King*, 181 Fed. 913, 104 C. C. A. 351 (1910).

Pedigree.—Declarations concerning pedigree must be made by one who is related by blood or affinity to the family of which he speaks. But this cannot be shown by hearsay in the declaration itself but must be proved by some evidence independent of the declaration itself. So the declaration of a deceased person cannot be admitted simply because the declaration contains the statement that the declarant is a member of the family in question as told to the declarant by a member of the family. *Aalholm v. People*, 211 N. Y. 406, 105 N. E. 647, L. R. A. 1915 D 215 (1914).

6. *State v. McDonald*, 55 Oregon 419, 104

Pac. 967 (1900), rehearing denied 106 Pac. 444 (1910) (statute).

7. *Malone v. Adams*, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259 (1901).

8. "The phrase, 'pedigree,' embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened." *Kelly v. McGuire*, 15 Ark. 555, 604 (185), per Hempstead, J.

9. *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570 (1910); *Taylor v. Grand Lodge A. O. U. W.*, 101 Minn. 72, 111 N. W. 919, 11 L. R. A. (N. S.) 92n, 118 Am. St. Rep. 606 (1907). Compare *Doe v. Ford*, 3 U. C. Q. B. 352 (1847).

10. *Bamford v. Barton*, 2 M. & Rob. 28 (1837). In a jurisdiction having a statute which gives an illegitimate child the right to inherit from his father, it was proper, in an action for partition, to admit evidence of declarations of the alleged father of a claimant in regard to his relationship with the latter who claimed a share of the property as an illegitimate son. *Alston v. Alston*, 114 Iowa 29, 86 N. W. 55 (1901).

11. 4 Chamberlayne, Evidence, §§ 2912, 2913.

12. When other evidence of the fact is attainable, the extrajudicial statement will not, it is said, be received. *Rogers v. De Bardeleben Coal, etc., Co.*, 97 Ala. 154, 12 So. 81 (1893); *Covert v. Hertzog*, 4 Pa. St. 145 (1846).

This necessity may be *general* or *special*, according as it applies to pedigree evidence as a whole or in relation to the statements of a particular witness. Should it appear that the proponent can establish the genealogical facts necessary to the proof of his contention by the direct evidence of witnesses, the court, as an administrative matter, may very properly decline to admit secondary evidence in the form of hearsay declarations¹³ as to pedigree, until, at least, further proof rebutting the proponent's case is introduced. Thus, where witnesses having adequate knowledge attend for the purpose of testifying to the age of a given person, the record of his birth in a family Bible may properly be rejected.¹⁴ The recognized special necessity for receiving the extrajudicial statement of a declarant in the pedigree declaration is that the latter has deceased.¹⁵ The fact of death must be proved to the satisfaction of the court, although it may be inferred from lapse of time¹⁶ or other relevant circumstances.

§ 928. [Administrative Requirements]; Relevancy.¹⁷—Passing over the objective relevancy of a declaration concerning pedigree, as presenting no peculiarity in this connection, objective relevancy being an absolute requirement in respect to evidence of every class, it may be appropriate to consider the subjective relevancy of such statements, which requires that when they are offered as proof of the facts asserted the declarant be shown (1) to have possessed adequate knowledge of the facts which he asserts, and (2) to have been free from a controlling motive to misrepresent. The qualifications of the declarant must be shown in advance by the proponent as a condition of the admissibility of the declarations.¹⁸ Of course, where the declarations concern the declarant only, adequate knowledge need not be shown as an independent fact, as it is axiomatic that a person may speak concerning himself.¹⁹ It is generally assumed that a member of the family has adequate knowledge concerning family history²⁰ but the relationship of the declarant must be established by evidence independent of the declaration itself.²¹ The statement need not however be contemporaneous with the event.²² Intimate friends²³ or even old servants²⁴ or other members of the family²⁵ not relations do not

13. *Wolf v. Wilhelm* (Tex. Civ. App. 1912), 146 S. W. 216.

14. *Bigliben v. State* (Tex. Civ. App. 1912), 151 S. W. 1044; *Rowan v. State*, 57 Tex. Cr. Rep. 625, 124 S. W. 668 (1910).

15. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052n (1907).

16. *Mann v. Cavanaugh*, 110 Ky. 776, 62 S. W. 854, 23 Ky. Law Rep. 238 (1901).

17. 4 Chamberlayne, Evidence, §§ 2914-2920.

18. *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 (1901).

19. See *Malone v. Adams*, 113 Ga. 791, 39 S. E. 507 (1901).

20. *Bernards Tp. v. Redminster Tp.*, 74 N. J. Law 92, 64 Atl. 980 (1906).

21. *Greene v. Almand*, 111 Ga. 735, 36 S. E. 957 (1900); *Doe v. Servos*, 5 U. C. Q. B. (O. S.) 284 (1849).

22. *Swift & Co. v. Rennard*, 119 Ill. App. 173 (1905).

23. *Bridger v. Huett*, 2 F. & F. 35 (1860).

24. *Flora v. Anderson*, 75 Fed. 217 (1896).

25. *Chapman v. Chapman*, 2 Conn. 347, 7 Am. Dec. 277 (1817); *Jackson v. Cooley*, 8 Johns. (N. Y.) 128 (1811).

come within the rule. The extrajudicial statement as to pedigree may be testified to by anyone who heard it.²⁶ The declaration should be made by one with no controlling motive to misrepresent²⁷ and hence *ante litem motam*.²⁸

§ 929. [Administrative Requirements]; Validity of Documents not Demanded.²⁹

— The instrument containing a pedigree statement need not itself be valid for the purpose for which it was intended. The pedigree assertion contained in a will or circumstantially employed as proof of pedigree may be equally effective, for example, although the will itself fail of operation.³⁰ The essential requirement is that the pedigree assertion should be identified as having been made by a competent declarant.

§ 930. [Administrative Requirements]; Issue Must be One of Genealogy.³¹

In many jurisdictions, it seems to be a fairly well established rule that, in order that hearsay evidence may be admitted under the pedigree exception, it is essential that the issue upon which the testimony is offered be one of genealogy.³² The courts in some jurisdictions maintain a less restricted view of the administrative position of pedigree declarations, relying upon the general principle upon which extrajudicial statements are admitted as an exception to the hearsay rule. In such jurisdictions, declarations of genealogical facts, including facts of family history incidental thereto, are admitted in evidence upon compliance with the administrative requirements without regard to the nature of the issue of the case in which they are offered.³³ In settlement cases, an attempt was made in the early English decisions to establish the admissibility of the statements of a deceased pauper as to his place of birth and residence. It was thought that this might be done as part of the exception relating to pedigree and a favorable ruling was actually made, although by an equally divided court.³⁴ Later, this case was overruled, the doctrine remaining settled since that time that the declarations of a pauper³⁵ or member of his family³⁶ will not be received after their decease regarding the place

²⁶. *Arents v. Long Island R. Co.*, 156 N. Y. 1, 50 N. E. 422 (1898).

²⁷. *In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681 (1906).

²⁸. *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884). For a statement to have been made *ante litem motam* within the meaning of the rule judicial administration requires that it must not only have been made before an action was started, but before any controversy or prospect of controversy arose *Rollins v. Wicker*, 154 N. C. 559, 70 S. E. 934 (1911).

²⁹. 4 Chamberlayne, Evidence, § 2921.

³⁰. *Jennings v. Webb*, 8 App. Cas. (D. C.)

43 (1896); *In re Lambert*, 56 L. J. Ch. 122, 56 L. T. Rep. N. S. 15 (1886).

³¹. 4 Chamberlayne, Evidence, §§ 2922-2927.

³². *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256 (1897); *Bowen v. Preferred Acc. Ins. Co.*, 74 N. Y. Suppl. 101, 68 App. Div. 342 (1902).

³³. *In re Hurlburt's Est.*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

³⁴. *Rex v. Eriswell*, 3 T. R. 707 (1790).

³⁵. *Rex v. Ferry Frystone*, 2 East 54 (1801).

³⁶. *Greenfield v. Camden*, 74 Me. 56 (1882). *Londonderry v. Andover*, 28 Vt. 416 (1856).

of birth³⁷ or residence of the pauper.³⁸ The rule is the same whether the declarations are oral or written.³⁹

§ 931. **Scope of Rule; Facts Directly Asserted.**⁴⁰—The immediate and primary purpose of an extrajudicial declaration, admissible under the present rule as secondary evidence of the truth of its assertions, is to state a fact of pedigree.⁴¹ The fact may be age,⁴² birth,⁴³ death,⁴⁴ identity,⁴⁵ marriage⁴⁶ or relationship⁴⁷ or any of the steps or links constituting relationship.⁴⁸ The relationship covered may be in the direct ascending line either by blood⁴⁹ or marriage⁵⁰ or in the direct descending⁵¹ or collateral⁵² line.

§ 932. **[Scope of Rule]; Facts Incidentally Asserted; Relationship.**⁵³—An extrajudicial statement relating to pedigree may furnish evidence not only of facts directly asserted but as to those collaterally involved in the statement⁵⁴ or of those which may reasonably be implied or inferred from it.⁵⁵ Thus, the dates⁵⁶ at which or the places⁵⁷ where facts of genealogical importance oc-

37. *Connecticut*.—*Union v. Plainfield*, 39 Conn. 563 (1873) (father).

Maine.—*Greenfield v. Camden*, 74 Me. 56 (1882).

38. *Braintree v. Hingham*, 1 Pick. (Mass.) 245 (1822); *Londonderry v. Andover*, 28 Vt. 416 (1856); *Rex v. Frystone*, 2 East 54 (1801); *Rex v. Chadderton*, 2 East 27 (1801) Records, belonging to a town which is a party to the suit, bearing upon the question of the residence of the pauper's ancestry, are competent: they are part of the *res gestae* and partake of the character of declarations made by the town. *Greenfield v. Camden*, 74 Me. 56 (1882).

39. *Rex v. Ferry Frystone*, 2 East 54 (1801).

40. 4 Chamberlayne, Evidence, §§ 2928–2938.

41. The rule allowing hearsay evidence on the issue of pedigree cannot be invoked to show the source of money which it is alleged was received by one member of a family from another member. *Bispham v. Turner*, 83 Ark. 331, 103 S. W. 1135 (1907).

42. *New Jersey*.—*Hancock v. Supreme Council Catholic Benev. Legion*, 67 N. J. Law 614, 52 Atl. 301, 69 N. J. Law 308, 55 Atl. 246 (1902).

43. *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

44. *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891).

45. *Malone v. Adams*, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259 (1901).

46. *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836 (1891).

47. *Alston v. Alston*, 114 Iowa 29, 86 N. W. 55 (1901).

48. *Matter of Fails*, 107 N. Y. Suppl. 224, 56 Misc. 217 (1907).

49. *South Hampton v. Fowler*, 54 N. H. 197 (1874); *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71 (1893).

50. *Jewell v. Jewell*, 1 How. (U. S.) 219, 11 L. ed. 108 (1843).

51. *Arents v. Long Island R. Co.*, 156 N. Y. 1, 50 N. E. 422 (1898).

52. *California*.—*Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351 (1909) (statute)

53. 4 Chamberlayne, Evidence, § 2939.

54. *Kelly v. McGuire*, 15 Ark. 555 (1855); *Morrill v. Foster*, 33 N. H. 379 (1853); *Clements v. Hunt*, 46 N. C. 400 (1854).

55. *Wood v. Sawyer*, 61 N. C. 251 (1867); *Viall v. Smith*, 6 R. I. 417 (1860). Facts not strictly those of pedigree may be so connected with pedigree facts as to be provable in the same way. *Wall v. Lubbock* (Tex. Civ. App. 1909), 118 S. W. 886.

56. *Maine*.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

Michigan.—*Van Sickle v. Gibson*, 40 Mich. 170 (1879).

New Hampshire.—*Morrill v. Foster*, 33 N. H. 379 (1858).

57. *Jackson v. Boneham*, 15 John (N. Y.) 227 (1818); *Hammond v. Noble*, 57 Vt. 103, 203 (1894); *Rishton v. Nesbitt*, 2 M. & Rob. 554 (1844).

curred may be included in an extrajudicial statement relating to pedigree. A very considerable range of other incidental facts has been permitted to the proponent. Thus, general facts relating to a particular branch of the family⁵⁸ as that they owned property⁵⁹ may be given in evidence under the rule. So the names,⁶⁰ nationality⁶¹ and residences⁶² of particular members of the family, their number,⁶³ as well as relationship to each other⁶⁴ and similar facts⁶⁵ may be stated in such an extrajudicial declaration. While the fact of membership in a given family cannot be satisfactorily proved by the unaided extrajudicial statement of the person in question,⁶⁶ but must, on the contrary, be established, in the absence of an admission,⁶⁷ by some evidence, either direct⁶⁸ or circumstantial,⁶⁹ to the satisfaction of the presiding judge⁷⁰ outside the declaration itself,⁷¹ the latter may, upon being thus shown to be that of a member of the family, be used to prove the relationship of the declarant to any particular member of it.⁷² The declaration regarding pedigree naturally covers, moreover, other intimate relationships existing between members of the immediate family, such as husband⁷³ or wife,⁷⁴ brother⁷⁵ or sister.⁷⁶ Finally, the declarant may state his own relation to the family,⁷⁷ or to any designated member of it.

§ 933. **Form of Statement.**⁷⁸—An unsworn statement regarding pedigree may present itself to the tribunal in any one of a variety of forms. So far as such declarations constitute an exception to the hearsay rule, they rest, in main, upon the credit of the declarant. They are, therefore, personal evidence. As

58. *Shrewsbury Peerage Case*, 7 H. L. Cas. I, 11 Eng. Reprint I (1858).

59. *Maslin v. Thomas*, 8 Gill (Md.) 18 (1849).

60. *McClaskey v. Barr*, 47 Fed. 154; *reversed* 70 Fed. 529, 530, 17 C. C. A. 251 (1891).

61. *Currie v. Stairs*, 25 N. Brunsw. 4 (1890).

62. —*Stumpf v. Osterhage*, 111 Ill. 82 (1884); *Rishton v. Nesbitt*, 2 M. & Rob. 554 (1844); *Currie v. Stairs*, 25 N. Brunsw. 4 (1890).

63. *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. 1038 (1893).

64. *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147, 156, 11 Eng. Ch. 147 (1831).

65. *Young v. State*, 36 Ore. 417, 50 Pac. 812, 60 Pac. 711, 47 L. R. A. 548 (1900) (for identification, declarations that deceased had changed his name, had enlisted and deserted were admitted).

66. *Vantine v. Butler*, 240 Mo. 521, 144 S. W. 807, 39 L. R. A. (N. S.) 1177 (1912).

67. *In re Clark's Estate*, 13 Cal. App. 786,

110 Pac. 828 (1910); *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903).

68. *Pierce v. Jacobs*, 7 Mackey (18 D. C.), 489 (1887).

69. *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

70. *Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207 (1884).

71. *Welch v. Lynch*, 30 App. D. C. 122 (1907); *State v. McDonald*, 55 Oreg. 419, 104 Pac. 967 (1909) rehearing denied, 106 Pac. 444 (1910).

72. *Wallbridge v. Jones*, 33 U. C. Q. B. 613, 618 (1873).

73. *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

74. *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587 (1895).

75. *In re Fail's Will*, 107 N. Y. Suppl. 224, 56 Misc. Rep. 217 (1907).

76. *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

77. *Russell v. Langford*, 135 Cal. 356, 67 Pac. 331 (1902).

78. 4 Chamberlayne, *Evidence*, §§ 2940, 2941.

submitted to the court, the pedigree declarations may be oral or in writing,⁷⁹ formal⁸⁰ or informal. No superior admissibility attaches to written statements above those which are oral;⁸¹ nor is the official entry in the absence of statute, received as proof of a higher grade. Declarations may be also classified as *composite*, i.e., proceeding from an indeterminate number of persons in a general statement where the individual voices of the declarants have been lost; and *individual*, i.e., the statements of identified persons.

§ 934. [Form of Statement]; Composite; Reputation.⁸²—The evidence of reputation in the family, i.e., among persons whose declarations would be competent is receivable⁸³ for the purpose of establishing, in connection with a member of any branch of the family,⁸⁴ an appropriate fact of pedigree. This rule has sometimes been extended to include a general reputation in the community.⁸⁵ Facts covered may be both those directly asserted and those whose existence is incidentally or collaterally declared.⁸⁶ Such reputation, in fine, may relate to any of the ordinary facts of pedigree.⁸⁷

History in the family may fairly be deemed practically equivalent to reputation.⁸⁸ As this is primary evidence no necessity for its introduction need be shown.⁸⁹ Adequate knowledge of the declarant may be shown by showing him to be a member of the family⁹⁰ with no motive to misrepresent.⁹¹ Among facts of pedigree which may be established by reputation in the family are those of age,⁹² birth,⁹³ death,⁹⁴ marriage,⁹⁵ or its absence,⁹⁶ and the dates

79. *Wolf v. Wilhelm* (Tex. Civ. App. 1912), 146 S. W. 216

80. *In re Peterson's Estate* (N. D. 1912), 134 N. W. 751 (entries in family Bible); *Wolf v. Wilhelm* (Tex. Civ. App. 1912), 146 S. W. 216 (affidavit).

81. "The existence of a family register does not exclude proof of declarations of deceased members of the family." *Swing v. French*, 11 Lea. (Tenn.) 78, 80, 47 Am. Rep. 277 (1883), per Cooper, J

82. 4 Chamberlayne, Evidence, §§ 2942–2948.

83. *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088 (1892).

84. *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088 (1892) (grandfather's cousin); *Webb v. Richardson*, 42 Vt. 465 (1869) (grandfather); *Cox v. Brice*, 159 Fed. 378, 86 C. C. A. 378 (1908).

85. *Wall v. Lubbock*, 52 Tex. Civ. App. 405, 118 S. W. 886 (1909).

86. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882 (1879) (residence); *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875) (dates); *Swink v. French*, 11 Lea. (Tenn.) 78, 47 Am. Rep. 277 (1883) (dates); *Webb v. Richardson*, 42 Vt. 465 (1869) (dates).

87. The location of a land certificate is not a fact of pedigree in this connection *Odom v. Woodward*, 74 Tex. 41, 11 S. W. 925 (1889)

88. *Cook v. Carroll Land, etc., Co.* (Tex. Civ. App. 1897), 39 S. W. 1006; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895); *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895); *Doe v. Griffin*, 15 East 293, 13 Rev. Rep. 474 (1812).

89. *Smith v. Kenney* (Tex. Civ. App. 1899), 54 S. W. 801. But see *Rogers v. De Bardeleben Coal, etc., Co.*, 97 Ala. 154, 12 So. 81 (1893).

90. *Metheny v. Bohn*, 160 Ill. 263, 43 N. E. 380 (1896).

91. *Morgan v. Purnell*, 11 N. C. 95 (1825) (*ante litem motam* if possible).

92. *Watson v. Brewster*, 1 Pa. St. 381 (1845) *Contra* *Rogers v. De Bardeleben Coal, etc., Co.*, 97 Ala. 154, 12 So. 81 (1893); *White v. Strother*, 11 Ala. 720 (1847)

93. *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

94. *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

at which these respective events occurred.⁹⁷ Reputation which is admissible to establish the fact of marriage may be either general reputation⁹⁸ or reputation in the family.⁹⁹ Facts of parentage¹ or of relationship in general² may be proved in the same way.

§ 935. [Form of Statement]; Tradition.³—A further form of composite statement is tradition in the family.⁴ Like reputation,⁵ a tradition is a form of family history⁶ and may be shown by the testimony of any member of the family,⁷ in proof of the same familiar genealogical facts,⁸ e.g., death,⁹ marriage¹⁰ or relationship.¹¹ Certain minor details relating to tradition as proof of pedigree may be mentioned. The requirement has been made that the members of the family among whom the tradition existed should be shown to be dead.¹² The fact, however, that the declarant appears to have had but slight personal knowledge furnishes no ground for rejecting the testimony.¹³ Nor is entire accuracy in the statement insisted on, it being received for what it is worth, notwithstanding some admitted discrepancy.¹⁴ To the relevancy, however, of the evidence it is essential that the tradition should be shown to have arisen among those possessed of adequate knowledge and without controlling motive to misrepresent.¹⁵

§ 936. [Form of Statement]; Individual.¹⁶—The extrajudicial declaration

95. *In re Pickens*, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477 (1894).

96. *Jacobs v. Fowler*, 119 N. Y. Suppl. 647, 135 App. Div. 713 (1909).

97. *Metropolitan Life Ins. Co. v. Lyons* (Ind. App. 1912), 98 N. E. 824.

98. *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

99. *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1877); *Barnum v. Barnum*, 42 Md. 251 (1875); *Henderson v. Cargill*, 31 Miss. 367, 409 (1856); *Clark v. Owens*, 18 N. Y. 434 (1858).

1. *State v. McDonald*, 55 Oreg. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

2. *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958 (1899); *Lindsey's Devisee v. Smith*, 131 Ky. 176, 114 S. W. 779 (1908).

3. 4 Chamberlayne, Evidence, § 2949

4. *In re Hurlburt's Estate*, 68 Vt. 366, 377, 35 Atl. 77, 35 L. R. A. 794 (1895), per Thompson, J.

5. *Pancoast's Lessee v. Addison*, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520 (1802); *Carter v. Montgomery*, 2 Tenn. Ch. 216 (1875); *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895); *Johnson v. Todd*, 5 Beav. 597 (1843).

6. *Eisenlord v. Clum*, 126 N. Y. 552, 27

N. E. 1024, 12 L. R. A. 836 (1891); *Eaton v. Tallmadge*, 24 Wis. 217 (1869); *Johnson v. Todd*, 5 Beav. 597 (1843).

7. *Doe v. Griffin*, 15 East 293 (1812).

8. *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468 (1825); *Jackson v. Browner*, 18 Johns. 37 (1820); *Jackson v. Cooley*, 8 Johns. 128 (1811); *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1886).

9. *Anderson v. Parker*, 6 Cal. 197 (1856); *Pancoast's Lessee v. Addison*, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520 (1802); *Van Sickle v. Gibson*, 40 Mich. 170 (1879); *Fosgate v. Herkimer Mfg., etc., Co.* 12 Barb. (N. Y.) 352; *affirmed*, 12 N. Y. 580 (1852).

10. *Van Sickle v. Gibson*, 40 Mich. 170 (1879).

11. *Van Sickle v. Gibson*, 40 Mich. 170 (1879).

12. *Fosgate v. Herkimer Mfg., etc., Co.* 12 Barb. (N. Y.) 352, *affirmed*, 12 N. Y. 580 (1852).

13. *Lovat Peerage Case*, 10 App. Cas. 763 (1885).

14. *Johnson v. Todd*, 5 Beav. 597 (1843).

15. *Whitelocke v. Baker*, 13 Ves. Jr. 511, 9 Rev. Rep. 216, 33 Eng. Reprint 385 (1807).

16. 4 Chamberlayne, Evidence, §§ 2950, 2951.

may be not only composite, as in case of reputation or tradition, but individual, as where the speaker is identified. Individual statements may be oral¹⁷ or written. The oral statement is as competent as the most solemn written assertion, on the same point,¹⁸ even one contained in a family Bible.¹⁹

§ 937. **Circumstantial Proof of Pedigree.**²⁰—Evidence as to pedigree is often circumstantial in nature as presented in the form of various facts whose principal value is circumstantial rather than assertive and whose bearing upon the issue often seems remote.²¹ Let it be assumed that a contention regarding a point in family history is of such a nature that, if correct, certain entries would very probably, be found in a particular record. Finding them there will be received as a fact circumstantially relevant.²² *Per contra*, the failure, upon inquiry, to find such entries may be a relevant fact, occasionally of considerable probative force, tending to disprove the truth of the contention itself.²³

§ 938. **Proof by Acquiescence in Case of Pedigree.**²⁴—That a statement of a fact of pedigree should be allowed to go uncontradicted and unaltered, when brought to the attention of persons who should be interested in having the truth alone stated, has a strong tendency to convince and satisfy reasonable minds that the statement is true. This conclusion of logic is of great assistance in many instances where proof of a genealogical fact is sought to be established. Where the necessity is shown, the court will permit a proponent to prove a statement of a relevant pedigree fact by whomsoever made or whatever may be its form, provided it be shown or can fairly be inferred that it came to the knowledge of some member of the family, connected either by blood, or marriage, who had or may reasonably be taken to have had adequate knowledge as to the truth of the matter: *provided further*, that the latter is shown or can fairly be assumed to have assented to or acquiesced in the accuracy of the

17. *Morrill v. Foster*, 33 N. H. 379 (1856).

18. *Clements v. Hunt*, 46 N. C. 400 (1854); *Swink v. French*, 11 Lea (Tenn.) 78, 47 Am. Rep. 277 (1883); *Currie v. Stairs*, 25 N. Brunsw. 4 (1885). But see *Webb v. Haycock*, 19 Beav. 342 (1864).

19. *Currie v. Stairs*, 25 N. Brunsw. 4 (1885).

20. 4 Chamberlayne, Evidence, §§ 2952–2954.

21. “Correspondence of deceased members of the family, recitals in family deeds, descriptions in wills, and other solemn acts, are original evidence, where the oral declarations of the parties are admissible. Inscriptions on tombstones, and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like, are

also admissible, as original evidence of the same facts.” *Kelly v. McGuire*, 15 Ark. 555, 604 (1855), per Hempstead, J.

22. *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468 (1825).

23. *Crouch v. Hooper*, 16 Beav. 182, 1 Wkly. Rep. 10 (1852). The fact that no certificate of marriage is produced from the office of the clerk of the county, where the marriage was alleged to have been performed in a state whose law required the person performing a marriage to file such a certificate, is a circumstance throwing great doubt on the probability that the marriage ever took place and is competent evidence on that question. *Barnum v. Barnum*, 42 Md. 251, 299 (1875).

24. 4 Chamberlayne, Evidence, §§ 2955–2965.

declaration.²⁵ The probative element in this proof is the failure to make any corrections in the statement. In this case adequate knowledge of the declarant need not be shown,²⁶ but the adequate knowledge necessary and which may be assumed is that of members of the family who acquiesce in the statement²⁷ without motive to misrepresent²⁸ and *ante litem motam*. The statement may be in any form²⁹ and an adequate necessity must be shown for its admission. Less stringency of proof is required in case of ancient facts³⁰ of family history³¹ than others. The conduct of persons towards each other may be used to show their relationship.³² Mere possession of documents may be evidence³³ as corroboration³⁴ in proving facts of family pedigree.

§ 939. **Animal Pedigree.**³⁵—Evidence of reputation as to the pedigree of an animal may be properly received.³⁶ Thus, in an action to recover damages for injuries caused to an animal by reason of the negligence of a carrier, proof of reputation as to the pedigree of the animal was held to be admissible.³⁷ Pedigree books may also be admitted where they are recognized as a standard authority among dealers or breeders of the particular class of animals referred to by such a book.³⁸

§ 940. **Scope of Circumstantial Evidence in Case of Pedigree; Age.**³⁹—Should the necessity be satisfactorily shown by the proponent,⁴⁰ he may establish the fact of age by resorting to declarations which owe their probative force to cir-

25. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *Jones v. Jones*, 45 Md. 144 (1876); *Eastman v. Martin*, 19 N. H. 152 (1848).

26. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *Jones v. Jones*, 45 Md. 144 (1876); *Eastman v. Martin*, 19 N. H. 152 (1848).

27. *Weaver v. Leiman*, 52 Md. 708 (1879).

28. *Dinan v. Supreme Council Catholic Mut. Ben. Assoc.*, 201 Pa. St. 363, 50 Atl. 999 (1902).

29. *Union Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

30. *Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (1905).

31. After a long lapse of time, where the parties are dead and where it appears that a person has been recognized and treated as the legitimate child of a certain man and woman, not only by the father and mother, but also by various members of the families of both father and mother, legitimacy may be presumed. *In re Robb's Estate*, 37 S. C. 19, 16 S. E. 241 (1891).

32. *White v. Strother*, 11 Ala. 720 (1847); *Green v. Norment*, 5 Mackey (Dist. of Colum-

bia) 80 (1886); *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874).

33. *Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (1905).

34. *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1885).

35. 4 Chamberlayne, Evidence, § 2966.

36. "The question of pedigree and ancestry is a matter of common or general reputation, whether the question concerns horses, cattle, dogs, or men. The matter, from the very nature of things, depends upon reputation or common repute." *Citizens, Rapid Tr. Co. v. Dew*, 100 Tenn. 317, 324, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 318 (1897), per Wilkes, J.

37. *Jones v. Memphis, etc., Packet Co.* (Miss. 1902), 31 So. 201. See also *Ohio & M. Ry. Co. v. Stribling*, 38 Ill. App. 17 (1899).

38. *Louisville & N. R. Co. v. Kice*, 109 Ky. 786, 60 S. W. 705 (1901) (holding American stud books are admissible on question of pedigree where carefully compiled and universally accepted as conclusive by persons dealing in such animals).

39. 4 Chamberlayne, Evidence, §§ 2967-2969.

40. *People v. Mayne*, 118 Cal. 516, 50 Pac.

cumstances and which are admissible under the pedigree exception for like reason.⁴¹ This may be done by entries in a family record⁴² or family Bible⁴³ and a person may testify to his own age though necessarily based on hearsay⁴⁴ but he may not testify to the age of another on the basis of hearsay⁴⁵ or reputation.⁴⁶

§ 941. [Scope of Circumstantial Evidence in Case of Pedigree]; Birth.⁴⁷—It has been said that hearsay cannot be used to prove the place of a person's birth.⁴⁸ This, however, may well be doubted, for hearsay declarations or reputation in the family⁴⁹ regarding the fact, place⁵⁰ or time of birth may be as competent as is the circumstantial proof⁵¹ by which these facts are established.

§ 942. [Scope of Circumstantial Evidence in Case of Pedigree]; Death.⁵²—Should a suitable forensic necessity for receiving it be presented,⁵³ not only may secondary evidence of extrajudicial statements be received in proof of the

654, 62 Am. St. Rep. 256 (1897); *Hunt v. Supreme Council O. of C. F.*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887); *Leggett v. Boyd*, 3 Wend. (N. Y.) 376 (1829); *Campbell v. Wilson*, 23 Tex. 253, 76 Am. Dec. 67 (1859).

41. *California*.—*People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896).

42. *Bertram v. Witherspoon*, 138 Ky. 116, 127 S. W. 533 (1910); *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617 (1905); *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

43. Where a mother testified as to the age of her children, a record of the entries of their births made in the family Bible under her dictation by a person since deceased was admitted to corroborate the testimony of the mother. *Wiseman v. Cornish*, 53 N. C. 218 (8 Jones Law) (1860).

44. This may be true though the parents of the declarant are available as witnesses. *Bain v. State*, 61 Ala. 75 (1878); *Pearce v. Kyzer*, 16 Lea (Tenn.) 521, 57 Am. Rep. 240 (1886). It is competent to show, on the question of a girl's age, that, before the controversy arose, the girl had a birthday party and, on that occasion, there was a birthday cake having her age in figures upon it. *Parkhurst v. Krellinger*, 69 Vt. 375, 38 Atl. 67 (1897).

45. *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256 (1897); *Dinan v. Supreme Council Catholic Mut. Ben. Assoc.*, 201 Pa. St. 363, 50 Atl. 999 (1902); *Con-*

necticut Mut. L. Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. ed. 294 (1876).

46. *Sims v. State* (Tex. Cr. App. 1902), 70 S. W. 90; *Colclough v. Smyth*, 15 Ir. Ch. 347, 10 L. T. Rep. (N. S.) 918 (1863).

47. 4 Chamberlayne, Evidence, § 2969a.

48. *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545 (1821); *Adams v. Swansea*, 116 Mass. 591 (1875); *Tyler v. Flanders*, 57 N. H. 618 (1876); *Currie v. Stairs*, 25 New Bruns. 4 (1885). A witness will not be permitted to testify, entirely from the hearsay statements of others, as to the place of his birth. *McCarthy v. Deming*, 4 Lans. (N. Y.) 440 (1871); *Mima Queen v. Hepburn*, 7 Cranch (U. S.) 290, 3 L. ed. 348 (1813); *Rex v. Erith*, 8 East 539, 542 (1807).

49. *Clark v. Owens*, 18 N. Y. 434 (1858). See also *Grand Lodge A. O. U. W. v. Bartes*, 69 Neb. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. Rep. 577 (1904).

50. *Wilmington v. Burlington*, 4 Pick. (Mass.) 174 (1826); *McCarty v. Terry*, 7 Lans. (N. Y.) 236 (1872).

51. *Weaver v. Leiman*, 52 Md. 708 (1879); *Beckham v. Nacke*, 56 Mo. 546 (1874); See also *Currie v. Stairs*, 25 N. Bruns. 4 (1885).

52. 4 Chamberlayne, Evidence, §§ 2970-2973.

53. Unless the fact be an ancient one, it may properly be assumed, in the absence of affirmative proof on the subject, that primary, i.e., more original, evidence can be procured on the subject, all forms of secondary proof being provisionally rejected. *Stouvenel v. Stephens*, 26 How. Pr. (N. Y.) 244 (1863).

fact of death, whether such declarations be in individual⁵⁴ or composite⁵⁵ form, but facts circumstantially relevant are equally available for the purpose.⁵⁶ The conduct of the family⁵⁷ or information received from the family⁵⁸ may be used to establish the death of one of its members. Death may also be shown by proof of general reputation in the community⁵⁹ where the family had knowledge of it.⁶⁰ A report of death must be in the form of a declaration by a deceased member of the family.⁶¹

§ 943. [Scope of Circumstantial Evidence in Case of Pedigree]; Marriage.⁶²—The fact of marriage may be proved circumstantially by cohabitation,⁶³ by the fact that the persons in question had children whom they acknowledged and to whom they gave the family name,⁶⁴ by the alleged husband's support of the alleged wife and children,⁶⁵ or by any acts or conduct of the parties probatively relevant.⁶⁶ Marriage may also be shown by entries in a family record,⁶⁷ by reputation in the community⁶⁸ or in the family⁶⁹ but reputation may be insufficient when standing alone in criminal cases.⁷⁰

54. *Stouvenel v. Stephens*, 26 How. Pr. (N. Y.) 244 (1863); *Fosgate v. Herkimer Mfg., etc., Co.*, 12 Barb. (N. Y.) 352, *affirmed*, 12 N. Y. 580 (1852); *Primm v. Stewart*, 7 Tex. 173 (1851); *Scott v. Ratliffe*, 5 Pet. (U. S.) 81, 8 L. ed. 54 (1831).

55. *Ewing v. Savary*, 3 Bibb. (Ky.) 235 (1813). Reputation may be the only available evidence. *Ringhouse v. Keever*, 49 Ill. 470 (1869); *Houston City St. R. Co. v. Richart* (Tex. Civ. App. 1894), 27 S. W. 920.

56. Mortality tables if of recognized authority, are receivable as part of the common knowledge of the community and may be examined by the judge as tending to establish the facts asserted. *Mississippi, etc., R. Co. v. Ayres*, 16 Lea (Tenn.) 725 (1886); *Galveston, etc., R. Co. v. Arispe*, 81 Tex. 517, 17 S. W. 47 (1891); *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298 (1887); *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. ed. 257 (1886).

Gravestones.—*North Brookfield v. Warren*, 16 Gray (Mass.) 171 (1860); *Smith v. Patterson*, 95 Mo. 525, 8 S. W. 567 (1889).

Family Bible.—*Wiseman v. Cornish*, 53 N. C. 218 (8 Jones Law) 186; *In re Berkeley*, 4 Campb. 401 (1811).

57. *North Brookfield v. Warren*, 16 Gray (Mass.) 171 (1860); *Hunt v. Johnson*, 19 N. Y. 279 (1859); *McClaskey v. Barr*, 47 Fed. 154, *reversed*, 70 Fed. 529, 530, 17 C. C. A. 251 (1893); *Lewis v. Marshall*, 30 U. S. (5 Pet.) 469, 8 L. ed. 195 (1831).

58. *Anderson v. Parker*, 6 Cal. 197 (1856);

Mason v. Fuller, 45 Vt. 29 (1872); *Du Pont v. Davis*, 30 Wis. 170 (1872).

59. *Pancoast v. Addison*, 1 Har. & J. (Md.) 350, 2 Am. Dec. 520 (1802); *Jackson v. King-5 Cow.* (N. Y.) 237, 15 Am. Dec. 468 (1825); *Flowers' Lessee v. Haralson*, 14 Tenn. (6 Yerg.) 494 (1834); *Ringhouse v. Keever*, 49 Ill. 470 (1869); *Flowers' Lessee v. Haralson*, 6 Yerg. (Tenn.) 496 (1834).

60. *Welch v. R. Co.*, 182 Mass. 84, 64 N. E. 695 (1902); *Blaisdell v. Bickum*, 139 Mass. 250, 1 N. E. 281 (1885).

61. *Wallace v. Howard* (Tex. Civ. App. 1895), 30 S. W. 711.

62. 4 Chamberlayne, Evidence, §§ 2974–2977.

63. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Jones v. Jones*, 45 Md. 144 (1876); *Copes v. Pearce*, 7 Gill. (Md.) 247 (1848); *Henderson v. Cargill*, 31 Miss. 367 (1894); *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847 (1892).

64. *Henderson v. Cargill*, 31 Miss. 367 (1894).

65. *Vincent's Appeal*, 60 Pa. St. 228 (1869).

66. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874); *Jennings v. Webb*, 8 D. C. App. 43, 56 (1896); *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847 (1892).

67. *Jones v. Jones*, 45 Md. 144 (1876).

68. *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877). *In re Pickens*, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477 (1894).

69. *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1877); *Barnum v. Barnum*, 42 Md.

§ 944. [Scope of Circumstantial Evidence in Case of Pedigree]; Names.⁷¹— The name of an individual or family may be proved by reputation,⁷² the fact that a reputation exists rendering it worthy of consideration.

§ 945. [Scope of Circumstantial Evidence in Case of Pedigree]; Race.⁷³— Circumstances regarding the recognition and treatment of a person as a member of a particular race are competent on the question of race.⁷⁴

§ 946. [Scope of Circumstantial Evidence]; Relationship.⁷⁵— Relationship may be proved not only by the declarations of deceased members of the family but by evidence more circumstantial in its nature, e.g., the possession of property at one time belonging to an ancestor by one claiming to be his descendant⁷⁶ or the manner in which two persons conducted themselves in respect to each other.⁷⁷ Acts of a deceased, tending to show his illegitimacy, are admissible on that point, as are also the acts of his mother.⁷⁸ Likewise common reputation upon the subject of the parentage of a person whose pedigree is in dispute is admissible.⁷⁹ Even similarity of names will be considered on the question of relationship in case of ancient facts.⁸⁰

§ 947. [Scope of Circumstantial Evidence in Case of Pedigree]; Residence.⁸¹— For the purpose of identifying a given person or establishing some other relevant fact, the question of place of residence may become closely involved with pedigree and treated in many respects as a pedigree fact.⁸² However, it seems to be settled that residence cannot be established by reputation.⁸³

§ 948. [Scope of Circumstantial Evidence in Case of Pedigree]; Status.⁸⁴— General reputation has been held admissible to prove the status of a person, for example, that he was a free person⁸⁵ or that he was a noncitizen;⁸⁶ but this is contrary to the weight of authority.⁸⁷ In criminal cases, where the fact

251 (1875); *Henderson v. Cargill*, 31 Miss. 367, 409 (1856); *Clark v. Owens*, 18 N. Y. 434 (1858).

70. *Durning v. Hastings*, 183 Pa. St. 210, 38 Atl. 627 (1897) (crim. con.).

71. 4 Chamberlayne, Evidence, § 2978.

72. *U. S. v. Dodge*, 25 Fed. Cas. No. 14,974, Deady 186 (1866).

73. 4 Chamberlayne, Evidence, § 2979.

74. *Locklayer v. Locklayer*, 139 Ala. 354, 35 So. 1008 (1903); *Gilliland v. Board of Education*, 141 N. C. 482, 54 S. E. 413 (1906).

75. 4 Chamberlayne, Evidence, § 2980.

76. *Wiess v. Hall* (Tex. Civ. App. 1911), 135 S. W. 384; *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1885).

77. *White v. Strother*, 11 Ala. 720 (1847).

78. *State v. McDonald*, 55 Ore. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

79. *State v. McDonald*, 55 Ore. 419, 103

Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

80. *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1885).

81. 4 Chamberlayne, Evidence, § 2980a.

82. *Byers v. Wallace*, 87 Tex. 503, 511, 28 S. W. 1056, 29 S. W. 760 (1895), per Brown, J.

83. *R. Co. v. Thompson*, 94 Ala. 636, 10 South. 280 (1891); *Shearer v. Clay* 11 Ky. (1 Litt.) 260 (1822); *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691 (1893); *Londonderry v. Andover*, 28 Vt. 416 (1856).

84. 4 Chamberlayne, Evidence, § 2981.

85. *Bryan v. Walton*, 20 Ga. 480, 509 (1856). See also *Shorter v. Boswell*, 2 Harr. & J. (Md.) 359 (1808).

86. *George v. U. S.*, 1 Okla. Cr. 307, 97 Pac. 1052, 100 Pac. 46 (1908).

87. *Walkup v. Pratt*, 5 Harr. & J. (Md.) 51 (1820); *Walls v. Hemsley*, 4 Harr. & J.

of corporate existence is merely a collateral matter, such fact may be established by general reputation.⁸⁸

(Md.) 243 (1817) : Charlton v. Unis, 4 Gratt. 1 (1893) ; State v. Thompson, 23 Kan. 338, 33 Am. Rep. 165 (1880).
(Va.) 58 (1847).

88. Fleener v State, 58 Ark. 98, 23 S.W. 1147, 1150

CHAPTER XLIV.

HEARSAY AS PRIMARY EVIDENCE; SPONTANEITY.

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§ 949. **Hearsay as Primary Evidence.**¹—Hearsay evidence is received as primary evidence only in two classes of cases. Judicial administration recognizes mainly, if not exclusively, two influences upon the mind of the declarant in any given case which, in the absence of countervailing considerations, uniformly are deemed to confer admissibility upon his extrajudicial statements. These are, (1) the truth-compelling power of a spontaneous reaction to an over-

1. 4 Chamberlayne, Evidence, § 2982.

whelming motor impulse; (2) a force of habit. The former, it has seemed convenient briefly to designate as the Relevancy of Spontaneity. The latter will be spoken of as the Relevancy of Regularity.

§ 950. Relevancy of Spontaneity.²—To judicial administration, the automatic is the true.³ What a declarant asserts, not so much of himself⁴ as overborne and forced thereto by overwhelming emotion, the stress of sudden shock or intense pain, the law of evidence assumes to be the fact.⁵

§ 951. Declarations Part of a Fact in the *Res Gestae*.⁶—Apparently, in current judicial parlance, a spontaneous extrajudicial statement is spoken of as being a declaration which is "*part of the res gestae*."⁷ Such unsworn statements are customarily received in civil cases or on criminal proceedings in proof of the facts asserted. Indeed, wherever the element of spontaneity is present, e.g., in connection with independently relevant extrajudicial statements, including, to use Greenleaf's phrase,⁸ "verbal acts," and the like, the presence of this element of proof tends to superimpose upon the constituent or probative relevancy of such statements a tendency to establish the truth in point of fact of that which has been asserted. For reasons which are in part stated elsewhere,⁹ the presence of spontaneity is not essential for this purpose of proving the fact asserted in an extrajudicial declaration. Wherever spontaneity is present, however, such is its probative effect.

Res gestae is indeed, as employed by the American courts, a term of protean meaning.¹⁰ Properly considered, and as, in a majority of cases, represented in the English view, the term designates the actual series of world happenings out of which the right or liability asserted in the action arises so far as it arises at all. To extend the same phrase so as to include not only the probative facts which, when direct proof of the true *res gestae* is unavailable, are used to establish them, but to cover also all evidentiary or probative facts whatever, and even those which, though lacking in probative relevancy, the rules of procedure have made admissible, seems by no means ideal. A careful examination of a considerable number of decisions in which it has been held that certain evidence was admissible as "*part of the res gestae*" will, it is believed, convince the student of two facts, (1) that a rational and true reason may be discovered

2. 4 Chamberlayne, Evidence, § 2983.

3. Murray v. Boston & M. R. Co., 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

4. Competency as a witness.—So little is the declarant in an extrajudicial spontaneous utterance regarded as thinking his own thoughts that it is not even required for the admissibility of his statement that he should be competent as a witness. Croomes v. State, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882 (1899).

5. People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908).

6. 4 Chamberlayne, Evidence, §§ 2984, 2985.

7. Feldman v. Detroit United Ry., 162 Mich. 486, 127 N. W. 687, 17 Detroit Leg. N. 707 (1910).

8. 1 Glf. Ev. (15th ed.) § 108.

9. § 2580.

10. State v. Territory, 12 Ariz. 36, 38, 94 Pac. 1104 (1908).

for admitting the evidence in every case where it was properly admitted, without resorting to a meaningless phrase; (2) that the court, feeling from the standpoint of reason or "common sense" that the jury should have the aid of the evidence, admitted it as "part of the *res gestae*" without taking the trouble to discover and assign the true reason for its admissibility. Illustrations of this loose and hurried use of the convenient term *res gestae* are not rare in judicial opinions.¹¹

§ 952. [Declarations Part of a Fact in the *Res Gestae*]; Relevancy to Fact Asserted.¹²— That the relevancy of an extrajudicial statement to the existence of the fact asserted in it is due to the spontaneous nature of the utterance rather than to position among the *res gestae* becomes obvious upon comparing those *res gestae* utterances deemed admissible for the purpose and those not so regarded. A very large number of extrajudicial statements deemed independently relevant are undoubtedly part of the *res gestae*, properly so called, as being constitutively relevant. These utterances, however, have no tendency, in the absence of spontaneity, to establish the existence of the facts which they assert. That the defendant, for instance, said, speaking of the plaintiff, "A. B. is a thief," may on an action of slander be proved as a relevant, indeed, a necessary fact. Such a declaration would have little tendency, standing alone, though obviously part of the *res gestae*, to show that it was true, that A. B. was, in point of fact, a thief.

Whether the exhibition by an extrajudicial statement of a proving power resulting from an intimate relation to attending circumstances would ever be accepted as sufficient judicial proof of the fact asserted is very doubtful. Upon principle, it may fairly be contended that such proof should be sufficient.

No distinction, as a matter of principle or of authority, exists between the meaning of *res gestae* when employed in criminal as distinguished from civil cases. What is law for a criminal case is law for a civil case, and *vice versa*.

The distinction which procedure recognizes between the independently relevant capacity of an extrajudicial statement and its use in an assertive capacity is, at bottom, false and misleading. The circumstantially probative quality of any statement, the proving power of the fact of its existence, persists in all cases, whether the statement be judicial or extrajudicial, the capacity in which it is used, assertive or relevant, independent of its truth or falsity.

The assertive capacity of an extrajudicial statement presents, as compared to that of independent relevancy, certain essential differences, at least on the surface. The fact of the statement, its circumstantially probative quality in establishing the existence of a physical or psychological fact in itself relevant, recedes into the background. The inference of truth to which the making of

¹¹ Hall v Uvalde Asphalt Pav. Co., 92 N. Y. Suppl. 46, 47 (1905).

¹² 4 Chamberlayne, Evidence, §§ 2986-2991.

the statement gives rise, under the circumstances disclosed, assumes the first importance.

§ 953. [Declarations Part of a Fact in the *Res Gestae*]; Statement Must be Contemporaneous.¹³— The rule as commonly laid down is that an extrajudicial declaration must, in order to be received in evidence, be contemporaneous with some principal fact in the *res gestae*.¹⁴ Few rules are more confusing. In the first place, strictly speaking, it is not and cannot be insisted on. Practical contemporaneousness is all that is required.¹⁵

The statement is further confused as the extrajudicial declarations which properly constitute part of the *res gestae* may fall within one or the other of two general classes. (1) They may be independently relevant, circumstantially probative by reason of their mere existence, e.g., the utterance in an action of libel or slander or proof of the mental state with which a particular act is done. (2) They may be hearsay statements, used in their assertive capacity, as proof of the facts alleged, e.g., where one injured in a railroad collision gives a spontaneous account of it, before he has time to invent anything to his own advantage. To the admissibility of these two classes or species of extrajudicial statement an entirely different standard of contemporaneousness is customarily applied by judicial administrators.

The independently relevant statement may be admitted whether it follows¹⁶ or precedes¹⁷ the principal fact to be established by such declaration if it continues to be evidentiary of the fact to be proved by it¹⁸ as in case of statements of intention.

In case of a spontaneous statement it is of course necessary that the controlling fact or facts from which spontaneity arises should be actually present or that its or their influence should remain, dominating the mind of the declarant.¹⁹ In other words, the essential consideration is as to the presence of what may be called the reflection-numbing operation of certain impressive facts upon the mind of the declarant.

The interval must be so short that any suspicion of fabrication will be eliminated.²⁰

The rule is customarily laid down that an extrajudicial statement admitted as part of the *res gestae* must characterize some proper fact within its scope.²¹

13. 4 Chamberlayne, Evidence, §§ 2992–2996

14. Trenton Pass. R. Co. v. Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637 (1897).

15. Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 459, 101 Am. St. Rep. 660 (1903).

16. Bradley v. State, 54 Tex. Cr. App. 53, 111 S. W. 733 (1908).

17. State v. Laster, 71 N. J. L. 586, 6 Atl. 361 (1905).

18. Louisville, etc., R. Co. v. Pearson, 97 Ala. 211, 12 So. 176 (1893); Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

19. Keyes v. Cedar Falls, 107 Iowa 509, 78 N. W. 227 (1899).

20. Com. v. Van Horn, 188 Pa. St. 143, 41 Atl. 469 (1898).

21. Smith v. National Ben. Soc., 123 N. Y. 85, 25 N. E. 127, 9 L. R. A. 616 (1890).

This may be doubted, notwithstanding the well-settled character of the rule. Certainly, the proposition does not hold true in case of a *spontaneous* utterance. What the half-dazed victim of a railroad accident, for example, has to say regarding the cause of his condition has, as a rule, little effect in limiting, explaining or otherwise characterizing any fact in the *res gestae*, whatever may be the meaning attached to that elastic phrase.

In accident cases great assistance is furnished by admitting in evidence spontaneous statements of the participants in the transaction,²² and in criminal cases statements of the deceased²³ or of the accused²⁴ or of the person injured are likewise admitted even though self-serving.²⁵ The so-called *res gestae* fact should itself be receivable in evidence²⁶ as one material to the issue.²⁷

§ 954. The "Principle of the *Res Gestae*."²⁸—What did Prof. Greenleaf understand by "the principle of the *res gestae*"? To attempt grasping, even in outline, the present situation regarding the meaning of *res gestae* as employed by American courts and something as to the rule admitting extrajudicial statements as part of this class of facts, it may be necessary to examine the work of this eminent authority in some detail. "*Res gestae*" means what, if anything, Greenleaf has made it mean. To him, it owes its great extension in scope, its rank as a so-called "principle." The feature which the various rules relied upon by Greenleaf in illustration of his general "principle" of the *res gestae* possess in common is that of introducing as a ground for receiving the evidence an element of probative force *distinct from the general credit of the declarant*.

The basis of Greenleaf's "principle of the *res gestae*" is further defined by his inclusion, as illustrations of it, of classes of extrajudicial statements which are chiefly evidentiary by reason of their mere existence and which, in the present treatise it has seemed appropriate to denominate independently relevant, i.e., probative, regardless of their truth or falsity. Under this head are grouped all juridical uses of an unsworn statement in its circumstantial aspect, no inference being suggested as to the truth of the facts asserted.

§ 955. [The "Principle of the *Res Gestae*"]; Relation to Rule Against Hearsay.²⁹—The firm establishment and general acceptance among courts and jurists of the proposition really implied in Greenleaf's "principle of the *res gestae*" would seem to promise much benefit to the practical operation of the

22. *Gilbert v. Ann Arbor R. Co.*, 161 Mich 73, 125 N. W. 745 (1910).

23. *Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469 (1898).

24. *Darby v. State*, 9 Ga. App. 700, 72 S. E. 182 (1911); *State v. Rutledge*, 135 Iowa 581, 113 N. W. 461 (1907).

25. *Murer Coal & Ice Co. v. Howell*, 217 Ill. 190, 75 N. E. 469 (1905).

26. *Pinney v. Jones*, 64 Conn. 545, 30 Atl. 762, 42 Am. St. Rep. 209 (1894).

27. *State v. Whitt*, 113 N. C. 716, 18 S. E. 715 (1893).

28. 4 Chamberlayne, *Evidence*, §§ 2997-3002.

29. 4 Chamberlayne, *Evidence*, § 3003.

rule against hearsay. That an extrajudicial statement should be received under proper administrative restrictions in individual cases, as primary evidence in support of any relevant inference, not resting in main upon the credit of the declarant, to which it logically gives rise would at once deprive the hearsay rule of its anomalous character and introduce a simplifying rule of much scientific value and of great practical assistance to judicial administration.

§ 956. **The Modern View.**³⁰— Recognizing the actual and the still greater potential value of Greenleaf's work in this connection, it may be reluctantly admitted that the main body of the legal progress along lines of evidence has by no means taken up the entire advanced ground which the eminent authority of the last century, as it were, staked out for it. The mere logical relevancy of an unsworn statement, though not resting in main upon the credit of the declarant, is not in itself as yet a sufficient ground for receiving it in support of a proposition as to which it convinces the mind. This is true regardless of the forensic necessities of the proponent or the administrative situation of the case.

Courts had long been familiar with the probative force of an extrajudicial statement rendered spontaneous by the controlling influence of a fact in the *res gestae*, properly so-called. That they should hesitate to do justice by receiving spontaneous statements where the dominating fact is an evidentiary or probative one could scarcely be expected. The essential element of proving power was the spontaneous, unreflecting nature of the utterance. The relation which the controlling fact sustained to the proposition in issue, whether its relevancy was constituent, as being that of a *res gestae* fact, or probative as being that of an evidentiary one could not be permitted to be a determining factor in the doing of justice. As Greenleaf's classification made all spontaneous statements "part of the *res gestae*," modern courts have felt no hesitation in extending the term *res gestae* so as to cover relevant facts controlling the volition of the declarant, whatever be their relation to the issue.³¹

§ 957. **[The Modern View]; Considerations Determining Spontaneity.**³²— Whether the circumstances under which a declaration was made are such as to make it reasonably probable that it was spontaneous presents a preliminary question for the determination of the trial judge.³³ The burden is upon the proponent to show the essential fact.³⁴ Should the judge be of opinion that an opportunity for deliberation and reflection has been afforded to the speaker, it will be assumed to have been utilized, the declaration being rejected.³⁵

§ 958. **[Considerations Determining Spontaneity]; Elapsed Time.**³⁶— The paramount single influence in consideration of the admissibility of spontaneous

30. 4 Chamberlayne, Evidence, §§ 3004, 3005.

34. Pool v. Warren County, 123 Ga. 205, 51 S. E. 328 (1905).

31. Travellers' Insurance Co. v. Mosley, 8 Wall. (U. S.) 397, 403, 19 L. ed. 437 (1869).

35. Wright v. State, 88 Md. 705, 41 Atl. 1060 (1898).

32. 4 Chamberlayne, Evidence, § 3006.

36. 4 Chamberlayne, Evidence, §§ 3007-

33. State v. Williams, 109 La. 222, 32 So. 402 (1902).

3009.

declarations is that of elapsed time as other things being equal³⁷ the shorter the interval of elapsed time the greater the probability that the declaration is spontaneous.³⁸ No definite rule can be laid down however as shortness of elapsed time is by no means equivalent to proof of spontaneity.³⁹ Where the interval is indefinite spontaneity must be affirmatively shown and even a very short interval of time is not conclusive in favor of its existence.⁴⁰ Where the interval of elapsed time is definite the comparative number of receptions to rejections increases as the length of time is shorter and where the time is two minutes⁴¹ or less a large proportion of the statements are admitted unless it otherwise appears that the statement was not spontaneous⁴² but even long periods as several hours may not render the statement inadmissible under exceptional circumstances.⁴³

§ 959. [Considerations Determining Spontaneity]; Form of Statement.⁴⁴—A form of statement presented in the evidence may assist judicial administration in determining whether a given utterance is spontaneous. Strong emotion is brief, incisive, often disjointed in expression. It gravitates, apparently by some rudimentary impulse, to the pulsating, the rythmical. Overflowing emotion shows a peculiar torrential quality, in itself readily distinguished from the calm, orderly word-choosing process of deliberate, purposeful discourse. An extended, involved and closely connected form of statement naturally tends, therefore, to repel the inference of spontaneity.⁴⁵ Should the utterance actually be automatic or instinctive, the circumstance that it is made in a narrative form is by no means conclusive against its admissibility.⁴⁶ Should a reasonable suspicion exist on the part of the judges that the statement is, as a matter of fact, a narrative, i.e., a deliberate account of past events, the administrative practice is to exclude it.⁴⁷

37. Whether particular sayings constitute a part of *res gestae* depends rather on the spontaneity of the events than on the precise time which may have elapsed between the main fact and the statements made. *Cobb v. State* (Ga. App. 1912), 74 S. E. 702.

38. *State v. Molisse*, 38 La. Ann. 381, 58 Am. Rep. 181 (1886); *Houston, etc., R. Co. v. Weaver* (Tex. Civ. App. 1897), 41 S. W. 846.

39. *Du Bois v. Luthmer*, 147 Iowa 315, 126 N. W. 147 (1910) (ten minutes received).

Adequate knowledge on the part of the declarant must in any event be shown.

New Hampshire.—*Davis v. Boston & M. R. R.*, 75 N. H. 467, 76 Atl. 170 (1910).

40. "It is no more competent because made immediately after the accident than if made a week or a month afterwards." *Lane v. Bryant*, 9 Gray (Mass.) 245, 247; 69 Am. Dec. 282 (1857), per Bigelow, J.

41. *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903); *Coll v. Easton Transit Co.*, 180 Pa. St. 618, 37 Atl. 89 (1897).

42. *King v. State*, 5 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681 (1888) (a little more than a minute).

43. *Walters v. Spokane International Ry. Co.*, 58 Wash. 298, 108 Pac. 593 (1910) (nearly two hours).

44. 4 Chamberlayne, Evidence, § 3010.

45. *Indianapolis St. R. Co. v. Whitaker*, 160 Ind. 125, 66 N. E. 483 (1903).

46. *Lovett v. Georgia*, 30 Ga. 255, 4 S. E. 912 (1887); *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903); *Edwards v. Edwards*, 39 Pa. St. 369 (1861).

47. *People v. Dice*, 120 Cal. 1897, 52 Pac. 477 (1898); *Thornton v. State*, 107 Ga. 683, 33 S. E. 673 (1899); *Savannah, etc., R. Co. v.*

A written statement is not *per se* inadmissible,⁴⁸ although it would seem that deliberation must usually accompany the making of a statement in such form.

§ 960. [Considerations Determining Spontaneity]; Consciousness and Lack of Motive to Misstate.⁴⁹— It should appear in all cases that the declarant was conscious⁵⁰ and the fact that the statement was against the interest of the declarant will render it more readily received⁵¹ than where it is self-serving.⁵²

§ 961. [Considerations Determining Spontaneity]; Permanence of Impression.⁵³— A fact receiving great judicial consideration is as to the permanent nature of the impression which the controlling circumstances are calculated to create.⁵⁴ “The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration.”⁵⁵

The presence of an excited state of mind at the time of the declaration tends to make the statement more spontaneous⁵⁶ and a spectator is deemed less likely to be excited than a participant in the affair.⁵⁷ To render the statement automatic it is essential that no intervening circumstance should have taken place⁵⁸ and in such case the burden is on the proponent to show that the statement subsequently made was spontaneous⁵⁹ as where medical assistance is obtained⁶⁰ or removal from the scene of the transaction occurs.⁶¹

§ 962. [Considerations Determining Spontaneity]; Physical State or Condition.⁶²— Plainly important for consideration of the court in determining the question of spontaneity is the physical state or condition in which the declarant is shown to have been at the time his statement was made. For example, an

Holland, 82 Ga. 257, 268, 10 S. E. 200, 14 Am. St. Rep. 158 (1888).

48. From three to five minutes after her throat was cut, the windpipe being severed so that she could not speak, the deceased wrote. “Jess Morrison killed me” This was shown in evidence. State v. Morrison, 64 Kan. 669, 68 Pac. 48 (1902).

49. 4 Chamberlayne, Evidence, §§ 3011, 3012.

50. Christopherson v. Chicago, M. & St. P. R. Co., 135 Iowa 409, 109 N. W. 1077 (1906).

51. O'Shields v. State, 55 Ga. 696 (1876).

52. Bradberry v. State, 22 Tex. App. 273, 2 S. W. 582 (1886); U. S. v. King, 34 Fed. 302 (1888).

53. 4 Chamberlayne, Evidence, §§ 3013-3019.

54. Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104 (1908); Murray v. Boston, etc., R. Co., 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

55. Murray v. Boston, etc., R. Co., 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903), per Walker, J.

56. State v. Rutledge, 135 Iowa 581, 113 N. W. 461 (1907).

57. Louisville Ry. Co. v. Johnson's Adm'r, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133 (1909).

58. Bernard v. Grand Rapids Paper Box Co., 170 Mich. 238, 136 N. W. 374 (1912).

59. Ford v. State, 40 Tex. Cr. App. 280, 50 S. W. 350 (1899).

60. State v. Deuble, 74 Iowa 509, 38 N. W. 383 (1888); Mutch v. Pierce, 49 Wis. 231, 5 N. W. 486, 35 Am. Rep. 776 (1880).

61. Martin v. New York, etc., R. Co., 103 N. Y. 626, 9 N. E. 505 (1886). But see, Scheir v. Quirin, 177 N. Y. 568, 69 N. E. 1130 (1904), affirming 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956.

62. 4 Chamberlayne, Evidence, § 3020.

unsworn statement made while the declarant is afflicted with intense pain resulting from a recent injury,⁶³ would probably, were no modifying facts suggested, be judged to be spontaneous. Severe bodily suffering or mental anguish may be highly significant in establishing the truth of facts asserted in the utterance. Thus the declarations of a woman accusing her husband of setting her clothing on fire, made while her body was still smoking;⁶⁴ those of a workman who had shortly before fallen into a vat of scalding liquid;⁶⁵ those of a man who had been shot, made while his shirt was still on fire from the flash of the weapon;⁶⁶ and those of a man who had both arms crushed, made about an hour after the accident,⁶⁷ have been received in evidence as spontaneous and worthy of consideration by a jury. The first successful efforts by an injured person at articulation may be received as spontaneous though the interval of time since the original occurrence has been a considerable one.⁶⁸

§ 963. Narrative Excluded; Admissions.⁶⁹—That a spontaneous statement may relate to the existence of a fact which is physically past, though present in the influence which it exerts, is not questionable. Where, however, an extrajudicial assertion is a deliberate statement, made upon reflection of past events, the declaration is classed as narrative and cannot be received under the present rule,⁷⁰ admitting spontaneous statements as proof of the facts asserted.

Substance, rather than form, of statement, is regarded by judicial administration as decisive, in this connection.⁷¹ Though an extrajudicial declaration be, in form, narrative, it will be received in its assertive capacity if in reality it amounts to the spontaneous assertion of a relevant fact.⁷² Nor is a statement necessarily to be regarded as lacking in spontaneity because it is made in response to a question,⁷³ though that fact often is an important element in rendering a statement inadmissible.⁷⁴

63. *Scheir v. Quirin*, 177 N. Y. 568, 69 N. E. 1130 (1904), *affirming* 77 App. Div. 624, 78 N. Y. Suppl. 956 (1902).

64. *Walker v. State*, 137 Ga. 398, 73 S. E. 368 (1912).

65. *Scheir v. Quirin*, 177 N. Y. 568, 69 N. E. 1130 (1904), *affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956 (1902).

66. *Bice v. State*, 51 Tex. Cr. App. 133, 100 S. W. 949 (1907).

67. *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 Pac. 113, 4 L. R. A. (N. S.) 636 n (1905).

68. *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750 (1890). A physician may not testify that when he pressed the plaintiff's ankle the plaintiff flinched as this is a mere declaration to the physician *Norris v. Detroit United R. Co.*, 185 Mich. 264, 151 N. W. 747. It may well be doubted whether this case is good law.

69. 4 Chamberlayne. Evidence, §§ 3021, 3022.

70. *Waldele v. R. Co.*, 95 N. Y. 274, 278, 47 Am. Rep. 41 (1884), per Earl, J.

71. *Bionto v. Illinois Cent. R. Co.*, 125 La. 147, 51 So. 98, 27 L. R. A. (N. S.) 1030 (1910).

72. *Lovett v. State*, 80 Ga. 255, 4 S. E. 912 (1887); *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

73. *Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 Pac. 1051 (1911); *Christopher v. Chicago, M & St. P. R. Co.*, 135 Iowa 409, 109 N. W. 1077 (1906); *Lexington v. Fleharty*, 74 Neb. 626, 104 N. W. 1056 (1905).

74. *Greener v. General Electric Co.*, 208 N. Y. 135, 102 N. E. 527 (1913).

Statements against interest are to be carefully distinguished from ordinary spontaneous statements as they are received as admissions.⁷⁵ The admissions of the agent are under a canon of substantive law received only when made while the agent was acting in the business of the principal although they are commonly received or rejected as being within or outside of the "*res gestae*."⁷⁶

§ 964. [Narrative Excluded]; Spontaneous Statements by Agents.⁷⁷—The spontaneous statements of an agent stand in an entirely different administrative position, as evidence of the facts asserted, from his extrajudicial admissions. The latter, whatever may be the phraseology employed in relation to the term *res gestae*, involve questions of law, procedural or substantive. A narrative extrajudicial statement of an agent will be received as an admission, if shown to be suitably connected with the agency.⁷⁸ Otherwise it will generally be rejected.⁷⁹

§ 965. [Narrative Excluded]; Remoteness.⁸⁰—It has been settled by authority both in England and in the States of the American Union that there is an important administrative difference between a narrative statement and one which simply relates to a past transaction. In other words, a spontaneous utterance may, and indeed usually does, relate to a fact which is past in point of time. So long as the controlling effect of the *res gestae* or probative fact upon the will of the declarant, has not so far ceased to operate as to make it reasonable to feel that the stage of automatic utterance has been replaced by that of self-consciousness, the statement is not to be regarded as narrative.⁸¹ It is doubtful whether any more definite rule can well be formulated as to the precise point of time or causation at which the so-called "principal fact" can be said to be too remote from the statement offered in evidence, for the latter to be regarded as spontaneous.⁸²

§ 966. Range of Spontaneous Statements; Probative Facts Preceding the *Res Gestae*.⁸³—The effect of the modern extension of the term *res gestae* in such a way as to embrace not only the *res gestae*, but also the probative facts, by which, in the absence of direct evidence, it is sought to reproduce, circumstantially, the former or constituent facts, has resulted in depriving the phrase *res gestae* of any very definite meaning. As at present generally used the phrase *res gestae*,

75. *People v. Simonds*, 19 Cal. 275 (1861); *State v. Davis*, 104 Tenn. 501, 58 S. W. 122 (1900); *McGee v. State*, 31 Tex. Cr. App. 71, 19 S. W. 764 (1892); *Johnson v. State*, 8 Wyo. 494, 58 Pac. 761 (1899).

76. *American Law Review*, XV 80 (1881), per Professor James Bradley Thayer.

77. 4 Chamberlayne, Evidence, §§ 3023, 3024.

78. *Sonnentheil v. Christian Moerlein Brew-*

ing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492 (1899).

79. *Connecticut*.—*Morse v. Consolidated Ry. Co.*, 81 Conn. 395, 71 Atl. 553 (1908).

80. 4 Chamberlayne, Evidence, § 3025.

81. *State v. Alton*, 105 Minn., 410, 117 N. W. 617, 15 Am. & Eng. Ann. Cas. 906 (1908).

82. *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908); *State v. Blanchard*, 108 La. 110, 32 So. 397 (1902).

83. 4 Chamberlayne, Evidence, § 3026.

in connection with the relevancy of spontaneity now under consideration, is so employed as to cover, not only the *res gestae* or constituent facts, properly so-called, but also, with apparently entire indifference, those which precede and those which follow a period of time at which alone any constituent fact could have occurred. It occasionally happens that the reflective faculties of a person are so numbed and stilled by some danger which is imminent or by dread of something that is clearly about to take place that any statement made at the time may properly be regarded as spontaneous.⁸⁴

§ 967. [Range of Spontaneous Statements]; Probative Facts Subsequent to the *Res Gestae*.⁸⁵— Probative facts, the office of which is to throw light backward, as it were, upon the nature of the actual *res gestae*, are receivable in evidence, upon ordinary principles. Among these may properly be extrajudicial statements, employed either in an independently relevant capacity or as spontaneous utterances. In the first case, the probative effect is produced by reason of the mere existence of the declaration, suitable relevancy being shown. A spontaneous utterance is evidence of the truth of the facts asserted in the declaration.

Criminal cases offer the most conspicuous field for the application of this rule⁸⁶ as the parties are most often under excitement and in such cases even explanations by the accused of his conduct are often admitted⁸⁷ as in homicide cases⁸⁸ as well as larceny.⁸⁹ In a poisoning case the prosecution is permitted to show practically everything said by the injured person regarding the administration or operation of the poison from the time it was first introduced into the system of the deceased until death ensues.⁹⁰

§ 968. [Range of Spontaneous Statements]; Accusation in Travail.⁹¹— The presence of an element of spontaneity may affect the probative force of a so-called declaration in travail. It has long been held that the mother of an illegitimate child might accuse the putative father at the time of her travail,⁹²

84. In a prosecution for assault with intent to kill, evidence that as the wife of the victim opened a door at the time of the shooting, her child said "Look! there is Uncle Isaac and Uncle Jesse going to shoot us!" was properly admitted. *Shirley v. State*, 144 Ala. 35, 40 So. 269 (1906). On an inquiry regarding the death of a person, a letter written by him stating an intention to commit suicide has been admitted. *Rogers v. Manhattan Ins. L. Co.*, 138 Cal. 285, 71 Pac. 348 (1903).

85. 4 Chamberlayne, Evidence, §§ 3027-3032.

86. *Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900); *State v. Spivey*, 151 N. C. 676, 65 S. E. 995 (1909).

87. *Slay v. State* (Tex. Cr. App. 1907), 99 S. W. 550.

88. *Carwile v. State*, 148 Ala. 576, 39 So. 220 (1905).

89. *Bennett v. People*, 96 Ill. 602 (1880).

90. *People v. Benham*, 63 N. Y. Suppl. 923, 30 Misc. 466, 14 N. Y. Cr. Rep. 434 (1900).

91. 4 Chamberlayne, Evidence, § 3033.

92. The time of travail, as this phrase is employed by the legislature has been held to mean the period of labor-pain prior to the birth of the child. *Bacon v. Harrington*, 5 Pick. (Mass.) 63 (1827); *Com. v. Cole*, 5 Mass. 517 (1809). See, also, *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871 (1891); *Tacey v. Noyes*, 143 Mass. 449, 9 N. E. 830 (1887); *Long v. Dow*, 17 N. H. 470 (1845).

and that the statement so made might be received in evidence on affiliation proceedings as proof of the fact asserted.⁹³

§ 969. [Range of Spontaneous Statements]; Declarations of Complainant in Rape.⁹⁴—Criminal proceedings to punish for rape, attempts at rape, indecent assault and the like present peculiar problems of judicial administration, which have been recognized since early times. The peculiar nature of the offence, the circumstances which usually surround its commission, the sex of the injured party, and her natural reticence to speak of it tend to make proof difficult and lead to a relaxation of strict rules of evidence. The result has been the development of a unique rule,⁹⁵ or perhaps what would better be termed a principle, as there can hardly be said to exist a settled rule, at least, a uniform rule. The courts have all recognized the principle that, notwithstanding the general rule that a party's self-serving declarations may not be introduced in evidence by him, in this instance there should be an exception. They have differed in the manner of applying this principle and in the latitude to be given to the exception.

The mere fact that the injured party had made a complaint to a proper person in seasonable time is all that has been allowed in many cases. This was permitted to be shown by both the complainant and by the person to whom the complaint was made.⁹⁶

In other cases, the fact of the complaint and the particulars thereof have been shown as part of the case-in-chief of the prosecution; but the particulars were not admitted as proof of the facts complained of. They were purely for the purpose of corroborating the prosecutrix in anticipation of impeachment; or for the purpose of determining the conflict of veracity frequently arising in such cases between the complaining witness and the accused; or to anticipate the adverse inference upon which the defendant would rely, if no proof of a complaint by his accuser were offered.

A rule which has been adhered to in many cases allows the fact that a complaint was made to be shown in the case-in-chief of the prosecution; and, if any attempt is made by the defence to impeach the credibility of the prosecutrix, then the particulars of the complaint may be shown. Here, again, the particulars are admitted solely for corroborative purposes. They are not considered any proof of the facts asserted by them. The question of the extent to which the impeachment of the prosecutrix must go before the particulars of the com-

93. *Bacon v. Harrington*, 5 Pick. (Mass.) 63 (1827).

94. 4 Chamberlayne, Evidence, §§ 3034, 3035. Admissibility of prompt complaints in rape. See note, Bender, ed., 104 N. Y. 493.

95. For some statement of the historical basis upon which the anomalous rule with regard to rape rests, see article of Prof. J. B.

Thayer on Bedingfield's case in 14 Amer. Law Rev. at page 830.

96. "In *R. v. Stroner*, 1 C. & K. 650 (1845), the prosecution was compelled by the court to call the woman to whom the complaint was made, although she was at the time in attendance as a witness for the accused." 14 Amer. Law Rev. p. 830 n.

plaint are admissible seems not to have been very clearly indicated by the authorities.

Lastly, the fact of the complaint, together with its details, are frequently admitted as spontaneous statements under a true exception to the hearsay rule. The entire evidence is given as part of the case-in-chief of the prosecution.⁹⁷

The earlier English decisions allowed the fact that the alleged outraged woman had made a complaint to be shown, but excluded the particulars of such complaint.⁹⁸ The later decisions modified this view and the present rule in England admits both the fact of the complaint and its particulars; but the latter are not admitted as proof of the facts complained of. They are received solely for the purpose of showing consistent conduct on the part of the prosecutrix and to corroborate her testimony. The particulars of the complaint are admitted on the examination-in-chief of the witnesses for the prosecution.⁹⁹

§ 970. [Declarations of Complainant in Rape]; American Rule.¹—The various courts of the United States are not all in harmony in their attitude toward the admissibility of the declarations of the complainant in a case of rape. The mere fact that a complaint was made to a proper person within a reasonable time is uniformly held to be admissible as part of the case-in-chief of the prosecution for the purpose, it is commonly said, of corroborating the prosecutrix.² As to whether the particulars of the complaint can be shown as part of the case-in-chief of the prosecution, there is a clear and marked division of opinion. In the large majority of the jurisdictions, the details or particulars of the complaint cannot be shown in the first instance,³ while in a few jurisdictions the modern English rule is followed and both the fact that a complaint was made and its full details are admitted upon the direct examination of the witnesses for the prosecution.⁴ The defence may draw out the particulars of the complaint upon the cross-examination of the people's witnesses.⁵ However, in some jurisdictions, where the details of the complaint are rejected in the first instance, it has been held that, if the defense attempts to impair the credibility of the prosecutrix, the full details may be shown by way of rebuttal for the purpose of corroborating her.⁶

§ 971. [Declarations of Complainant in Rape]; Independent Relevancy; Failure

97. Sodomy.—Upon principle it would seem that the rules of evidence applicable in rape cases would be equally applicable in sodomy cases, where the victim does not consent. This has in effect been held in a case where the victim was a boy four years of age. *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908).

98. *Rev. v. Mercer*, 6 Jur. 243 (1842).

99. *Rex v. Osborne*, 74 L. J. K. B. 311, 1 K. B. 551, 92 L. T. 393, 53 W. R. 494, 69 J. P. 189, 21 L. T. R. 288 (1905).

1. 4 Chamberlayne, Evidence, §§ 3036-3039.

2. *People v. Wilmot*, 139 Cal. 103, 105, 72 Pac. 838 (1903).

3. *People v. Weston*, 236 Ill. 104, 86 N. E. 188 (1908).

4. *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608 (1879).

5. *Huey v. State*, 7 Ga. App. 398, 66 S. E. 1023 (1910).

6. *Pulley v. State*, 174 Ind. 542, 92 N. E. 550 (1910).

to **Complain.**⁷— So natural is the spontaneous impulse to disclose the fact and nature of the injury in this class of cases that any delay in making such a complaint not shown to be due to the presence of some adequate cause will almost inevitably suggest the inference of subsequent fabrication and invention. A forensic necessity, therefore rests upon the prosecution to explain, to the satisfaction of the jury, the reason for any delay which might otherwise seem unreasonable.⁸

It is obvious from what has been said that the administrative reasons which permit the independently relevant fact of a complaint to be received in evidence require not only that the statement should be freshly made but also that it should be *voluntary*. Where the condition of the complainant is such as to compel explanation, or the explanation is demanded by interested persons in the form of questions⁹ there is no such voluntary complaint as tends to negative the inference of consent which has arisen from previous silence. However, in view of the peculiar nature of the crime of rape and the situation of the injured party after its commission, the complaint is not under all circumstances excluded because made in response to questions.¹⁰

§ 972. [**Declarations of Complainant in Rape**]; **The Element of Time; Independent Relevancy.**¹¹— The early English law requiring "hue-and-cry" was designed to afford immediate notice to the community of the commission of a crime that instant pursuit might be made and the offender apprehended. In rape, as in other crimes, a *fresh* complaint was demanded; i.e., only a short interval could be permitted to elapse between the doing of the deed and the making of the complaint. So far as the fact of complaint is one of independent relevancy, the same strictness of requirement as to length of time between offence and complaint is not made under the modern rule.¹² The use of the fact of complaint is, in this connection, a corroborative one, operating by the removal of the infirmative explanation of subsequent invention. To be relevant in this respect, a complaint must have been made within such a time after the occurrence that it may reasonably be held to negative in some degree the alternative theory of fabrication.¹³

Where the detailed statements of the complainant are used in their hearsay capacity as primary evidence of the facts asserted the same requirement of immediate complaint is made, but the reason for it is entirely different. Fresh

7. 4 Chamberlayne, Evidence, §§ 3040, 3041.

8. *Com v. Rollo*, 203 Mass. 354, 89 N. E. 556 (1909); *People v. Marra*, 125 Mich. 376, 84 N. W. 284 (1900).

9. *Cunningham v. People*, 210 Ill. 410, 413, 71 N. E. 389 (1904), per Hand, J.

10. *State v. Dudley*, 147 Iowa 645, 126 N. W. 812 (1910); *State v. Peres*, 27 Mont. 358, 71 Pac. 162 (1903).

11. 4 Chamberlayne, Evidence, §§ 3042, 3043.

12. *State v. Bebb*, 125 Iowa 494, 496, 101 N. W. 189 (1904), per Bishop, J.

13. *State v. Bebb*, 125 Iowa 494, 101 N. W. 189 (1904); *Cowles v. State*, 51 Tex. Cr. App. 498, 102 S. W. 1128 (1907) (after defendant's arrest).

complaint is required, not for the purpose of securing pursuit and apprehension of the offender nor even for the later and still common purpose of corroboration,¹⁴ but in order that the resulting statement may be *spontaneous* and, accordingly furnish evidence of the facts declared in it.

§ 973. [Range of Spontaneous Statements]; Declarations of Owner on Discovering Larceny, etc.¹⁵—Worthy of note among spontaneous utterances which follow the general rule now under consideration are the declarations of owners of property made shortly after it has been taken from their possession, by violence or otherwise. Where the conditions of spontaneity are present, these extrajudicial statements may be received as proof of the facts asserted.¹⁶ On the other hand, a failure to complain with reasonable promptness may well afford ground for a doubt as to the good faith of a present charge.¹⁷

§ 974. [Range of Spontaneous Statements]; Personal Injuries.¹⁸—A common application of the rules relating to the use of unsworn spontaneous statements as proof of the facts asserted is found in those cases where action is brought to recover damages for personal injuries.¹⁹ In a typical case, the attendant excitement, the bodily pain or mental anguish consequent upon the injury, the unwonted importance temporarily attaching to the injured person himself constitute a combination of influences calculated to drive from the mind of a sufferer thoughts of premeditation or invention. As was said by the supreme court of New Hampshire: "When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character."²⁰ After an interval, however, of greater or less duration according to the circumstances of the case, the question is sure to occur to the victim of the accident. Who is responsible for this pain which I am suffering; who will recompense me for my other injuries? With this, or some similar act of introspection, the state of deliberated utterance may be assumed to begin.

The declarations may be those of the person injured²¹ or those of the party sought to be held liable or his agent, employee or representative.²² In some instances the declarations of third parties or bystanders have been received.²³

That an unsworn statement made under such circumstances as render it spon-

14. *People v Row*, 135 Mich. 505, 98 N. W. 13, 10 Detroit Leg. N., 841 (1904) (three months).

15. 4 Chamberlayne, Evidence, § 3044.

16. *Illinois*.—*Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593 (1896).

17. *Tompkins v Saltmarsh*, 14 Serg. & R. (Pa.) 275, 280 (1826).

18. 4 Chamberlayne, Evidence, § 3045.

19. *Muren Coal & Ice Co. v. Howell*, 217 Ill. 190, 75 N. E. 469 (1905).

20. *Murray v Boston & M. R. Co.*, 72 N. H. 32, 37, 54 Atl. 280, 61 L. R. A. 495, 101 Am. St. Rep. 650 (1903), per Walker, J.

21. *Muren Coal & Ice Co. v. Howell*, 217 Ill. 190, 75 N. E. 469 (1905).

22. *Hyvonen v. Hector Iron Co.*, 103 Minn. 331, 115 N. W. 167, 123 Am. St. Rep. 332 (1908).

23. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 37 Utah 473, 109 Pac. 10, 24 Am. & Eng. Ann. Cas. 307 (1910).

taneous reveals an apparent element of inference on the part of the speaker²⁴ does not necessarily furnish ground for rejecting the declaration.

It scarcely need be said that, if the elements of spontaneity were present in the making of an unsworn statement, the fact that it was made to a physician cannot affect its admissibility, the statement being received, in accordance with the general rule, as proof of the facts therein stated.

It is a well-settled general rule that statements to a physician concerning present pain, suffering and physical condition generally, made with a view to obtaining treatment and relief are admissible in evidence as proof of the patient's condition at the time the statements were made.²⁵

The facts shown by the articulate utterances of the patient should be those reasonably essential to a proper diagnosis of his state or condition,²⁶ collateral matters²⁷ such as the name of an assailant²⁸ or an assertion as to the instrument with which an assault was committed²⁹ not being regarded as properly included.

Statements as to past bodily or mental condition cannot be regarded as admissible under the present rule.³⁰ It has, however, been decided that statements of past pain and suffering made to a physician, when necessary to a correct diagnosis, may be testified to by the physician;³¹ but that they must not be considered by the jury as evidence tending to show the fact of such pain and suffering.³² The wisdom of such a rule may be doubted as its application by the court and jury must clearly be difficult.

Statements made to a physician for the purpose of enabling the latter to testify as an expert in favor of the declarant are usually excluded for administrative reasons.³³

§ 975. Probative Weight of Spontaneous Statements.³⁴—The probative force of a spontaneous utterance clearly lies in the elimination of any controlling motive to misrepresent the truth. The operation of the reflective faculties, with their possible perversions of self-interest, has been replaced by the mentally automatic, closely analogous to the exactness of natural law. This judi-

24. *State v. Morrison*, 64 Kan 669, 68 Pac. 48 (1902).

25. *Chicago City Ry. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28 (1904).

26. Statements of third persons are not deemed proper constituents upon which to base the diagnosis of a physician. *Atchison, etc., R. Co. v. Frazier*, 27 Kan. 463 (1882) (husband); *Heald v. Thing*, 45 Me. 392 (1858) (wife).

27. *Richards v. Com.*, 107 Va. 881, 59 S. E. 1104 (1908).

28. *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84 (1892).

29. *Collins v. Waters*, 54 Ill. 485 (1870); *People v. O'Brien*, 92 Mich. 17, 52 N. W.

84 (1892); *Denton v. State*, 1 Swan (Tenn.) 279 (1851).

30. *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573 (1892).

31. A statement by a slave to his attending physician that he had been ill for the past three weeks was received as proof of that fact. *Yeatman v. Hart*, 6 Humphr. (Tenn.) 374 (1845). See, also, *Looper v. Bell*, 1 Head (Tenn.) 373 (1858).

32. *Wilkins v. Brock*, 81 Vt. 332, 70 Atl. 572 (1908); *Acme Cement Plaster Co. v. Westman* (Wyo. 1912), 122 Pac. 89.

33. *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. (N. S.) 826 n. (1908).

cial administration trusts, it being assumed that the declarant has stated the truth as it appears to him.³⁵ That the statement is self-serving does not constitute a necessary ground for its rejection, and one against the interest of the declarant in the nature of a confession need not be shown to have been voluntary as that term is commonly used in connection with alleged confessions by those accused of crime,³⁶ its admissibility resting upon an entirely different basis. In like manner, the spontaneous statement of a person about to die may take the place of a dying declaration, properly so-called,³⁷ even in a civil case.³⁸

§ 976. Who Are Competent Declarants.³⁹—Determining the admissibility of extrajudicial statements from the standpoint of the competency of the declarant to make the particular statements in question has often taxed administrative judgment. The competency of the declarant may be affected by his age, mental capacity, knowledge of the subject-matter, relation to the main transaction, and the like. It may be laid down as a broad general rule from which there is little dissent and from which, on principle, there can be dissent only in cases where the circumstances are unusual, that a spontaneous declaration is admissible in and of itself without regard to the person making it. This necessarily follows as a result of the basis of admissibility, such declarations being received because of their automatic unpremeditated character. Therefore, the spontaneous declarations of a child too young to be sworn as a witness,⁴⁰ an agent or representative of one of the parties,⁴¹ a bystander who witnessed the main transaction,⁴² particularly when related to or having a special interest in one of the parties,⁴³ or an adult person of sound mind who is not sworn as a witness because of incompetency⁴⁴ or otherwise are ordinarily received as evidence of the facts declared. It has even been indicated that the spontaneous declarations of an insane person are admissible.⁴⁵ This no doubt is a sound view where it does not appear that the person was insane when the declarations were made, although he is insane at the time of the trial.⁴⁶ Obvi-

34. 4 Chamberlayne, Evidence, §§ 3048, 3049.

35. State v. Alton, 105 Minn. 410, 417, 117 N. W. 617, 15 Am. & Eng. Ann. Cas. 806 (1908), per Lewis, J.

36. Allen v. State, 60 Ala. 19 (1877); Head v. State, 44 Miss. 731 (1870); Miller v. State, 31 Tex. Cr. App. 609, 21 S. W. 925, 37 Am. St. Rep. 836 (1893).

37. State v. Morrison, 64 Kan. 669, 68 Pac. 48 (1902); People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908).

38. Brownell v. Pacific R. Co., 47 Mo. 239 (1871) (negligence); Jack v. Mutual, etc., Life Assn., 113 Fed. 49, 51 C. C. A. 36 (1902).

39. 4 Chamberlayne, Evidence, § 3050.

40. Grant v. State, 124 Ga. 757, 53 S. E. 334 (1906).

41. Ensley v. Detroit United R. Co., 134 Mich. 195, 96 N. W. 34 (1903).

42. Smith v. State, 10 Ga. App. 36, 72 S. E. 527 (1911).

43. People v. McArron, 121 Mich. 1, 79 N. W. 944 (1899) (mother of accused).

44. Dunham v. State, 8 Ga. App. 668, 70 S. E. 111 (1911) (wife of accused, incompetent); Flores v. State (Tex. Cr. App. 1904), 79 S. W. 808 (convict).

45. Wilson v. State, 49 Tex. Cr. App. 50, 90 S. W. 312 (1905).

46. The fact that the prosecuting witness in a case of robbery was insane, and, therefore, incompetent as a witness, at the time of

ously, however, sound administration must sometimes exclude what is apparently a truly spontaneous utterance because of attendant circumstances which make the evidence unreliable, as, for example, the mental incapacity of the declarant⁴⁷ or the admitted physical conditions under which the declaration was made.⁴⁸

In rape cases, and those of similar nature, there is an apparent confusion among the authorities as to the competency of the injured female to make a statement of complaint which is receivable in evidence.⁴⁹

A reasonable rule which would avoid all uncertainty seems easy to formulate. The bare fact that a complaint was made is an independently relevant circumstance and does not depend for its probative force upon whether or not the complainant is sworn as a witness. Such fact, without the details of the complaint, should be shown to the jury in all cases, except possibly in cases where the length of time which elapsed before the complaint was made clearly justifies the trial judge in regarding the evidence as worthless. Where the complaint was spontaneous, the details should, of course, be received also.

trial which took place more than two months after the robbery, is no ground for excluding his spontaneous declarations made shortly after the robbery. *State v. Smith*, 28 Wash. 354, 67 Pac. 70 (1901).

47. *Adams v. State*, 34 Fla. 185, 15 So. 905 (1894) (child three and a half years old too young to be reliable).

48. *Regnier v. Territory*, 15 Okla. 652, 660, 82 Pac. 509 (1905) (where declarant had not seen assailant who had shot from ambush)

49. The statement of a child, made to his

mother after an assault of which he was the victim, with respect to the assault, may be received in evidence notwithstanding the fact that he is too young to be competent to testify. *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908). In an action for assault with intent to commit rape on the person of a female, who, by reason of being an imbecile, was incompetent to testify, the declarations of such female made after the assault are inadmissible. *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608 (1879).

CHAPTER XLV.

HEARSAY AS PRIMARY EVIDENCE; RELEVANCY OF REGULARITY.

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§ 977. **Shop Book Rule.**¹— The shop book rule is that the account-books of a party, supported by his suppletory oath are admissible in evidence to show a sale or delivery of goods or the performance of services.² The rule was a necessity under the old rule that a party could not be a witness for himself as where a shopkeeper had no clerk there was no way of proving the account except through the books³ and this practice was early recognized by statute and in the eighteenth century entries made by deceased clerks began to be received.⁴

The rule was early adopted in the New England States but was made subject to certain modifications or restrictions as to the amounts covered by the entries⁵ but the books were admitted when supported by the suppletory oath.⁶ New

1. 4 Chamberlayne, Evidence, §§ 3051–3063.

2. Pratt v. White, 132 Mass 477 (1882)

3. Conklin v. Stamler, 8 Abb. Prac. (N. Y.) 395, 2 Hilt. 422, 17 How. Prac. 399 (1859); Cole v. Dial, 8 Tex. 347 (1852).

4. Pitman v. Maddox, Holt N. P. 298, 2 Salk. 690, 2 Ld. Raym. 732 (1698).

5. Terrill v. Beecher, 9 Conn. 344 (1832); Davis v. Sanford, 9 Allen (Mass) 216 (1864).

6. Sheehan v. Hennessey, 65 N. H. 101, 18 Atl. 652 (1889).

York and New Jersey also early adopted the rule but the suppletory oath was not required in those states.⁷

A shopbook thus received in evidence becomes primary and independent evidence of the facts stated therein though used in a hearsay capacity.⁸ The rule is not founded on the principle that the entries are a part of the *res gestae* but on the theory that a system of accounts demands accuracy and accuracy becomes habitual with the person keeping such records.

The modern growth of business with the increase in the entries in account-books made the proof of such items increasingly difficult and the early restriction that the books must be used simply to refresh the recollection of the witness was abandoned and the books received in evidence when the witness could swear that the entries were correct when made although he had no memory about the matter.⁹

The difficulty, expense and frequent impossibility of making proof of book accounts combined with legislative enactments and judicial rulings, have resulted in a decided broadening of the "shop book" rule. The rule, in its first stage of development, although frequently designated by its original name, has, in most jurisdictions, been modified by removing every limitation in regard to the amount involved in the transaction and allows, under the old conditions prescribed by the "shop book" rule, original entries in the books of account of persons engaged in all lines of business, professional lines included, made in the usual course of business, as a contemporaneous record of current transactions, by a party or his agent or employee, to be introduced in evidence, without regard to whether such record is in favor of or against the party whose transactions are recorded therein.¹⁰

§ 978. Administrative Requirements; Necessity.¹¹—The fundamental administrative necessity for receiving evidence of shop books lay in the circumstance that as a rule indebtedness from small transactions could be proved in no other way under the ancient rule that a party could not be a witness in his own behalf¹² and it was formerly necessary that the party should prove that he had no clerk or assistant who could testify. This might be shown by proving that there was no clerk¹³ or that he was dead,¹⁴ insane¹⁵ or otherwise unavail-

7. *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521 (1838).

8. *Place v. Parsons*, 17 Wkly. Dig. (N. Y.) 293 (1883).

9. *Halsey v. Sinsebaugh*, 15 N. Y. 485 (1857).

10. The tendency of modern statutes is to enlarge the scope of the shop book rule. See for example Mass. St. 1913, c. 288.

11. 4 Chamberlayne. Evidence. §§ 3065-3070.

12. "It was founded upon a supposed necessity and was intended for cases of small

traders who kept no clerks." *Smith v. Rentz*, 131 N. Y. 169, 176, 30 N. E. 54, 15 L. R. A. 138 (1892), per Andrews, J.

13. *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1900) holding that a clerk is one who had something to do with and had knowledge generally of the business of his employer in reference to goods sold or work done so that he could testify on the subject.

As a corporation must necessarily act by clerks or other servants or agents, it cannot prove an account by means of the shopbook

able¹⁶ and today wherever a reasonable necessity is shown for doing so the evidence of the handwriting of the declarant will be received in lieu of his verbal testimony.¹⁷

§ 979. [Administrative Requirements]; Relevancy; Adequate Knowledge.¹⁸—As in case of other statements, judicial or extrajudicial, used in an assertive capacity, i.e., as evidence of the facts alleged, it is required in case of the declaration contained in a shop book, that it should be objectively and subjectively relevant to the existence of some *res gestae* fact. Objective relevancy being assumed as an essential prerequisite for all evidence, it may be said that, in this connection as in others, the familiar elements of subjective relevancy are two: (1) The declarant must have adequate knowledge as to the fact asserted; (2) He must be free from controlling motive to misrepresent. The entrant must know of his own knowledge the truth of the transaction which he enters,¹⁹ and it is usually required that the clerk actually making the entry be produced if he be available.²⁰

A short delay in making the entry will not cause its exclusion as where a temporary record is made on a slate²¹ where it appears that the delay will not impair the knowledge of the entrant²² but where other facts tending to show impairment of knowledge are shown even a short delay may be sufficient to exclude the entry.²³

Under the complicated conditions of modern business the person who makes the entries seldom does anything else and is forced to rely for the accuracy of what he states upon the information of those who have sold the goods, rendered the services or done the other necessary parts of a completed transaction. In such case it is proper to show the course of business and to prove by the evidence of those who reported the facts that the reports were made by those who had personal knowledge of them and that the reports were accurate and the entries were accurately made from these reports.²⁴ The informant should be

rule. *Congdon v. Aylesworth Co. v. Sheehan*, 11 N. Y. App. Div. 456, 42 N. Y. Suppl. 255 (1896); *Snyder v. Harris*, 61 N. J. Eq. 480, 48 Atl. 329 (1901).

14. *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910).

15. *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767 (1909).

16. *Cook v. People*, 231 Ill. 9, 82 N. E. 863 (1907).

17. *North Bank v. Abbot*, 13 Pick. (Mass.) 465, 25 Am. Dec. 334 (1833).

18. 4 Chamberlayne, Evidence, §§ 3071-3075

19. It should appear as to these entries that "they related to transactions within the knowledge of the persons making the entries."

Shipman v. Glynn, 31 App. Div. (N. Y.) 425, 430, 52 N. Y. Suppl. 691 (1898), per Ward, J. See also, *Leask v. Hoagland*, 205 N. Y. 171, 98 N. E. 395, reversing judgment 128 N. Y. Suppl. 1017, 144 App. Div. 138; rehearing denied, 205 N. Y. 594, 98 N. E. (1912).

20. *Barnes v. Simmons*, 27 Ill. 512, 81 Am. Dec. 248 (1862).

21. *Woolsey v. Bohn*, 41 Minn. 235, 42 N. W. 1022 (1889).

22. *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87 (1881).

23. *Forsythe v. Norcross*, 5 Watts (Pa.) 432, 30 Am. Dec. 334 (1836).

24. *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952 (1911).

produced when possible but if he is not available his attendance will be excused in most States.²⁵

Where a book of original entries is kept by several persons the entries being mingled each entrant may testify to the accuracy of the items he has himself entered²⁶ but he may not testify to the correctness of items entered by his associates.²⁷

§ 980. [Administrative Requirements; Relevancy]; Absence of Controlling Motive to Misrepresent.²⁸— The suggestion has been offered that, as an administrative matter, it should not only be made to appear that the entrant had actual adequate knowledge, but also that he was without such a controlling motive to misrepresent as would render it probable that he is not telling the truth. Such a requirement might with greater propriety be insisted upon where the evidence offered is secondary, e.g., entry of a deceased person in course of business, rather than in cases where the evidence offered is primary in its nature.²⁹ However this may be, it seems at least certain that there is no requirement that the entry should be adverse to the pecuniary interest of the entrant.³⁰ The knowledge of the declarant is greatest before distracting circumstances have intervened. The motive to misrepresentation is reduced to a minimum where the possible consequences of the statement in its bearing upon the interest of the speaker has not as yet become apparent.

Contemporaneousness is one of the strongest factors in favor of the probative force of an entry, which means within a reasonable time. What is a reasonable time under the circumstances is a question of fact in each case³¹ having in mind the nature of the business.³²

An echo of the early shopbook rule is still to be found in the requirements that the entries be those of charge and not of discharge,³³ and entries tending to relieve a debtor will be rejected under this rule. Shopbook entries are not properly classified as *res gestae* facts but are based rather on the automatism of business as done in the modern way.

§ 981. [Administrative Requirements]; Suppletory Oath.³⁴— The suppletory oath formerly required was that the books were regularly kept as a contemporaneous record of the daily doings of the business.³⁵ This form of oath has been dispensed with and it is now necessary to show merely that the book is

25. *Rothenberg v. Herman*, 90 N. Y. Suppl. 431 (1904).

26. *Herriott v. Kersey*, 69 Iowa 111, 28 N. W. 468 (1886).

27. *Whitley Grocery Co. v. Roach*, 115 Ga. 918, 42 S. E. 282 (1902).

28. 4 Chamberlayne, Evidence, §§ 3706–3081.

29. *Lord v. Moore*, 37 Me. 208 (1854); *Kennedy v. Doyle*, 10 Allen (Mass.) 161 (1865).

30. *Augusta v. Windsor*, 19 Me. 317 (1841).

31. *Mahoney v. Hartford Inv. Corps*, 82 Conn. 280, 73 Atl. 766 (1909).

32. *Yearsley's Appeal*, 48 Pa. St. 531 (1865) (once a week sufficient).

33. *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84 (1896).

34. 4 Chamberlayne. Evidence, §§ 3082–3084.

35. *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461 (1815).

admissible as being kept in the regular course of business.³⁶ Where the entrant is available he should be produced and swear to the correctness of the entry³⁷ but if he is not available the book will be admissible on proof of his handwriting.³⁸

The shop-book may be used against the representatives of the deceased debtor notwithstanding statutes forbidding a party to be a witness against the estate of a deceased person.³⁹

§ 982. [Administrative Requirements]; Books Must be Those of Original Entry.⁴⁰— One of the administrative requirements in connection with the admission of the shop book in evidence is that it must be the book of original entries, that is, the book in which the entries were first permanently made.⁴¹

For this purpose temporary memoranda are not regarded as original entries and need not be produced where the books are made up from them at once as they are regarded simply as methods for refreshing the recollection of the entrant.⁴² The books may be in any form which does not throw such discredit on its accuracy and good faith as to deprive it of all reasonable probative force.⁴³ The books may be in day book⁴⁴ or ledger form.⁴⁵ Shop books within the rule

36. *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1900).

37. *Townsend v. Coleman*, 18 Tex. 418, 20 Tex. 817 (1857).

38. *Leighton v. Manson*, 14 Me. 208 (1837); *Odell v. Culbert*, 9 Watts & S. (Pa.) 66, 42 Am. Dec. 317 (1845). See *Seaboard Air L. Ry. v. Railroad Commr's*, 86 S. C. 91, 67 S. E. 1069, 138 Am. St. Rep. 1028 (1910). Handwriting of accounts in books immaterial. See note, *Bender*, ed., 17 N. Y. 72. Proving books of account. See note, *Bender*, ed., 102 N. Y. 583. Right to testify to entries. See note, *Bender*, ed., 61 N. Y. 530.

39. *Post v. Kenerson*, 72 Vt. 341, 47 Atl. 1072 (1900).

40. 4 Chamberlayne, *Evidence*, §§ 3085-3095.

41. *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498 (1902).

42. *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300 (1900).

43. *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449 (1887).

44. *Way v. Cross*, 95 Iowa 258, 63 N. W. 691 (1895).

45. *Schlicher v. Whyte*, 74 N. J. Eq. 839, 71 Atl. 337 (1908).

Original reports missing.— The testimony of the bookkeeper is sufficient to prove the contents of a ledger of a large mercantile house where it is impossible to prove the

original reports from which the ledger was made up or where the number of employees was so great that it would be impractical to produce them all to testify that they made true reports to the bookkeeper. *Givens v. Pierson*, 167 Ky. 574, 181 S. W. 524. A record book of car equipment kept by railroad officials as the result of reports made from time to time is admissible in evidence to show the condition of the cars at the time of their destruction and their value. The fact that the original reports are not put in evidence does not bar them as the original reports were made by many men and it would be impossible to put all these men on the stand especially as the work on the cars is done by various gangs of men and it is impossible to tell just who did the work or made the reports. The fact that they were made in the regular course of business seems to be enough. *Pittsburgh C. C. & St. L. R. Co. v. Chicago*, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358 (1909).

The record book of a physician constituting his book of original entries and charges is original and primary evidence when proved by the living entrant and is evidence of a very high class when proven to have been contemporaneous with the transaction and where there could have been no motive to misrepresent, and may be used to show the date of birth of a child. *Griffith v. American*

do not include check-stubs⁴⁶ or collection registers,⁴⁷ diaries,⁴⁸ or other memoranda but will include time-books.⁴⁹

Entries are usually admitted though not dated⁵⁰ but where the charges are lumped in one item they may be properly refused admission.⁵¹ It is not fatal to the entries that they are on separate sheets of paper.⁵²

§ 983. [Administrative Requirements]; Corroboration *Aliunde*.⁵³—The presiding judge is justified in requiring that the plaintiff reinforce the effect of his book by showing facts tending to establish its accuracy and his own care in keeping it. Even without this evidence, the presiding judge may admit the book *de bene*, i.e., conditional upon corroboration of this nature being subsequently furnished. If this corroboration be not supplied, the judge may reject the book, as his final action in the matter.⁵⁴ Corroborative proof must be given⁵⁵ by evidence independent of the book itself.

This corroboration may be made by the testimony of an employee⁵⁶ or of other customers that the plaintiff kept honest books⁵⁷ when they have seen and settled by the books themselves.⁵⁸ It must be shown by evidence *aliunde* that the goods were delivered or the services were rendered.⁵⁹

§ 984. [Administrative Requirements]; Entry Must be Intelligible.⁶⁰—The court may well insist that the book of account, to be admissible, should have been so kept as to be clear and intelligible upon inspection. He may accord-

Coal Co. 75 W. Va. 686, 84 S. E. 621, L. R. A. 1915 F 803 (1915).

Ledger cards used by plaintiff in its system of bookkeeping which constitute its original, permanent and only records of accounts with its customers are admissible in evidence when properly authenticated. *Haley & Lang Co. v. Vecchio*, 36 S. D. 64, 153 N. W. 898, L. R. A. 1916 B 631 (1915). The courts seem properly to regard such sheets as account books under the statutes when kept as part of a regular system.

46. *Leask v. Hoagland*, 205 N. Y. 171, 98 N. E. 395 (1912), *reversing judgment*, 128 N. Y. Suppl. 1017, 144 App. Div. 138; *rehearing denied*, 205 N. Y. 594, 98 N. E. 1106.

47. *U. S. Bank v. Burson*, 90 Iowa 191, 57 N. W. 705 (1894); *Larabee v. Klosterman*, 33 Neb. 150, 50 N. W. 1102 (1891).

48. *Barber's Appeal*, 63 Conn. 393, 410, 412, 27 Atl. 973, 22 L. R. A. 90 (1893); *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910).

49. *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289 (1895).

50. *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153 (1858).

51. *Putman v. Grant*, 101 Me. 240, 63 Atl. 816 (1906).

52. *Jonesboro, L. C. & E. R. Co. v. United Iron Wks. Co.*, 117 Mo. App. 153, 94 S. W. 726 (1906).

53. 4 Chamberlayne, Evidence, §§ 3096-3099.

54. "The judge could not know, until the end of the trial, what corroborating evidence there would be; and after the evidence was all in, it was proper for the court to decide upon the competency of the book. This is a species peculiar in its nature, of the competency of which, in each case, the court must decide." *Henshaw v. Davis*, 5 Cush. (Mass.) 145 (1849).

55. *Conklin v. Stamler*, 2 Hilt. (N. Y.) 422, 8 Abb. Prac. 395, 17 How. Prac. 399 (1859).

56. *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882), *overruling* *Hauptman v. Catlin*, 1 E. D. Smith (N. Y.) 729 (1854).

57. *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 7 N. Y. Annot. Cas. 470, 52 L. R. A. 545 (1900), *affirming* 13 App. Div. 207, 43 N. Y. Suppl. 257 (1897).

58. *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882).

59. *Maine*.—*Godfrey v. Codman*, 32 Me. 162 (1850).

ingly decline to receive evidence of a charge kept by arbitrary signs the meaning of which is known only to the proponent.⁶¹ The entry, however, need not be absolutely clear on its face to one not acquainted with the usages of a particular business or calling. A charge of this nature may be explained by those having special knowledge on the subject.⁶² For example, a physician may, in satisfactory compliance with the rule, make his entries in the ordinary shorthand employed in his profession.⁶³ The entry need not be in any particular language⁶⁴ or form of bookkeeping.⁶⁵ Abbreviations may even be used, in which case their meaning may be explained.⁶⁶

§ 985. [Administrative Requirements]; Entry on Book Account Must Have Been a Routine One.⁶⁷— It is essential that the entry be one made in the regular course of business⁶⁸ and it must be the entrant's duty to make a record of the precise thing which he has recorded⁶⁹ and the same rule should be applied where several entries are involved in the same transaction.⁷⁰

The nature of the business may have a bearing on whether it is a matter of routine or not. The banking business for example presents conditions favorable for grounding a rational inference of automatism⁷¹ while a train register might be held not to be within the principle.⁷²

§ 986. [Administrative Requirements]; Facts Creating Suspicion.⁷³— The presiding judge may, in the exercise of his power of administration, exclude a shop book where either from its condition or appearance or from other evidence, there are circumstances which, unexplained, are such as to create a suspicion that it is not a true record of daily transactions in the routine of business,⁷⁴ as where entries covering a period of several years appear, from the

60. 4 Chamberlayne, Evidence, § 3100.

61. Remick v. Rumery, 69 N. H. 601, 45 Atl. 574 (1899).

62. Fulton's Estate, 179 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133 (1896).

63. Bay v. Cook, 22 N. J. L. 343 (1850).

64. Massachusetts.— Miller v. Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449 (1887).

65. Cather v. Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35 (1904).

66. Richardson v. Benes, 115 Ill. App. 532 (1904); Bank v. Richardson, 141 Iowa 738, 118 N. W. 906 (1909).

67. 4 Chamberlayne, Evidence, §§ 3101, 3102.

68. Kelley v. Crawford, 112 Wis. 368, 88 N. W. 296 (1901).

69. Ridgeley v. Johnson, 11 Barb. (N. Y.) 527 (1851). See also, Osborn v. Merwin, 50 How. Pr. (N. Y.) 183 (1875); Watts v. Shewell, 31 Ohio St. 331 (1877). Entries made in a diary by a third party deceased are not

admissible where not kept as a duty or in the regular course of business. All authorities seem to require that the entries must be made in the regular course of business. Arnold v. Hussey, 111 Me. 224, 88 Atl. 724, 51 L. R. A. (N. S.) 813 (1913).

70. New York v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886).

71. Taylor County v. Bank of Campbells-ville, 145 Ky. 389, 140 S. W. 680 (1911); Continental Nat. Bank v. First Nat. Bank, 109 Tenn. 374, 68 S. W. 497 (1902).

72. People v. Mitchell, 94 Cal. 550, 29 Pac. 1106 (1892).

73. 4 Chamberlayne, Evidence, § 3103.

74. "The court examines it to see if it appears, *prima facie*, to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the court may reject it as incompe-

brightness of the pencil marks, etc., all to have been written at one time,⁷⁵ or where an account bears evidence of material alterations or erasures⁷⁶ or contains only entries debiting the persons against whom the action is brought.⁷⁷ This must be explained to the reasonable satisfaction of the judge before the book will be admitted.⁷⁸

§ 987. [Administrative Requirements]; Identity of Book Must be Established.⁷⁹— In any case involving the use of the book entry it must be shown to the reasonable satisfaction of the trial judge that the book before the court is, in fact, the book which it is said to be. No special form of attestation is, as a rule, demanded. Thus, the fact that a certain book produced in court is the stock ledger of a bank may be proved satisfactorily by the evidence of the cashier.⁸⁰

§ 988. [Administrative Requirements]; Material Used.⁸¹— It is not deemed necessary by the courts that any particular material, such as paper, be selected to act as a vehicle for the words, figures and the like constituting the account.⁸²

Wood may be used, as where an account is kept upon a shingle⁸³ or by notches made on a stick.⁸⁴

§ 989. [Administrative Requirements]; Original Must be Produced.⁸⁵— The rule of procedure or canon of administration known as the "best evidence rule" applies to the use of shop books. If the original book can be produced by the proponent, within the limits of reasonable exertion, he will be required to offer it.⁸⁶ Where the original book has been lost or destroyed a copy which the maker swears to be accurate may be received in evidence.⁸⁷

§ 990. Scope of Evidence.⁸⁸— The doctrine has already been stated that an essential of the probative force of the relevancy of regularity is that the book entries must have been made in the regular routine of the entrant's business or employment. It is the habit or custom of making such entries with an

tent." *Funk v. Ely*, 45 Pa. 444, 449 (1863), per Woodward, J.

75. *Dunbar v. Wright's Adm'r*, 20 Fla. 446 (1884). See also, *Davis v. Sanford*, 91 Mass. 216 (1864).

76. *Pratt v. White*, 132 Mass. 477 (1892).

77. *Fulton's Estate*, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133 (1896).

78. *Gutherless v. Ripley*, 98 Iowa 290, 67 N. W. 109 (1896).

79. 4 Chamberlayne, Evidence, § 3104.

80. *Skowhegan Bank v. Cutler*, 52 Me. 509 (1864).

81. 4 Chamberlayne, Evidence, § 3105.

82. *Hooper v. Taylor*, 39 Me. 224 (1855);

Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501 (1843).

83. *Kendall v. Field*, 14 Me. 30, 30 Am. Dec. 728 (1836). See also, *Pallman v. Smith*, 135 Pa. St. 188, 19 Atl. 891 (1890).

84. *Rowland v. Burton*, 2 Harr. (Del.) 288 (1835).

85. 4 Chamberlayne, Evidence, §§ 3106, 3107.

86. *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887). See, *Smiley v. Dewey*, 17 Ohio 156 (1848).

87. *Hodnett v. Gault*, 64 App Div. (N. Y.) 163, 166, 71 N. Y. Suppl. 831 (1901).

88. 4 Chamberlayne, Evidence, §§ 3108-3125.

automatic regularity that gives to them an increased proving power. It therefore follows that the entries should relate to the regular business of the person for whom the books are kept,⁸⁹ in order to be admissible.

Such entries cannot be used to prove collateral facts as in such matters the element of habit or custom on the part of the entrant is lacking.⁹⁰

All the early limitations as to the amount of the entries which might be proved by the shop-books have been removed.⁹¹

The books may be used to show the sale and delivery of goods and their prices⁹² but large bulky articles may in some cases not be proved in this way as their delivery may be proved better by the evidence of those who did the work.⁹³ The charge may be made before the actual delivery of the article.⁹⁴

Loans or cash payments cannot be proved in this way⁹⁵ as such items should appear by a check or receipt unless where the money so charged was advanced in payment of goods or merchandise procured by the party for the defendant.⁹⁶ In some jurisdictions money payments in the regular course of business as in the banking business may be shown.⁹⁷

Charges for board⁹⁸ or public services⁹⁹ or the use of animals¹ may be proved in this way but not charges for literary services.²

§ 991. [Scope of Evidence]; Nature of Charges; Special Contract.³—Special contracts or agreements are susceptible, in respect to their terms, conditions and to performance thereunder, of various kinds of proof other than book entries. They may be embodied in some formal written or printed memoranda of greater or less length, and in fact frequently are. Under such circumstances the terms and conditions are provable by the memorandum of the contract which may be spoken of as the "best evidence." In the absence of proof of this nature they may be shown by other evidence, such as by correspondence which has passed between the parties or by conversations at

⁸⁹. *Fulton's Estate*, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133 (1896).

⁹⁰. *Galbraith v. Starks*, 117 Ky. 915, 922, 79 S. W. 1191, 25 Ky. L. Rep. 2090 (1904), per O'Rear, J. Admissibility of books or statements of account in criminal prosecution, see note, Bender ed., 143 N. Y. 107.

⁹¹. *Richardson v. Emery*, 23 N. H. 220 (1851); *Irish v. Horn*, 84 Hun 121, 32 N. Y. Suppl. 455, 65 N. Y. St. Rep. 641 (1895).

⁹². *Copeland v. Boston Dairy Co.*, 189 Mass. 342, 75 N. E. 704 (1905).

⁹³. *Leighton v. Manson*, 14 Me. 208 (1837).

⁹⁴. *Wollenweber v. Ketterlinus*, 17 Pa. St. 389 (1851).

⁹⁵. *Shaffer v. McCrackin*, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465 (1894).

⁹⁶. *Le Franc v. Hewitt*, 7 Cal. 186 (1857).

⁹⁷. *Ganahl v. Shore*, 24 Ga. 17, 24 (1858).

⁹⁸. *Tremain v. Edwards*, 7 Cush. (Mass.) 414 (1851).

⁹⁹. *Kinney v. United States*, 54 Fed 313 (1893).

1. *Easley v. Eakin, Cooke* (Tenn.) 388 (1813).

2. *Hirst v. Clarke*, 3 Pa. L. J. 32, 1 Pa. L. J. Rep. 398 (1842).

To prove a negative.—The old shop-book exception does not allow the proving of a negative. So account-books are not admissible to prove that certain goods were not received. *Winder v. Pollock*, 151 N. Y. Suppl. 870. The correctness of this decision to-day may well be doubted. Professional entries or memoranda, see note, Bender ed., 31 N. Y. 525.

3. 4 *Chamberlayne, Evidence*, §§ 3126-3129.

the time of making the alleged contract showing the agreement entered into. Performance or non-performance may also be established by various kinds of proof. In this class of cases the transaction is not regarded as arising in the usual course of business within the principle which makes the book of account primary evidence. There are lacking in the case of an entry as to terms, conditions ⁴ or performance ⁵ of a special contract the elements which are essential to the relevancy of regularity, which must be established to render the account book admissible.

Hence book accounts are not admissible to prove matters like the amount due under a contract ⁶ or damages ⁷ though book entries may be used to show matters like delivery and other things done in the regular course of business although they may be done under a special contract.⁸

§ 992. [Scope of Evidence]; Nature of Charges; Other Matters.⁹—The rule does not permit the introduction of books of account kept by a fiduciary ¹⁰ or a billiard room proprietor.¹¹ Wholesale dealings may often not be proved in this way as the charges may be of such magnitude as to preclude them ¹² but under the modern development of the doctrine they are often admitted.

§ 993. [Scope of Evidence]; Nature of Occupation.¹³—The rule permitting the admission of shop books in evidence was originally for the benefit of the small tradesman or handicraftsman who kept no clerk and was limited to books kept by such persons, and to the items usually embraced in such accounts. In the development of the rule admitting books of account, the early limitations have been, as a general rule, removed. The reasons which appealed to the courts in the early days for the application of the rule likewise existed to cause an extension of the principle so that it may be said generally that at the present day the rule applies, not only to tradesmen and merchants, but to all persons dealing, the one with the other,¹⁴ in a business, occupation or calling

4. *Wait v. Krewson*, 59 N. J. L. 71, 35 Atl. 742 (1896). The entries in the policy book of a deceased insurance agent as to the terms of a lost policy are not admissible in evidence where they were not verified by any one knowing the facts recited therein. *Cummings v. Pennsylvania Fire Insurance Co.*, 153 Iowa 579, 134 N. W. 79, 37 L. R. A. (N. S.) 1169 (1912).

5. *Hall v. Chambersburg Woolen Co.*, 187 Pa. St. 18, 40 Atl. 986, 67 Am. St. Rep. 563, 52 L. R. A. 689 (1898).

6. *Danser v. Boyle*, 16 N. J. L. 395 (1838).

7. *Wait v. Krewson*, 59 N. J. L. 71, 35 Atl. 742 (1896).

8. *Bailey v. Harvey*, 60 N. H. 152 (1880); *Oliver v. Phelps*, 21 N. J. L. 597 (1845).

9. 4 *Chamberlayne*, Evidence, §§ 3130-3132.

10. *Fowler v. Hebbard*, 40 App. Div. (N. Y.) 108, 57 N. Y. Suppl. 531 (1899).

11. *Boyd v. Ladson*, 4 McCord L. (N. C.) 76, 17 Am. Dec. 707 (1826).

12. *Bustin v. Rogers*, 11 Cush. (Mass.) 346 (1853), per Dewey, J., wherein it was said of an item of "7 gold American watches \$308." "This species of evidence was not the proper evidence to establish a sale of this magnitude and character." See also, *Coor v. Seller*, 100 Pa. St. 169, 45 Am. Rep. 370 (1882).

13. 4 *Chamberlayne*, Evidence, §§ 3133-3137.

14. *Foster v. Coleman*, 1 E. D. Smith (N. Y.) 83 (1850).

where a record of transactions in the regular routine thereof is necessarily kept in a book of accounts.

The rule now includes for example not only merchants but also mechanics¹⁵ and professional men.¹⁶

§ 994. [Scope of Evidence]; Who May be Charged.¹⁷— The rule permitting of the introduction of the shop book into evidence is ordinarily interpreted as limiting its admission thereunder to those cases where the entries show an intentional charge in favor of one party to the action against the adverse party.¹⁸

The charges may however be in the alternative¹⁹ but may not be used to charge a third person though the book may be used where it embodies an admission.²⁰

It has been held for example that the books showing a charge against another are not conclusive as to the person to whom credit is given²¹ and the books are not admissible to charge the defendant with goods delivered to or services performed for another on the defendant's order²² but where the fact of such an order is established by evidence *aliunde* the books then become admissible to show delivery or the performance of the services rendered.²³

Mistakes in the account may be rectified by parol.²⁴ The books may not be used to establish a joint liability²⁵ but parol evidence may be used to establish the liability and then the entries may be used to show the items²⁶ and so agency being established to charge an undisclosed principal the books then become admissible.²⁷

§ 995. Weight.²⁸— Preliminary inquiries as to the character, authenticity, regularity of the book, and which have reference to its admissibility, are ques-

15. Linnell & Foot v. Sutherland, 11 Wend. (N. Y.) 568 (1834).

16. Bay v. Cook, 22 N. J. L. 343 (1850).

17. 4 Chamberlayne, Evidence, §§ 3138-3145.

18. Gill v. Staylor, 93 Md. 453, 49 Atl. 650 (1901).

19. Burnell, Gillett & Co., v. Dunlap, 11 Iowa 446 (1861).

20. Loomis v. Stuart (Tex. Civ. App. 1893), 24 S. W. 1078. See also, Winslow v. Dakota Lumber Co., 32 Minn. 237, 20 N. W. 145 (1884).

21. Myer v. Grafflin, 31 Md. 350, 100 Am. Dec. 66 (1869).

22. Kaiser v. Alexander, 144 Mass. 71, 12 N. E. 209 (1887). The account books and check stubs of the defendant with memoranda thereon are not admissible in evidence to show that payments made were intended to be used to pay the debt of another than the payee. Books of account are not admissible to prove

special contracts such as are not shown to be or to be inferred from the entries alone. The admission of such entries would open wide the door to fraud as a party might make any contract the subject of book entry. Wells v. Hays, 93 S. C. 168, 76 S. E. 195, 42 L. R. A. (N. S.) 727.

23. Wilcox Silver Plate Co. v. Green, 72 N. Y. 17 (1878). Under a statute making book entries admissible in evidence they may be used in a suit between third parties and the fact that certain claims were paid is evidence as to third parties that they were valid. Richolson v. Ferguson, 87 Kan. 411, 124 Pac. 360, 40 L. R. A. (N. S.) 855 (1912).

24. Schettler v. Jones, 20 Wis. 412 (1866).

25. Severance & Smith v. Lombardo, 17 Cal 57 (1860); Kidder v. Norris, 18 N. H. 532 (1847).

26. Bowers v. Still, 49 Pa. St 65 (1865).

27. Davis v. Dyer, 60 N. H. 400 (1880).

28. 4 Chamberlayne, Evidence, § 3146.

tions for the court to determine in the exercise of its powers of administration.²⁹ The weight, however, which is to be given to such evidence depends upon the circumstances surrounding each case and is to be determined by the tribunal which decides the question of fact.³⁰

The declarant who offers his shopbook is open to the same kind of impeachment as other witnesses as to his character for veracity³¹ and the general character of the book may also be impeached as where it appears not to be accurately kept.³²

29. Pratt v. White, 132 Mass. 477 (1882); 876 (1888); Dickens v. Winters, 169 Pa. St. 126, 32 Atl. 289 (1895).
Burleson v. Goodman & Stroud, 32 Tex. 229 (1869).

31. Funk v. Ely, 45 Pa. 444, 448 (1863).

30. Rexford v. Comstock, 3 N. Y. Suppl.

32. Merchants' Bank v. Rawls, 7 Ga. 191, 50 Am. Dec. 394 (1849).

CHAPTER XLVI.

RELEVANCY OF SIMILARITY; UNIFORMITY OF NATURE.

Relevancy of similar occurrences; uniformity of nature, 996.

Preliminary observations; rule an assignment of irrelevancy; true ground of rejection, 997.

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*Administrative requirements; necessity, 999.
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Other uniformities than that of physical nature; regularity of law or business; habits, 1007.

§ 996. **Relevancy of Similar Occurrences; Uniformity of Nature.**¹— Of the four main exclusionary rules under which relevant evidence is excluded, we have already discussed opinion and hearsay evidence. The remaining two of such exclusionary rules, *res inter alios* and character, possess the common attribute that they employ, reasoning by analogy, the happening of a collateral occurrence as evidence of the doing of a particular act or the happening of a given event. In other words, the evidence is designed to show that an event happened under certain conditions because a similar one occurred under the same conditions, or that A. did a particular act because he did a similar act before under a like situation or possessed a trait of character which predisposed him to do it. This chapter treats especially of circumstances under which evidence is admissible to show that a particular event occurred in the realm of *nature* on one occasion because a similar event happened on another.

A good example of this characteristic judicial method is furnished in actions of negligence where generally evidence of the custom of others doing similar work is not admissible on the question of the negligence of the defendant² although such evidence is sometimes considered relevant.³

1. 4 Chamberlayne, Evidence, §§ 3150–3152.

2. A custom among bridge builders to trust to the engineer in charge cannot be shown to relieve it of the duty of looking after their employees as this is contrary to a well settled rule of law. *Pennsylvania Steel Co. v. Nace*,

113 Md. 460, 77 Atl. 1121, 45 L. R. A. (N. S.) 281 (1910). A custom of builders as to the meaning of the term building line as found in the ordinances is incompetent. *O’Gallagher v. Lockhart*, 263 Ill. 489, 105 N. E. 295, 52 L. R. A. (N. S.) 1044 (1914).

3. A custom among masons to leave mortar

§ 997. [Preliminary Observations; Rule an Assignment of Irrelevancy]; True Ground of Rejection.⁴— In accordance with the judicial habit of assigning the secondary, if conclusive, reason for rejecting evidence, much testimony is constantly rejected as *res inter alios* when the real ground for the exclusion is that the fact offered is irrelevant, i.e., has no logical bearing upon the issue involved.⁵

Under such circumstances where the evidence of the occurrence of an event is such as to afford no logical bearing upon the proof of the occurrence of another event, the true ground of rejection is irrelevancy. An irrelevant matter is no evidence at all and requires no exclusionary rule to warrant its rejection.⁶ Moreover, the evidence of the collateral act or event being circumstantial in its nature, it is deemed secondary, and, under the principles pertaining to secondary evidence, the testimony of the collateral occurrence may also in some cases be properly excluded as such.⁷

§ 998. Rule Stated.⁸— While the uniformity of nature may well furnish a basis of probative fact which possesses a probative force beyond that shown by moral uniformity used as a basis of similarity in conduct, the important administrative circumstance that the proof is circumstantial rather than direct has led the courts to treat the evidence of similar occurrences as secondary in its nature. In the absence, therefore, of an adequate administrative necessity, the inference that a given state of affairs existed or a particular event occurred at a certain time because a similar state of affairs is shown to have existed or a similar act occurred at another, is not one which the court accepts as primary evidence.⁹ Even when a suitable forensic necessity is shown on the part of the proponent, some special ground of *relevancy* must also be made to appear. The two states or events must be connected in some special way, other than the mere similarity in certain particulars, in order that the existence of the one, on a particular occasion, may be deemed to be probative of that of the other on a different occasion.

§ 999. Administrative Requirements; Necessity.¹⁰— Unlike the rule against hearsay, when not covered by a specific exception, the exclusion prescribed by the present rule is not absolute, but conditional. In other words, it is not so much a rule of procedure as it is a principle of administration. Let but a

boxes in the summer unfenced and uncovered may be shown. *Zartner v. George*, 156 Wis. 131, 145 N. W. 971, 52 L. R. A. (N. S.) 129 (1914). The custom of others in the same business as to the proper height above tide water for a warehouse is admissible as bearing on the negligence of the defendant. *Hecht v. Boston Wharf Co.*, 220 Mass. 307, 107 N. E. 990, L. R. A. 1915 D 725 (1915).

4. 4 Chamberlayne, Evidence, §§ 3153-3161.

5. *Churchill v. Hebden*, 32 R. I. 34, 78 Atl. 337 (1910).

6. *Wright v. City of Chelsea*, 207 Mass. 460, 93 N. E. 840 (1911).

7. *Foster Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253 (1891).

8. 4 Chamberlayne, Evidence, § 3162.

9. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 10 N. Y. Annot. Cas. 256, 62 L. R. A. 193 (1901).

10. 4 Chamberlayne, Evidence, §§ 3163-3165.

forensic necessity arise which the court deems adequate for the purpose and the paramount administrative canon that a party has a right to prove a reasonable case by the most probative evidence in his power will require that, so far as the similarity is relevant, the happening of a given event or the existence of a particular state of affairs at one time may be shown by its happening or existence at another. The factors affecting the action of the court in regard to admitting evidence of similarity claimed by the proponent to be necessary to proof of his case are obvious. They are practically the same which govern the administrative action of the court in dealing with any proponent who offers secondary evidence of a fact. In proportion as it appears to the presiding judge that there is but little prospect that better evidence will be attainable, that the danger that the jury may be misled or the trial unduly protracted by the raising of a collateral issue, either does not arise or cannot be avoided, will such secondary evidence be received.¹¹

This necessity may arise either in the original case or in the stage of rebuttal and the appellate courts will disturb the ruling made only in case of abuse of discretion.¹²

§ 1000. [Administrative Requirements]; Relevancy.¹³— That the secondary evidence of another event or occurrence should be received as evidence that, under the uniformity of nature, a given event occurred or state existed at a particular time, it will be required, as a matter of administration, not only that a suitable forensic necessity should be shown to exist, but also that the evidence offered should be relevant. However great may be the necessity for receiving secondary evidence, the facts offered must, at least, be evidence, i.e., relevant in some one of the aspects of relevancy. It may be expedient, before entering upon the general subject, to make two preliminary observations. The first of these is to the effect that, in connection with the uniformity of nature the relevancy of a particular state or event to the existence of another is, in itself, considered *objective* rather than *subjective*. In other words, it involves and is based upon the uniformity between antecedent and consequent, which experience has observed to exist in the physical universe. By contrast, the relevancy of moral uniformity is more largely subjective. In the second place, the evidence being used to establish, in a circumstantial manner, by means of a direct and clear proposition of experience, the existence of a *res gestae* fact, its relevancy is *probative*, while the slighter causal relation between antecedent and consequent, shown in cases of human conduct subject to the operation of volition, i.e., the relevancy of moral uniformity is, as has been said, more nearly *deliberative*.

§ 1001. [Administrative Requirements]; Relevancy of Similarity.¹⁴— In deal-

11. *Galveston, etc., R. Co. v. Ford* (Tex. Civ. App. 1898), 46 S. W. 77.

12. *Isbell v. New York, etc., R. Co.*, 25

Conn. 561 (1857); *Gillrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357 (1890).

13. 4 Chamberlayne, Evidence, § 3166.

14. 4 Chamberlayne, Evidence, § 3167.

ing with the direct probative force of the inference that under certain antecedents an event happened or state of things came into existence on a particular occasion because, under precisely similar conditions or antecedents, the same event happened or state of affairs came into being, a court or jury may well feel that they are treading upon firm logical ground. One is fairly certain, for example, that the sun gave light on a given occasion because at all previous times it has been observed to do so. In other words, the maximum of probative relevancy is obtained where, as in the uniformity of natural law, the same cause, in itself considered, always operates in precisely the same way, where the force is a powerful one and not affected by other forces.

§ 1002. [Relevancy of Similarity]; Essentially Similar Occurrences.¹⁵— The happening of an essentially similar state or event, shows not only the possibility of such an occurrence, where that is disputed — but furnishes an object lesson, as it were, in education and explanation of the state or event in question; — what caused it, or how it happened.¹⁶ Where it is disputed that the particular event in question actually occurred, the fact that the same event happened or state of things came into being under similar circumstances is also highly probative. Essential similarity on all material parts being established, the evidence is probative, and, if a suitable necessity is shown, will be admitted.¹⁷ For example, the question being as to the damage caused to plaintiff's trees by the escape of gas from the defendant's premises, evidence of the condition of other trees in the vicinity is admissible.¹⁸

§ 1003. [Relevancy of Similarity]; Experiments.¹⁹— Should it be made affirmatively to appear to the presiding judge by the proponent of the evidence²⁰ that the essential conditions of the actual state or event involved in the inquiry submitted for investigation can be artificially reproduced in an experiment, the results of the latter may be relevant,²¹ and if an adequate administrative necessity exists for receiving them, will be admitted.²²

Difference in some essential particular between the actual transaction, as it is claimed to have existed, and the conditions of the experiment, warrants the exclusion of the evidence as to the result obtained by it.²³ The closer the similarity in the facts proved and the facts on which the experiment is based, the greater the probative force of the evidence.²⁴

15. 4 Chamberlayne, Evidence, § 3168.

16. Polly v. McCall, 37 Ala. 20 (1860).

17. City of Emporia v. Kowalski, 66 Kan. 64, 71 Pac. 232 (1903).

18. Evans v. Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 615 (1895).

19. 4 Chamberlayne, Evidence, §§ 3169–3173.

20. People v. Thompson, 122 Mich. 411, 81 N. W. 344 (1899).

21. Evidence of experiments based on spec-

ulative and hypothetical theories where they are not shown to have been based upon facts connected with the crime charged is not admissible. Harris v. State (Tex. Cr. App. 1911), 137 S. W. 373.

22. Kimball Bros. Co. v. Citizens Gas, etc., Co., 141 Iowa 632, 118 N. W. 891 (1908).

23. Mitchell v. Sayles, 28 R. I. 240, 66 Atl. 574 (1907).

24. Atlanta, etc., R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500 (1907).

Experiments are received as a matter of indulgence. The party offering such evidence has no right to insist upon evidence of the experiment being received, should the presiding judge be of a contrary opinion.²⁵ The trial judge must, however, act within the limits prescribed by reason.²⁶

It has been held that the judge cannot undertake experiments on his own initiative to test the accuracy of the witness²⁷ and the jury cannot on their own initiative conduct experiments out of court.²⁸

§ 1004. [Relevancy of Similarity]; Varying Phenomena.²⁹— While it may be frankly conceded that should a collateral occurrence involving the uniformity of natural law be presented which should be precisely similar in all its circumstances to the principal case and result in the creation of a particular state or the happening of a given event the results of such collateral occurrence would be highly probative, the administrative difficulty experienced by the courts consists in the fact that such precisely similar collateral occasions are seldom encountered in practice. The rule, therefore, as usually stated, permits the reception of collateral occurrences which are *substantially* similar in their circumstances, i.e., are similar in all essential particulars. Where, however, the collateral occasion fails to present some substantial similarity to the one involved in the inquiry, i.e., where important or material variations in the phenomena of the two occasions are presented, proof of what happened on a collateral occasion will be rejected.

On the other hand, where one continuous state or condition of affairs is involved in the inquiry, the same administrative considerations do not apply. The presumption of continuance or against change, operates to render the inference that a state of affairs once shown to exist will continue to do so for a length of time proportionate to the permanence of the state or condition and to the improbability that a modifying cause will intervene.

Similar accidents which have only features of resemblance in particulars which are not essential do not have such a relation of relevancy as makes them probative. They are, therefore, inadmissible; — however great the administrative necessity,³⁰ except for illustration.³¹

§ 1005. Relevancy of Dissimilarity.³²— The administrative necessity for further use of other occasions beyond this relevancy of similarity is most largely

25. *Com. v. Buxton*, 205 Mass. 49, 91 N. E. 128 (1910); *State v. Ronk*, 91 Minn. 419, 98 N. W. 334 (1904).

26. *Woelfel Leather Co. v. Thomas*, 68 Ill. App. 394 (1896); *Ord v. Nash*, 50 Nebr. 335, 69 N. W. 964 (1897); *Streight v. State*, 62 Tex. Cr. App. 453, 138 S. W. 742 (1911).

27. *Burke v. People*, 148 Ill. 70, 35 N. E. 376 (1893).

28. *Smith v. St. Paul, etc., R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550 (1884).

29. 4 Chamberlayne, Evidence, §§ 3174, 3175.

30. *Florida Cent., etc., R. Co. v. Mooney*, 45 Fla. 286, 33 So. 1010, 110 Am. St. Rep. 73 (1903); *Georgia Cent. R. Co. v. Duffey*, 116 Ga. 346, 42 S. E. 510 (1902); *Smart v. Kansas City*, 91 Mo. App. 586 (1901).

31. *Aurora v. Brown*, 12 Ill. App. 122, *affirmed* 109 Ill. 165 (1882).

32. 4 Chamberlayne, Evidence, §§ 3176-3182.

due to the fact that neither in the realm of nature nor the mental or moral world do the actual phenomena of what happened on any particular occasion presented for investigation come before the tribunal in such simplicity, absence of complexity, as to leave the result, the obvious effect of a single and sufficient cause.

Where various causes united in producing the result the proponent can then rely on the presence of dissimilar features as showing which causes produced a dissimilar result, or where the result is admitted ³³ other occurrences in which the antecedent circumstances for which liability is claimed were present and the same result followed may be received in evidence;— provided that the facts of the other occurrences are so varied as to leave the antecedent circumstances claimed to have been the cause, the only constant antecedent circumstance.³⁴

Thus, the question being as to whether A. was injured by the unsafe and dangerous character of a sidewalk, evidence of similar accidents to other persons at the same place and about the same time has been received; — not for the purpose of showing that the plaintiff was injured, but for that of exhibiting the dangerous nature of the condition of the sidewalk.

In an action by an employee for injuries alleged to have resulted from particles of lead in the air where he worked, to show that such was the cause of his illness, evidence is competent that fellow-workers were also affected with lead poisoning. This relevancy of dissimilarity is entirely apart from the independent relevancy of these occurrences as showing notice to the responsible authorities by the notoriety of these occurrences themselves.

Replies of Opponent.— In reply to such evidence, it is, of course, open to the opponent and, indeed, to avoid its effect, it is necessary for him to contend that new affirmative hypotheses or explanations are introduced by the facts of the collateral occasion. It is precisely this right of the opponent which constitutes the administrative danger of collateral issues which forms an important reason for rejecting evidence of this nature.

Where the relation of cause and effect is to be established, it may not only be shown that in any combination of circumstances where the cause is present and permitted to operate freely, the result followed, but also that when the cause is absent, however the circumstances may otherwise be similar, the result does not appear.³⁵ Thus, where a person is sued for negligently shelling pop-corn, cracking the kernels and so making the pop-corn valueless. the plaintiff may show that precisely similar pop-corn was shelled, under the same conditions, by other persons without injuring it.³⁶

§ 1006. Inferences Other Than Similar Occurrences.³⁷— Whether a given

33. *Rowlands v Elgin*, 66 Ill. App. 60 (1895).

34. *Shea v Glendale Elastic Fabrics Co.*, 162 Mass. 463, 38 N. E. 1123 (1894).

35. *Avery v Burrall*, 118 Mich. 672, 77 N. W. 272 (1898).

36. *Chase v. Blodgett Milling Co.*, 111 Wis. 655, 87 N. W. 826 (1901).

37. 4 *Chamberlayne*, Evidence, §§ 3183-3186.

cause, of any nature, was *capable* of producing a given result may be satisfactorily established by proof that it actually accomplished it on another occasion.³⁸ In this most conclusive way, it may be shown that a certain machine is capable of doing a given piece of work,³⁹ or inflicting a certain injury.⁴⁰

In much the same way the fact of change can usually best be shown by comparing conditions, states, or events with later ones. Thus, where it is considered desirable to show the development of real property⁴¹ in order to establish the possibly essential fact of a change in its value,⁴² no more appropriate means for doing so may suggest itself than to show the different condition of the property on two or more occasions. In establishing the fact of change, it will be necessary to prove the existence at different times of distinct states or conditions.

In like manner, the general properties of matter, e.g., that a certain substance, used as a beverage, is poisonous,⁴³ may be established by proof of what happened on other occasions than that in question.

§ 1007. **Other Uniformities Than That of Physical Nature; Regularity of Law or Business; Habits.**⁴⁴—Certain uniformities other than that of natural law seem to possess an invariability of action superior to that observable in moral conduct as controlled by volition. The regularity in the operation of municipal law,⁴⁵ of the routine operations of a well-established and systematized business,⁴⁶ a settled physical or mental habit⁴⁷ present, for example, to a judicial

38. *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430 (1890).

39. *Baber v. Rickart*, 52 Ind. 594 (1876); *Waters' Patent Heating Co. v. Smith*, 120 Mass. 444 (1876).

40. *Leather v. Blackwell's Durham Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349 n. (1907).

41. *Vigel v. Naylor*, 24 How. (U. S.) 208, 16 L. ed. 646 (1860).

42. *Drucker v. Manhattan Ry.*, 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437 (1887).

43. *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770 (1897); *State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1895).

44. 4 Chamberlayne, *Evidence*, §§ 3187-3206.

45. *Rowe v. Brenton*, 8 B. & C. 737, 3 M. & R. 361, 15 E. C. L. 363 (1828).

46. *Morisette v. Canadian Pac. Ry. Co.*, 76 Vt. 267, 56 Atl. 1102 (1904) (size of switch lanterns). *Sheldon v. Hudson R. R. Co.*, 14 N. Y. 218, 221, 67 Am. Dec. 155 (1856), per Denio, C. J., wherein it was said: "The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashion of the engines and the character of the operation. I think, there-

fore, it is competent *prima facie* evidence, for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned."

"Where there is no proof of what particular engine set the fire, and the circumstantial evidence is such that there is a strong probability that some engine on the road did set the fire, then it may be proper to show that the engines on that road generally emitted sparks, or that some one or more of them did so at other times and places" (*Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335, 340, 17 N. W. 132 (1883), per Orton, J.).

Habit is not primary evidence and is not admissible where direct evidence is available. *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209 (1912). But where this cannot be had evidence of habit may be used to show conduct on a certain occasion. *Stollery v. Cicero etc., Ry. Co.*, 243 Ill. 290, 90 N. E. 700 (1910); *Devine v. National Safe Deposit Co.*,

tribunal, is the basis of a logical inference that things did happen or even that they will happen on a particular principal occasion in the same manner that they occurred on a previous one which experience shows to be superior in probative force to the simple inference that a person has done a thing at one time because he did it at another. The first and second of these uniformities intermediate, as it were, between that of nature and the one based on the regularity of moral conduct apparently relate more nearly to the happening of physical occurrence than to the conduct of individuals; the third — the force of habit — seems more nearly to concern the doings of individuals than the regular occurrence of physical phenomena. It would follow that the two former are more closely analogous to the uniformity of natural law than is the third; while habit would appear more closely affiliated with moral uniformity and, in fact, to present itself as a culmination and intensification of the uniformity of moral conduct. The distinction, however, is, in truth, more apparent than real; for even where these several intermediate uniformities control or otherwise affect the conduct of individuals, they all operate by minimizing or removing the influence of *volition*. In so doing, they remove conduct from the varying and divergent operation of the will, placing it among the automatic, intuitive, instinctive reflexes of bodily action — analogous to the unconscious or subconscious activities of the vital functions of the human body. Such automatic reflexes, as is elsewhere seen in connection with the probative force of regular spontaneous action, are, in reality, part of the uniformity of nature, and thereby acquire, even for the inference of conduct, much of the probative force inherent in the regularity of natural law.

145 Ill. App. 322 (1908); *Chicago v. Doolan*, 99 Ill. App. 143 (1900); *McNulta v. Lockridge*, 137 Ill. 270, 72 N. E. 452, 31 Am. St. Rep. 362, *affirmed*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. ed. 196 (1891). In criminal cases evidence of habit may be used to show a balance of probability. *Cox v. Com.*, 140 Ky. 65, 130 S. W. 819 (1910).

Habits of Animals.—The jury may infer from the well-known characteristics of turkeys that they would fly off the railroad track if the whistle had been sounded and therefore that as they were run over the whistle was not sounded. *Lewis v. Norfolk S. R. Co.*, 163 N. C. 33, 79 S. E. 283, 47 L. R. A. (N. S.) 1125 (1913).

CHAPTER XLVII.

RELEVANCY OF SIMILARITY; MORAL UNIFORMITY.

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§ 1008. *Res Inter Alios*.¹—Testimony of collateral occurrences, based solely upon mental uniformity, is frequently excluded as *res inter alios* or as *res inter alios acta*. The phrase *res inter alios* is an abbreviation of the maxim, *res inter alios acta alteri nocere non debet*, meaning a transaction between two parties ought not to operate to the disadvantage of a third.

The general rule relative to the principle now under consideration may be thus stated: The question being whether A. did or omitted to do a certain act, no evidence is admissible of other similar acts or omissions which, by their general resemblance, thereto, suggest a probable inference that A. did or omitted to do the act in question, unless the two transactions are connected in some particular manner.

The principle involved is well illustrated in negligence cases. Thus, in an action founded upon an allegation of negligence, no inference that a certain act was reasonable or that a certain person acted in a reasonably careful manner can be drawn from the fact that others in the same business have or have not done such act or are or are not in the habit of acting in such a manner.²

1. 4 Chamberlayne, Evidence, §§ 3207–458 (1912). Proof of similar accidents, see note, Bender ed., 127 N. Y. 46. Against ele-

2. Harmon v. Peoria Ry. Co., 160 Ill. App. vated railway in adjoining owner's action,

A familiar doctrine of criminal law of great importance to the accused announces that one cannot be proved to have been guilty of a particular crime by the simple showing that he has committed a similar one at about the same time.³

§ 1009. **Administrative Requirements.**⁴—The evidence of collateral facts being secondary in nature must be shown to be reasonably necessary to proof of the proponent's case and to be relevant.

§ 1010. **[Administrative Requirements]; Relevancy of Similarity.**⁵—In the case of a collateral act by A. whose relevancy is that of the uniformity of mind, the proving power is that of similarity. There is seen to be such a uniformity in the mental reactions of a given individual, say A., to a particular mental stimulus that the fact of his action on a particular occasion in a given way, a certain motive being operative, furnishes evidence that, the same stimulus being present, he acted in a like way on another occasion. The collateral occurrence operates, in many cases, to corroborate the existence of the connection claimed by the prosecution to exist between a particular stimulus and the actual conduct of the accused.

§ 1011. **[Relevancy of Similarity]; Proof of Mental State.**⁶—A constituent element of many offenses is a mental state of the alleged perpetrator of the crime. The crime, for example, charged against A. may be that of receiving stolen goods, *knowing* them to have been stolen. In such a case, A's knowledge of the stolen character of the goods is a necessary fact to be shown by the prosecution. Or a given act may be charged to have been done by him with *intent* to defraud. Thus, with regard to a great many offenses, some particular psychological state on the part of the alleged offender is a constituent element of the crime. In the absence of admissions by the person charged with the commission of an act, his mental state in connection with the doing of such act can rarely be shown except by the manifestations of such state to prove the existence of which, the use of collateral acts may be of great value, and, in many cases, the only mode of proof.

see note, Bender ed., 106 N. Y. 165. Propriety of showing other like accidents in an injury case, see note, Bender ed., 32 N. Y. 342. So similar acts of negligence by a party at another time are not admissible to show his negligence in a particular case. *Oklahoma R. Co. v. Thomas* (Okla.), 164 Pac. 120, L. R. A. 1917 E 405 (1917). Casting water by one engine at a stated time and upon a stated place cannot be proved by showing that other engines in some manner cast water at different times near and by possibility upon that place although it is claimed that this shows a custom. *Eisentrager v. Great Northern R. Co.*, 178 Iowa 713, 160 N. W. 311, L. R. A. 1917 B 1245 (1916).

3. *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48 (1909). Right to prove another crime or offense, see note, Bender, ed., 93 N. Y. 470, 104 N. Y. 598, 138 N. Y. 601, 143 N. Y. 374, 147 N. Y. 105, 175 N. Y. 197, 177 N. Y. 434, 461. Of other crimes in a criminal case, see note, Bender's ed., 108 N. Y. 303. Admissibility of other fraudulent transactions, see note, Bender's ed., 149 N. Y. 40.

4. 4 Chamberlayne, Evidence, §§ 3213-3215.

5. 4 Chamberlayne, Evidence, § 3216.

6. 4 Chamberlayne, Evidence, §§ 3217-3227.

That a separate indictment has been found for the commission of the collateral act⁷ or that the accused has been tried and acquitted⁸ furnishes no ground for rejecting evidence which it supplies as to the existence of the mental state. So the running of the Statute of Limitations should not affect its admissibility but the general rule is otherwise.⁹ The evidence should not be too remote in time¹⁰ or show such slight causal connection as to render it of no logical bearing.¹¹

The intent with which a party does an act may often be shown by evidence of other acts of a similar character done by the same person.¹² Intent to defraud for example may be shown by evidence that the perpetrator of the act had committed similar frauds of a like nature¹³ and so in cases of homicide¹⁴ or robbery¹⁵ other similar crimes may be shown to prove intent. The same is true of crimes against property¹⁶ or sexual offences,¹⁷ or other crimes.¹⁸

§ 1012. [Relevancy of Similarity]; Knowledge.¹⁹— In many actions for negligence where it is important to show that the defendant had knowledge this may be shown by evidence of other similar happenings as in case of actions for

7. *McCartney v. State*, 3 Ind. 353, 354, 56 Am. Dec. 510 (1852).

8. *State v. Leonard*, 72 Vt. 102, 47 Atl. 395 (1900).

9. *State v. Guest*, 100 N. C. 410, 6 S. E. 253 (1888); *State v. Potter*, 52 Vt. 33 (1879); *Wolfson v. U. S.*, 101 Fed. 430, 41 C. C. A. 422 (1900); writ of certiorari denied, 180 U. S. 637, 21 Sup. Ct. 919, 45 L. ed. 710 (1901).

10. *Bannon v. P. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170 (1909); *Horn v. State* (Tex. Cr. App. 1912), 150 S. W. 948; *Deitz v. State*, 149 Wis. 462, 136 N. W. 166 (1912).

11. *People v. Peckens*, 153 N. Y. 576, 592, 47 N. E. 883 (1897).

12. *People v. Zito*, 237 Ill. 434, 86 N. E. 1041 (1909).

13. *State v. Flanagan*, 83 N. J. L. 379, 84 Atl. 1046 (1912).

14. *Com. v. Birriolo*, 197 Pa. St. 371, 47 Atl. 355 (1900).

15. *State v. Ward* (Iowa 1902), 91 N. W. 898. But see, *State v. Spray*, 174 Mo. 569, 74 S. W. 846 (1903).

16. *Com. v. Sawtelle*, 141 Mass. 140, 5 N. E. 312 (1886).

17. *State v. Johnson*, 133 Iowa 38, 110 N. W. 170 (1907); *Evers v. State*, 84 Neb. 708, 121 N. W. 1005, 19 Am. & Eng. Ann. Cas. 96 (1909); *Williams v. State*, 8 Humph. (Tenn.) 585 (1848). See also, *State v. Leak*, 156 N. C. 643, 72 S. E. 567 (1911).

18. *State v. Johns*, 140 Iowa 125, 118 N. W. 295 (1908). In a prosecution for robbery the State cannot introduce evidence of another similar robbery committed by the defendant the previous night in the absence of evidence of conspiracy or common plan. *Miller v. State* (Okla. Crim. Rep.), 163 Pac. 131, L. R. A. 117 D 383 (1917). Importance of intent, see note, *Bender ed.*, 125 N. Y. 341. Right to testify to intention, see note. *Bender's ed.*, 129 N. Y. 61. Of notice to employer of habits of employee, see note. *Bender ed.*, 183 N. Y. 23.

A prosecutrix in a rape case may always be impeached by showing acts of intercourse with the defendant voluntarily but there is much conflict as to whether acts of intercourse with others may be shown. There seems to be much reason in the view that such evidence should be received as it seems much more likely that a woman of that class would submit to the defendant than a pure woman. *Lee v. State*, 132 Tenn. 655, 179 S. W. 145, L. R. A. 1916 B 963 (1915). In an action for an assault which the defendant denies the plaintiff may show that the defendant was intoxicated at the time and was in a belligerent frame of mind and that he had assaulted other persons immediately before and after the assault committed on the plaintiff. *Harshbarger v. Murphy*, 22 Idaho 261, 125 Pac. 180, 44 L. R. A. (N. S.) 1173 (1912).

19. 4 Chamberlayne, Evidence, §§ 3228-3238.

personal injury from machinery²⁰ or for the defective condition of a street²¹ or from the incompetence of a fellow servant²² or from injury caused by vicious animals.²³ So in criminal cases where guilty knowledge must be proved similar acts of the defendant may be shown as in case of embezzlement²⁴ or false pretences²⁵ or forgery,²⁶ illegal sale of liquor,²⁷ larceny,²⁸ receiving stolen goods²⁹ or other felonies.³⁰

§ 1013. [Relevancy of Similarity]; Malice.³¹—The existence of malice in connection with a particular transaction may be shown by its manifestation on other probative occasions.³² In other words, similar acts done at other times, not too remote to be probative, may be introduced in evidence for the purpose of showing that a given act was done maliciously.³³ To be evidentiary in such a connection the collateral occasion must be so connected with the principal transaction by proximity of time and similarity or dissimilarity of conditions as to render it probable that the same mental state was operative on both occasions.

§ 1014. [Relevancy of Similarity]; Other Mental States.³⁴—Other mental states may be proved by evidence of their manifestations on other occasions as

20. *Framke v. Hanly*, 215 Ill. 216, 74 N. E. 130 (1905); *Donovan v. Chase-Shawmut Co.*, 201 Mass. 357, 87 N. E. 580 (1909); *McCaragher v. Rogers*, 44 Hun (N. Y.) 628, 8 St. Rep. 847 (1887); *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387, 26 S. E. 23 (1896).

21. *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253 (1889).

22. *Maine*.—*Robbins v. Lewiston, etc., Ry.*, 107 Me. 42, 77 Atl. 537, 30 L. R. A. (N. S.) 109n, 24 Am. & Eng. Ann. Cas. 92 (1910).

23. *Arnold v. Norton*, 25 Conn. 92 (1856); *Kittredge v. Elliott*, 16 N. H. 77 (1844).

24. *Morse v. Com.*, 129 Ky. 294, 33 Ky. L. Rep. 831, 111 S. W. 714 (1908). In a prosecution for embezzlement the state may prove other transactions of the defendant not complained of to show that the defendant had kept his books in a manner different from what he had said. This is competent as showing a system or scheme adopted by the defendant for obtaining money from his employer. *State v. Downer*, 68 Wash. 672, 123 Pac. 1073, 43 L. R. A. (N. S.) 774 (1912).

25. *State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Am. & Eng. Ann. Cas. 904 (1906). In a prosecution for fraudulently uttering a check on an account containing insufficient funds evidence that the defendant uttered other checks on the same account at the same time is admissible to

show guilty knowledge. *People v. Bercovitz*, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667 (1912); *State v. Foxton*, 166 Iowa 181, 147 N. W. 347, 52 L. R. A. (N. S.) 919 (1914).

26. *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. Rep. 521, 9 Am. & Eng. Ann. Cas. 453 (1906).

27. *Gray v. State*, 44 Tex. Cr. App. 470, 72 S. W. 169 (1903). In a prosecution for keeping intoxicating liquors with intent to sell them evidence is admissible of the seizure of a large quantity of liquor and of the account books of the defendant showing the purchase of quantities of liquor. *State v. Barr*, 94 Vt. 38, 77 Atl. 914, 48 L. R. A. (N. S.) 302 (1910).

28. *Martin v. State*, 10 Ga. App. 795, 74 S. E. 304 (1912); *Territory v. Caldwell*, 14 N. M. 535, 98 Pac. 167 (1908).

29. *People v. Doty*, 175 N. Y. 164, 67 N. E. 303 (1903).

30. *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370 (1908).

31. 4 Chamberlayne, Evidence, § 3239.

32. *Com. v. Holmes*, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270 (1892).

33. *Henry v. People*, 198 Ill. 162, 65 N. E. 120 (1902).

34. 4 Chamberlayne, Evidence, §§ 3240, 3241.

in case of claim to property,³⁵ good faith³⁶ or its absence³⁷ or emotions such as purpose,³⁸ consent,³⁹ waiver⁴⁰ and the like.

§ 1015. [Relevancy of Similarity]; Motive.⁴¹—While motive is not so much, in most cases, a constituent as a probative fact,—it usually being immaterial with what motive a crime was committed where it is established by the use of direct evidence,—it may be conveniently observed, in this connection, that the motive with which an act was done may be established by evidence of similar transactions at about the same time, by which the practical operation and influence of the motive was manifested.⁴²

§ 1016. [Relevancy of Similarity]; Unity of Design.⁴³—Evidence as to what was done on other occasions may be used with especial probative force either to show that particular conduct took place on another occasion, to identify the person by whom the act was done, or to establish the mental state under which he did it, when the several occasions have such a relation, in their similar or dissimilar features, as to show that they all were, or might properly be regarded as being, manifestations of a single purpose.

Several persons may unite in the effort to accomplish a given result;—each doing on a separate occasion some act assumed to be calculated to advance the end in view relying upon the co-operation of his associates to supply the other elements which may be relied upon for the attainment of a successful result. This instance of unity of design may properly be regarded as the relevancy of a *common purpose*.⁴⁴ On the other hand, a single individual may resolve upon the attainment of a definite object, innocent or criminal, supposed to be profitable or meritorious. Various acts, on a number of occasions, may be done by such a person, in the effort to reach the object in view and adapted for that end;—either by procuring means for its attainment, securing an opportunity

35. *Irvin v. Patchin*, 164 Pa. St. 51, 30 Atl. 436, 35 W. N. C. 341 (1894).

36. *Rice v. Bancroft*, 11 Pick. (Mass.) 469 (1831); *Hunt, T. & Co. v. Reynolds*, 9 R. I. 303 (1869); *Walker v. Town of Westfield*, 39 Vt. 246 (1867); *Lackarie v. Franklin*, 12 Peters (U. S.) 151, 9 L. ed. 1035 (1838).

37. *Rex v. Win' worth*, 4 Car. & P. 441 (1830).

38. *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452 (1888). Declarations of the testator made after the execution of a will are admissible to show that he tore a will with intent to revoke it. *Burton v. Wyld*, 201 Ill. 397, 103 N. E. 976.

39. *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140 (1890).

40. *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13 (1897); *Andre v. Hardin*, 32 Mich.

324 (1875); *Missouri, etc., R. Co. of Texas v. Mayfield*, 29 Tex. Civ. App. 477, 68 S. W. 807 (1902).

41. 4 Chamberlayne, Evidence, § 3242.

42. *People v. Morse*, 196 N. Y. 306, 89 N. E. 816 (1909). Motive, see note, Bender, ed., 146 N. Y. 270. Proof of motive, see note, Bender, ed., 136 N. Y. 457.

43. 4 Chamberlayne, Evidence, §§ 3243-3245.

44. *Neff v. Landis*, 110 Pa. St. 204, 1 Atl. 177 (1885).

Proof of conspiracy is not essential to the admissibility of the evidence itself. *Cox Shoe Mfg. Co. v. Adams*, 105 Iowa 402, 75 N. W. 316 (1898). Reasonable proof of a conspiracy may, however, be demanded before the agency of one alleged conspirator may be properly held to affect those claimed to be his associates.

for the use of these means, removing obstacles which may threaten the success of the enterprise; or, in case of a criminal offense, by eliminating circumstances likely to assist in the detection and punishment of the principal act to which these successive steps are subservient. These and similar occurrences may be said to be fairly typical of the influence of a *continuous purpose*.⁴⁵

§ 1017. **Relevancy of Dissimilarity.**⁴⁶—The probative use of other occasions of the conduct of a given individual presenting dissimilar features to those exhibited on the occasion under investigation may be said to proceed, as it were,

45. *Com. v. Robinson*, 146 Mass. 571, 578, 16 N. E. 452 (1888).

Common Purpose Shown.—On the trial of a defendant for unnatural acts with women evidence is admissible that he had committed other similar acts of the same nature. *Frank v. State*, 141 Ga. 243, 80 S. E. 1016. In a prosecution for any of the sexual crimes except rape evidence of other acts of the same nature either before or as late as fourteen months after the crime charged may be put in evidence. The law takes notice of the fact that there is an extreme probability of the continuance of such relations and such evidence is admissible to show the sexual relations of the parties covering the date of the indictment. Rape is excepted as it would be an extraordinary case where one would commit rape a second time upon the same person. *State v. Reineke*, 89 Ohio St. 390, 106 N. E. 52, L. R. A. 1915 A 138 (1914). In a prosecution for taking a bribe evidence is admissible that the defendant had taken other bribes recently and had solicited from others systematically as this evidence shows his guilt according to logic and reason. So other bribes after the crime charged may be shown. *People v. Duffy*, 212 N. Y. 57, 105 N. E. 839, L. R. A. 1915 B 103 (1914). In a proceeding against a commissioner of deeds for making a false certificate where his knowledge of the falsity of the certificate is in issue the state to show intention may prove similar acts done under similar circumstances at about the same time with intent to defraud the same person by the same means. The common method, purpose and victim formed the connecting links which strung together the various efforts to defraud pursuant to a common scheme. *People v. Marrin*, 205 N. Y. 275, 98 N. E. 474, 43 L. R. A. (N. S.) 754 (1912). In a prosecution for rape evidence is admissible of other acts of intercourse between the parties when near enough in point

of time to show the existence of amorous inclinations at the time charged. They do not suddenly arise and are not likely to suddenly disappear and hence it is that their indulgence prior to or subsequent to the specific occasion charged may tend to increase and strengthen the proof as to that occasion. This appears when they are so related by brevity of time or continuity or otherwise as to justify the inference that the mutual disposition of the parties existed at the time of it. *People v. Thompson*, 212 N. Y. 249, 106 N. E. 78, L. R. A. 1915 D 236 (1914).

Common Purpose Lacking.—In a prosecution for rape evidence of another rape committed on a companion of the prosecutrix immediately after the crime on the prosecutrix is not admissible as mere proximity in time is not enough to establish causal connection with the crime in question. *People v. Gibson*, 255 Ill. 302, 99 N. E. 599, 48 L. R. A. (N. S.) 236 (1912). In a complaint for arson evidence is not admissible that other fires were set by the defendant where each fire was a separate transaction as in this country evidence of other crimes is not admissible. *People v. Grutz*, 212 N. Y. 72, 105 N. E. 843, L. R. A. 1915 D 229 (1914). Where one is charged with setting fire to his yacht evidence is not competent that another yacht and an automobile belonging to him had been previously over-insured and burned as this is simply evidence of other crimes unconnected with the one in question. *Fish v. United States*, 132 C. C. A. 56, 215 Fed. 544, L. R. A. 1915 A 809 (1914). In a prosecution for sodomy evidence is not admissible of other sodomies committed by the defendant at other times and places and under wholly disconnected circumstances with other parties. Such testimony would have the tendency to put in issue these other acts and cloud the issue and confuse the jury. *State v. Start*, 65 Or. 178, 132 Pac. 512, 46 L. R. A. (N. S.) 266 (1913).

by means of what may be called moral or psychological induction. The inference that A. did a particular act is not, as a rule, directly created by evidence that, on another occasion when the alleged stimulus was present, he acted in a different manner; or that, on another occasion when a different stimulus was present, he acted in the same manner as upon the particular occasion in question. No additional probative force is, in most cases, directly added to the proof that A. did the particular act in question by the operation of any relevancy of dissimilarity. The probative force of this particular method of using evidence of what was done upon other occasions by a particular individual is usually applied at another stage, i.e., at that of corroboration of an affirmative case already established by other evidence.

In any particular case the *res gestae* may be equivocal as to the mental state of the person in question; certainly, not clear beyond a reasonable doubt. The obvious and frequently the sole administrative expedient is to broaden the field of inquiry beyond the *res gestae* of the particular case by introducing in evidence proof of what happened upon other occasions so related to the facts under investigation that by the elimination, or as it were, the cancellation of infirmative hypotheses or explanations the steady line or channel of a single sufficient operative cause may be shown to run through the entire series of connected transactions and stand revealed as the real mental state of the person in question throughout them all.

§ 1018. [Relevancy of Dissimilarity]; Psychological Induction.⁴⁷— Closely analogous in operation and effect to the method of *natural induction*,⁴⁸ by which the operation of a particular cause is established as efficient in producing given results upon physical phenomena by the use of other occasions similar or dissimilar in their antecedents, is the employment of what may be called *psychological induction*;— by which the presence and operation, both in kind and degree of intensity, of a particular mental state on a given occasion may be established by showing other times at which it was present, so adjusted to the principal occurrence as to prove a similar operative force in both or to eliminate counter infirmative suggestions, or by both methods in combination.

To state the rule in a slightly different form, in case of a forensic necessity for proving the existence of a given mental state on a particular occasion, administrative indulgence may take the form of permitting proof of other transactions in which the mental state was exhibited; provided such a connection shall appear to exist between the two transactions, the collateral and the present, as to render it probable that the same mental state was present on both occasions. The occurrence must, however, relate to the acts of the person in question and not to those of third persons.

46. 4 Chamberlayne, Evidence, § 3246.

47. 4 Chamberlayne, Evidence, § 3247.

48. Birmingham R., etc., Co. v. Franscomb, 124 Ala. 621, 27 So. 508 (1899); Millsaugh

v. Potter, 62 App. Div. (N. Y.) 521, 71 N. Y. Suppl. 134 (1910); Patterson v. Smith, 73 Vt. 360, 50 Atl. 1106 (1901).

§ 1019. **Inferences Other Than Conduct.**⁴⁹— It is to be observed that the inference which is excluded by the principle under consideration, except in the event of an adequate forensic necessity and some special ground of relevancy other than mere similarity, is simply that a person did a particular act on one occasion because he did a similar one at another. In other words, that which is excluded is inference of conduct based upon moral uniformity in response to particular stimuli.

§ 1020. **[Inferences Other Than Conduct]; Constituent Facts.**⁵⁰— The *res gestae* of one transaction may properly, and even at times necessarily, involve proof of acts of conduct which might well form the *res gestae* of another. Nothing in the principle under investigation forbids such a use of the acts done on another occasion, provided their evidentiary employment as part of the *res gestae* of the pending action or proceeding is reasonable; *a fortiori*, if it is necessary.

The right of a litigant to prove the *res gestae* of his case is a fundamental one and will be protected by the court in any civil case, although making such proof may involve the establishment of the facts of other transactions.

For example in actions for negligence it may be necessary to show other facts as where knowledge is in issue.⁵¹ Even in criminal cases, the prosecution is not debarred from the orderly and necessary proof of its case against the prisoner by the fact that to do so involves proving that the accused committed another offense at another time.⁵²

§ 1021. **[Inferences Other Than Conduct]; Contradiction.**⁵³— Evidence of similar occurrences may be received regardless of the principle in question when not offered as probative on the issue of conduct but as a purely deliberative fact relevant for some independent purpose. For example, the evidence may be used to contradict the evidence of a witness.⁵⁴

§ 1022. **[Inferences Other Than Conduct]; Corroboration or Explanation.**⁵⁵— In much the same way, the evidence of what occurred on a similar occasion may be properly received to *corroborate* a witness.⁵⁶ Evidence of another

49. 4 Chamberlayne, Evidence, § 3248.

50. 4 Chamberlayne, Evidence, §§ 3249-3252.

51. Phila. & Reading R. Co. v. Hendrickson, 80 Pa. St 182, 21 Am. Rep. 97 (1875).

Subsequent Repairs.—In an action for damage to land from an irrigation canal the plaintiff may offer evidence of subsequent repairs which had stopped the damage as this evidence bears both on the question of the probable cause of the damage and on the possibility of preventing it; although evidence of subsequent repairs is not ordinarily admissible in negligence cases. Jensen v. Davis

and Weber, etc., 44 Utah 10, 137 Pac. 635.

52. People v. Furlong, 140 App. Div. 179, 125 N. Y. Suppl. 164; *affirmed*, 201 N. Y. 511, 94 N. E. 1096 (1911).

53. 4 Chamberlayne, Evidence, § 3253.

54. People v. Doody, 172 N. Y. 165, 64 N. E. 807 (1902); Com. v. House, 36 Pa. Super Ct. 363 (1908); State v. Kenny, 77 S. C. 236, 57 S. E. 859 (1907).

55. 4 Chamberlayne, Evidence, §§ 3254, 3255.

56. People v. Rogers, 192 N. Y. 331, 85 N. E. 135, 15 Am. & Eng. Ann. Cas. 177 (1908).

criminal offense committed by the accused has, however, been rejected, although offered for this purpose.⁵⁷ This would seem to carry the rule of exclusion to an unnecessary length, although very possibly justified in a particular case on the ground that its admission was calculated to prejudice the accused to an extent disproportionate to the gain to the cause of justice. In much the same way, evidence of a different transaction may be given in order to afford a reasonable *explanation* of the *res gestae* or probative facts under consideration in the pending case.⁵⁸ For example, it may be shown in this way who is the principal in a given transaction.⁵⁹

§ 1023. [Inferences Other Than Conduct]; Identification of Doer of Act; Essential Conditions for Conduct.⁶⁰.— Prominent among the inferences which may properly be drawn from the conduct of the given individual on other occasions are those which arise in connection with what may be called necessary conditions of action upon the occasion in question and which serve to connect a given individual with the *res gestae* of that transaction, *identifying him* as the actor of these *res gestae*.

Among such essential conditions of conduct are those of motive, means and opportunity. The actor must, in most cases, have had a motive for doing that which he has done. He must, in all cases, have had the means by which it was done, and the opportunity for using these means for achieving the result attained. Any other conditions of time, space and causation which the *res gestae* or probative facts show must be met by the actual doer of the act and proof of them, even as shown on other occasions, is often a necessary method of circumstantial proof.

When the doing of the act must be established by circumstantial evidence it must be shown that the alleged actor was possessed of the particular powers the possession of which is implied by the doing of the act which may be established by his conduct on other occasions.⁶¹ So knowledge may be shown by other acts of the person showing knowledge,⁶² and opportunity⁶³ and the necessary presence of the alleged actor or his necessary skill⁶⁴ may be proved by evidence of other conduct of his.

57. *People v. Schweitzer*, 23 Mich. 301 (1871).

58. *Bigcraft v. People*, 30 Colo. 298, 70 Pac. 417 (1902); *Mitchell v. People*, 24 Colo. 532, 52 Pac. 671 (1898). Evidence of the custom of the decedent in crossing railroad tracks is not competent as to his negligence on a particular occasion where there were eye-witnesses of the accident. The court remarks that the relevancy of the evidence does not outweigh the inconvenience of a multitude of collateral issues not suggested by the pleadings the trial of which would take time, tend to create confusion and do little good. In some courts such evidence is received when

there are no eye-witnesses of the accident. *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. (N. S.) 683 (1912).

59. *Woodward v. Buchanan*, 39 L. J. Q. B. 71, L. R. 5 Q. B. 285, 22 L. T. 123 (1872).

60. 4 Chamberlayne, Evidence, §§ 3256-3261.

61. *Blalock v. Randall*, 76 Ill. 224 (1875).

62. *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183 (1902).

63. *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766 (1893).

64. *Com. v. Choate*, 105 Mass. 451, 457 (1870).

Where the question is whether an animal could do a particular act, as whether it could attain a certain speed it may be shown to have done so on another occasion.⁶⁵

§ 1024. [Inferences Other Than Conduct]; Probative Facts.⁶⁶— Certain facts such as those of continuance in a mental feeling or change in the same can best be established by collateral occurrences showing the mental condition at different times. In like manner that certain action is habitual, accurate, or the like, calls, almost of necessity, for proof of appropriate action on other occasions. With regard to these, the collateral transaction may properly be regarded a probative fact.

Habit is best proved by specific instances of conduct. Obviously, if the habit of a person for accuracy in a certain line of work, for example, were in issue, proof that, on numerous occasions, he had done such work with absolute accuracy would be relevant and admissible.⁶⁷

So where it becomes necessary to prove a change in condition or conduct evidence of similar occurrences may be relevant and admissible.⁶⁸

⁶⁵. *Whitney v. Leominster*, 136 Mass. 25 360 (1898); *State v. Shaw*, 58 N. H. 73 (1883).

⁶⁶. 4 Chamberlayne, Evidence, §§ 3262–3264.

(1878); *Davis v. Lyon*, 91 N. C. 444 (1884).

⁶⁸. *Tilton v. Miller*, 66 Pa. St. 388, 5 Am. Rep. 373 (1870).

⁶⁷. *Ferner v. State*, 151 Ind. 247, 51 N. E.

CHAPTER XLVIII.

MORAL UNIFORMITY; CHARACTER.

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§ 1025. *Inference of Conduct from Character*.¹— Character is to be distinguished from reputation with which it is sometimes confused, even in judicial opinions. Reputation, or the opinion concerning a person which is entertained by those who are so situated as to be able to form an opinion with more or less intelligence, may extend to a variety of subjects. For example, it may be a reputation for musical ability. physical strength, wealth and the like. However, reputation is more commonly considered as having reference to the disposition or character of a person. Thus it is said of a person that he bears a good reputation, meaning that the person in question has a reputation for being a person of good character. For the purposes of the present chapter,

1. 4 Chamberlayne, Evidence, §§ 3265-3267.

character may be defined generally as that combination of traits which goes to make up the moral nature of an individual and serves to distinguish him from all others.

In most civil cases as in actions for goods sold and delivered, for money loaned, or services rendered the character of a party to an action can ordinarily throw no light on the question of the rights of the parties. The reason commonly assigned for excluding evidence of character is that it is irrelevant, but there is another important administrative reason that such evidence would make trials long and tedious.

§ 1026. **Necessity.**²— Character whenever evidentiary at all is primary evidence and no necessity need be shown to warrant its introduction. However, as actual character is difficult if not impossible to show in evidence,³ the law has resorted to the use of reputation to prove character. Reputation is a species of hearsay evidence, admitted under an exception to the hearsay rule. It is in connection with the use of reputation that necessity must appear as is the case with all classes of hearsay. The necessity for resorting to reputation lies partly in the difficulty in obtaining other proof and partly because of legal precedent which excludes the knowledge and opinion of individuals concerning the person whose character is under consideration and evidence of his conduct, and this often when such evidence might be of great value.

Often especially in criminal cases there is another meaning of necessity as where there is an entire absence of direct evidence of the facts alleged as in case of homicide to prove who was the aggressor.

§ 1027. **Relevancy.**⁴— The relevancy of character to prove conduct has a variety of sources. Among the more important of these, tending to prove good conduct, may be mentioned the force of habit, religious sanction and self respect. That a person of good character has a decided tendency to conduct himself consistently therewith merely from force of habit cannot be doubted, but probably self respect and religious sanction, either acting singly or together, may be regarded as more powerful influences. In most criminal cases, the character of the accused is clearly relevant on the question whether or not he committed the crime of which he is charged. A case can scarcely be conceived in which this would not be true, where the offense alleged involves a moral quality. The habitual regard or disregard for right doing as evidenced by a person's character cannot fail to have its effect upon his conduct whenever he is confronted with the necessity for acting in one direction or the other. This fact, well known to all thinking persons, gives to character its probative force or relevancy by way of raising an inference as to conduct.

So character may be useful in cases where it is necessary to prove criminal

2. 4 Chamberlayne, Evidence, §§ 3268–3269.

4. 4 Chamberlayne, Evidence, §§ 3270–3272.

3. *Ex parte Vandiveer*. 4 Cal. App. 650, 654, 88 Pac. 993 (1907), per Chipman, P. J.

intent as in homicide or in prosecutions for having counterfeit money with intent to utter it.

§ 1028. **Rule Stated; Civil Cases.**⁵— It may be laid down as the modern general rule that, in civil actions, evidence of the character of a *party* is not admissible for the purpose of raising an inference as to his conduct.⁶

It should be observed that only as furnishing a basis for an inference of conduct is evidence of character excluded. Where character is relevant for any other purpose, it is admissible in all cases. For example, the character of the female for chastity has been received in actions for breach of promise of marriage.⁷ Likewise, proof of a person's character may be relevant and admissible for the purpose of mitigating damages. Thus, where the plaintiff seeks damages because of an injury to his reputation, the defendant may show that the plaintiff's character and reputation at the time of the alleged injury was such that he suffered slight damage or no damage at all.⁸

§ 1029. [**Rule Stated**]; **Criminal Cases.**⁹— In criminal cases, it is a well established general rule that the prosecution may not introduce evidence of the character of the accused for the purpose of raising an inference that the latter is guilty of the crime for which he is being tried.¹⁰ The rule is one of administrative policy. The source of it may be found in the principle of the law of English speaking people, which obtains in criminal actions, that the accused is presumed to be innocent until he is proven guilty.¹¹ It would clearly be difficult to maintain this presumption of innocence in the minds of the jurors if testimony were given of a long list of crimes alleged to have been committed by the accused.

But where the accused takes the stand as a witness he waives his rights in this regard and his character may be impeached as that of any other witness.¹² So evidence of the bad character of a third person may be admitted whenever it is relevant as in some cases of homicide¹³ where the character of the de-

5. 4 Chamberlayne, Evidence, §§ 3273, 3274.

6. Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. Rep. 559 (1907).

7. Von Storch v. Griffin, 77 Pa. St. 504 (1875).

8. Wood v. Custer, 86 Kan. 387, 121 Pac. 355, 38 L. R. A. (N. S.) 1176 (1912).

9. 4 Chamberlayne, Evidence, §§ 3275-3279. Of character of accused in criminal cases, see note, Bender ed., 182 N. Y. 67, 83.

10. State v. Hull, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609 (1893).

11. See, People v. Fitzgerald, 156 N. Y. 253, 260, 50 N. E. 846 (1898).

12. Holloway v. People, 181 Ill. 544, 54 N. E. 1030 (1899).

13. "On all doubtful questions as to who was the aggressor, the violent or blood-thirsty character of the deceased, if such be his character, enters into the account. More prompt and decisive measures of defense are justified when the assailant is of known violent and blood-thirsty nature." De Arman v. State, 71 Ala. 351, 361 (1882), per Stone, J. The defendant in a homicide case may show the general reputation of the deceased as to being a lawless and violent character but not specific acts on the part of the deceased. Territory v. Lobato, 17 N. M. 666, 134 Pac. 222, L. R. A. 1917 A 1226 (1913). In an action for assault and battery where the defence is self-defence, the defendant may show that the plaintiff's reputation for turbulence and vio-

ceased may be shown or in prosecution for rape where consent may appear through the bad character of the prosecutrix for chastity.¹⁴

The defendant in a criminal action may in all cases give evidence of his good character.¹⁵ Character being always relevant in a criminal case, it follows that it is admissible whenever it is not excluded by some reasons of administrative policy. In regard to the good character of the accused, no reason exists for exclusion on the ground of policy, the situation being quite different from that which is confronted when bad character is sought to be shown. When the accused has introduced evidence of his good character, the protection thrown around him by the rule excluding evidence of bad character is necessarily withdrawn and the state may thereupon give such evidence of his bad character as may be obtainable.¹⁶

The inference of guilt or innocence of the accused is deliberative only and only a slight degree of probative force can be accredited to it. Where the prosecution may introduce evidence of the bad character of the accused it is a very valuable opportunity harmful to the accused.

§ 1030. [Rule Stated]; Quasi Criminal Cases.¹⁷—Certain actions which are conducted as civil actions and are commonly spoken of as being such are in reality on the border line between civil and criminal actions. Features belonging to both classes of actions are to be found in them. Frequently the state of facts out of which the cause for the civil action arises makes the defendant liable to criminal prosecution also. It would seem, upon principle, that evidence of the character of a party should be received in the majority of such cases as readily as in criminal cases, for the same reason and subject to the same rules. The courts, however, have commonly held that evidence of character of a party is not admissible in such cases.

This rule prevails in actions for penalties¹⁸ or where criminal charges are made in civil suits¹⁹ as in actions for bastardy²⁰ or conversion²¹ or injuries

lence is bad, even though there has been no evidence that it was good where the defendant knows this reputation as this may well justify him in thinking that he is in danger. *Davenport v. Silvey*, 265 Mo. 543, 178 S. W. 168, L. R. A. 1916 A 1240 (1915).

14. *People v. Gray*, 251 Ill. 431, 96 N. E. 268 (1911).

15. *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676 (1908). Previous good character is not a defence to a charge of crime but may have weight where the evidence is conflicting. *State v. McGuire*, 84 Conn. 470, 80 Atl. 761, 38 L. R. A. (N. S.) 1045 (1911). Propriety of good character of accused, see note. *Bender ed.*, 43 N. Y. 6. Of good character in criminal cases, see note, *Bender ed.*, 33 N. Y. 611. Of good character, see note,

Bender ed., 179 N. Y. 316, 326. Character of accused as defense in homicide, see note, *Bender ed.*, 189 N. Y. 409, 422.

16. *Com. v. Maddocks*, 207 Mass. 152, 93 N. E. 253 (1910).

Veracity distinguished from Peacefulness.

—The fact that a defendant in a criminal case offers evidence of his good character for truth and veracity does not deprive him of his presumption of good character for peace and quietness as the two are to be distinguished. *Durham v. State*, 128 Tenn. 636, 163 S. W. 447, 51 L. R. A. (N. S.) 180 (1913).

17. 4 *Chamberlayne*, Evidence, §§ 3280–3285.

18. *Hall v. Brown*, 30 Conn. 551 (1862).

19. *Contra*, *Hein v. Haldrige*, 78 Minn. 468, 81 N. W. 522 (1900) (seduction). Evidence

to the person as assault and battery²² though it is often admitted in actions for slander.²³ In cases where immoral conduct not amounting to a crime is charged the evidence is commonly excluded.²⁴

§ 1031. [Rule Stated]; Administrative Details.²⁵—The judge presiding at the trial, in his administrative capacity, must avoid an improper presentation of character evidence to the jury by observing certain well-settled rules limiting the use of such evidence and keeping it within the logical bounds of relevancy. The proof of character received must be with reference to a trait which logically has some probative weight in assisting to reach a conclusion on the question at issue. In other words, the trait of character proved must be the same as that involved in the commission of the offense charged. None but qualified witnesses must be allowed to testify. A witness must have been in a position to learn the reputation of the person in question during the period covered by the inquiry, which must be limited to a time prior to the date when the alleged offense involved in the action may reasonably be regarded as affecting such reputation.

§ 1032. [Rule Stated]; Physical or Mental Impairment.²⁶—A condition of physical or mental impairment is to be distinguished from a trait of character.

of a reputation for good character is not admissible according to the weight of the authorities even to rebut a charge of fraud. *Great Western Life Ins. Co. v. Sparks*, 38 Okla. 395, 132 Pac. 1092, 49 L. R. A. (N. S.) 724 (1913); *Wilson Lumber Co. v. Atkinson*, 162 N. C. 298, 78 S. E. 212, 49 L. R. A. (N. S.) 733 (1913). Evidence of character for honesty may be admitted in defence of a civil action quasi criminal in nature for selling bad meat as this involves moral turpitude. *De Weese v. People*, 61 Colo. 140, 156 Pac. 594, L. R. A. 1916 F 326 (1916), citing text. In disbarment proceedings though civil in nature the defendant may put in evidence of his good character. *Lenihan v. Commonwealth*, 165 Ky. 93, 176 S. W. 948, L. R. A. 1917 B. 1132 (1915). Where in an action on an insurance policy the deceased is charged with fraud evidence of his reputation for integrity and truth is admissible as he is dead and the jury cannot pass upon his credibility by observing his appearance on the stand. *Rasmusson v. North Coast Fire Ins. Co.*, 83 Wash. 569, 145 Pac 610, L. R. A. 1915 C 1179 (1915).

²⁰. *Low v. Mitchell*, 18 Me. 372 (1841).

²¹. *Wright v. McKee*, 37 Vt. 161 (1864).

²². *Givens v. Bradley*, 3 Bibb. (Ky.) 192, 6 Am. Dec. 646 (1813); *Noonan v. Luther*,

206 N. Y. 105, 99 N. E. 178 (1912); *Smithwick v. Ward*, 52 N. C. (7 Jones' L.) 64, 75 Am. Dec. 453 (1859). See also, *Denton v. Ordway*, 108 Iowa 487, 79 N. W. 271 (1899).

²³. *Sheehy v. Cokley*, 43 Iowa 183, 186, 22 Am. Rep. 236 (1876), per Day, J. *Contra*: *Hallowell v. Guntle*, 82 Ind. 554 (1882); *Stone v. Varney*, 7 Metc. 86 (1843); *Com. v. Snelling*, 15 Pick. 337 (1834); *Finley v. Widner*, 112 Mich. 230, 70 N. W. 433 (1897). In an action for libel where there is a plea of justification, it is error to allow the plaintiff, in his case-in-chief, to introduce evidence of his good character. *Blakeslee v. Hughes*, 50 Ohio St. 490, 34 N. E. 793 (1893).

²⁴. *Lamagdelaine v. Tremblay*, 162 Mass. 339, 341, 39 N. E. 38 (1894). A defendant in an indictment for adultery may show that the woman with whom he is charged with committing adultery was a woman of good character and reputation. *Glover v. State*, 15 Ga. App. 44, 82 S. E. 602. In a complaint for non-support the wife's adultery cannot be proved by evidence of the wife's bad reputation for chastity coupled with evidence of frequent opportunity for adultery. *Land v. State*, 71 Fla. 270, 71 So. 279, L. R. A. 1916 E 760 (1916).

²⁵. 4 Chamberlayne, Evidence, § 3286.

²⁶. 4 Chamberlayne, Evidence, § 3287.

The former is more easy of proof by direct evidence than the latter, making recourse to composite hearsay unnecessary. Consequently, it has become a well established principle that general reputation in the neighborhood is not admissible to prove what the physical or mental condition of a person was at a particular time. Thus the state of a person's bodily health²⁷ or his mental condition with respect to sanity²⁸ cannot be proved by evidence of reputation as to those matters.

§ 1033. [Rule Stated]; Trait must be Relevant.²⁹— It is a rule well enforced by reason and sanctioned by authority that character evidence, introduced for the purpose of laying a basis for an inference as to conduct, must be limited to proof of the existence of the particular trait or group of traits involved in the doing of an act like the one which is the subject of the investigation in which the evidence is offered.³⁰ This is for the obvious reason that proof of the possession or non-possession, by the person whose conduct is sought to be proved, of some other trait does not tend to enlighten a reasoning mind as to the probabilities of the conduct of that person.³¹ Such proof is irrelevant. For instance, that a man possesses a good character for loyalty to his sovereign is of no avail to him when on trial for murder.³²

Following this rule in prosecutions for adultery the character of the person for chastity is admissible,³³ in arson cases his character for honesty,³⁴ in assault his character as a peaceable citizen,³⁵ while in burglary he may not show that his work as a former policeman had been satisfactory.³⁶ In a prosecution for carrying concealed weapons his character as a peaceable citizen is relevant,³⁷

27. *Mosser v. Mosser's Ex'r*, 32 Ala. 551 (1858); *Home Circle Society v. Shelton* (Tex. Civ. App. 1904), 81 S. W. 84.

28. *Biddle v. Jenkins*, 61 Neb. 400, 85 N. W. 392 (1901). "Public opinion declared Copernicus a fool, when he promulgated the planetary system; and Columbus a fool when he announced the sublime idea of a New World. Hazardous in the extreme would it be to the rights of the parties under the law, if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals." *Foster v. Brooks*, 6 Ga. 287, 292 (1849), per Nisbet, J.

29. 4 Chamberlayne, Evidence, §§ 3288: 3306.

30. "In all criminal prosecutions, whether for a felony, or for a misdemeanor, the previous good character of the accused, having reference and analogy to the subject of the prosecution, is competent and relevant as original testimony." *Kilgore v. State*, 74 Ala. 1, 7 (1883), per Brickell, C. J. To same effect see *United States v. Wilson*, 176 Fed. 806 (1910).

31. "It has never been the practice in this State to permit a witness, in support of his character for veracity, to prove that he has been honest in his dealings, or moral and free from vice. It does not follow that because a man deals honestly, and is otherwise moral, he is therefore truthful. Nor is it believed that because a man is not fair, or is immoral, he is therefore untruthful." *Tedens v. Schumers*, 112 Ill. 263, 267 (1884), per Mr. Justice Walker.

32. *Trial of Capt. Wm. Kidd*, 14 How. St. Tr. 123, 146 (1701).

33. *State v. Donovan*, 61 Iowa 278, 16 N. W. 130 (1883); *Com. v. Gray*, 129 Mass. 474, 37 Am. Rep. 378 (1880).

34. See *State v. Emery*, 59 Vt. 84, 7 Atl. 129 (1886).

35. *State v. Schleagel*, 50 Kan. 325, 31 Pac. 1105 (1893); *State v. Dalton*, 27 Mo. 13 (1858).

36. *State v. Coates*, 22 Wash. 601, 61 Pac. 726 (1900).

37. *Lann v. State*, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445 (1888).

and in actions for fraud his character for honesty,³⁸ and in homicide cases his peaceableness,³⁹ while in illegal liquor cases he may not show his reputation as a peaceful citizen.⁴⁰

In cases of attacks on women the chastity of the female is often relevant⁴¹ and in infanticide cases the humane disposition of the accused,⁴² in larceny his reputation for honesty,⁴³ while in libel cases the reputation of the accused for veracity is not relevant.⁴⁴ In perjury cases reputation for truth is admissible⁴⁵ and in rape cases his reputation for chastity,⁴⁶ in prosecutions for receiving stolen goods his reputation for honesty,⁴⁷ and in seduction his reputation for virtue.⁴⁸

§ 1034. Inferences Other Than Conduct; Independent Relevancy.⁴⁹—The restrictions and limitations to the use of character evidence which have been discussed in the preceding sections of this chapter apply only where the proof of character is offered as a basis for an inference as to conduct. Whenever character is relevant as a basis for any other inference, it is admissible without restriction. Character may be an issue in the case. Under such circumstances, the method of making the proof is, in some instances, the same as when character is used in its evidentiary capacity; but, aside from that, this use of character has no connection with the law of evidence.

§ 1035. [Inferences Other Than Conduct]; Character a Constituent Fact.⁵⁰—In actions of breach of promise to marry specific acts of unchastity on the part of the plaintiff are relevant as a complete defence to the action⁵¹ and it is

38. *State v. Dexter*, 115 Iowa 678, 87 N. W. 417 (1901) (obtaining goods under false pretenses).

39. *People v. Bezy*, 67 Cal. 223, 7 Pac. 643 (1885); *People v. Stewart*, 28 Cal. 395 (1865); *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. 460 (1888); *Walker v. State*, 102 Ind. 502, 1 N. E. 856 (1885); *Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895); *Gandolfo v. State*, 11 Ohio St. 114 (1860).

40. *Baehner v. State*, 25 Ind. App. 597, 58 N. E. 741 (1900).

41. *Com. v. Kendall*, 113 Mass. 210, 18 Am. Rep. 469 (1873).

42. *State v. Cunningham*, 111 Iowa 233, 82 N. W. 775 (1900).

43. *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136 (1901); *Long v. State*, 11 Fla. 295 (1867); *State v. Bloom*, 68 Ind. 54, 34 Am. Rep. 247 (1879); *People v. Ryder*, 151 Mich. 187, 114 N. W. 1021, 14 Det. Leg. N. 912 (1908).

44. *State v. Heacock*, 106 Iowa 191, 76 N. W. 654 (1898).

45. *State v. Kinley*, 43 Iowa 294 (1876); *Edgington v. U. S.*, 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467 (1896).

46. *State v. Snover*, 63 N. J. L. 382, 43 Atl. 1059 (1899); *State v. Wolf*, 112 Iowa 458, 84 N. W. 536 (1900).

47. *Hey v. Com.*, 32 Grat. (Va.) 946, 34 Am. Rep. 799 (1879).

Possessing Counterfeit Money.—"When a man is arrested with counterfeit money in his possession, . . . he may relieve the charge thus placed upon him by proof of former character, showing that he would not be likely to be engaged in that class of business." *United States v. Kenneally*, 26 Fed. Cas. No. 15,522, 5 Biss. 122 (1870), per Blodgett, J.

48. *State v. Curran*, 51 Iowa 112, 49 N. W. 1006 (1879).

49. 4 Chamberlayne, Evidence, § 3307.

50. 4 Chamberlayne, Evidence, § 3308.

51. *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642, 25 Am. & Eng. Ann. Cas. 960 (1911).

also competent to show her general bad character⁵² which may be rebutted by proof of general good character.⁵³

Under prosecutions for seduction where the statute provides that the female must have been of previous chaste character specific acts of lewdness may be shown⁵⁴ but general bad reputation for chastity is not competent⁵⁵ while if the statute requires that she must be of good repute specific acts are not relevant while general reputation may be shown.⁵⁶

In some cases the reputation of the parties must be determined before damages can be fixed as in actions for breach of promise of marriage⁵⁷ or malicious prosecution⁵⁸ or seduction⁵⁹ or slander.⁶⁰

§ 1036. [Inferences Other Than Conduct]; Character a Probative Fact.⁶¹— The character of a person may be evidentiary in connection with its effect upon the belief or knowledge of another person. It may also throw some light on the intent or motive with which an act was done.

For example in negligence cases the knowledge of the employer of the incompetency of the agent may be shown by evidence of his reputation for incompetency⁶² and in homicide cases the reputation of the deceased for turbulence is competent to show the fear of the accused⁶³ and reputation may be shown to prove good faith of the defendant in proceedings for malicious prosecution⁶⁴ and it may be competent to show motive or intent.⁶⁵

§ 1037. Proof of Character; "Reputation is Character."⁶⁶— Notwithstanding the undoubted probative value of evidence of particular acts and the knowledge and opinion of individuals in arriving at a just estimate of a person's character, it is the almost universal rule that character must be proved by evidence

52. *McCarty v. Coffin*, 157 Mass. 478, 32 N. E. 649 (1892).

53. See *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642, 25 Am. & Eng. Ann. Cas. 960 (1911).

54. *State v. Prizer*, 49 Iowa 531, 31 Am. Rep. 155 (1878); *People v. Kenyon*, 5 Parker's Cr. Rep. 254 (1862); *affirmed* 26 N. Y. 203, 84 Am. Dec. 177 (1863).

55. *State v. Reinheimer*, 109 Iowa 624, 80 N. W. 669 (1899); *State v. Prizer*, 49 Iowa 531, 31 Am. Rep. 155 (1878).

56. *State v. Atterbury*, 59 Kan. 237, 52 Pac. 451 (1898); *State v. Bryan*, 34 Kan. 63, 8 Pac. 260 (1885); *Russell v. State*, 77 Neb. 519, 110 N. W. 380 (1906); *Foley v. State*, 59 N. J. L. 1, 35 Atl. 105 (1896); *Bowers v. State*, 29 Ohio St. 542 (1876).

57. *Burnett v. Simpkins*, 24 Ill. 264 (1860); *Denslow v. Van Horn*, 16 Iowa 476 (1864); *McGregor v. McArthur*, 5 U. C. C. P. 493 (1856).

58. *O'Brien v. Frazier*, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170 (1885).

59. *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736 (1896) (specific acts admissible).

60. *Lydiard v. News Co.*, 110 Minn. 140, 124 N. W. 985, 19 Am. & Eng. Ann. Cas. 985 (1910).

61. 4 Chamberlayne, Evidence, § 3309.

62. *Cooney v. Commonwealth Ave. St. Ry. Co.*, 196 Mass. 11, 81 N. E. 905 (1907).

63. *Abbott v. People*, 86 N. Y. 460 (1881).

64. *McIntire v. Levering*, 148 Mass. 546, 20 N. E. 191, 2 L. R. A. 517, 12 Am. St. Rep. 594 (1889).

65. *Kee v. State*, 28 Ark. 155 (1873); *Davis v. State*, 10 Ga. 101 (1851). See also *State v. Jones*, 14 Mo. App. 595 (1883); *People v. Gleason*, 1 Nev. 173 (1865); *Hogan v. State*, 36 Wis. 226 (1874).

66. 4 Chamberlayne, Evidence, §§ 3310-3314.

of reputation,⁶⁷ which is a form of hearsay and may be appropriately designated as composite hearsay, or a community expression of opinion in which the individual voices blend and are indistinguishable. The use of reputation for this purpose is justified on the ground of necessity, other evidence not being available, as most jurisdictions for reasons of administrative policy exclude evidence of particular acts and personal opinions.

The rule that character must be shown by proof of reputation is universal⁶⁸ except where the witness is impeached where proof of a prior conviction of a crime may also be shown. As one who leads an exemplary life is seldom the subject of comment as to his conduct evidence of reputation may often be negative in character and a witness who had been in a position to hear anything said may testify that he never heard any discussion concerning the matter⁶⁹ but this negative evidence is limited to evidence of good character.⁷⁰ The reputation must be general in character⁷¹ and be more than mere rumors,⁷² though rumors may be inquired about in cross-examination.⁷³

§ 1038. [Proof of Character]; What Witnesses are Qualified; Adequate Knowledge.⁷⁴— Before a witness can testify as to the reputation of a person he must have adequate knowledge in regard thereto.⁷⁵ His personal opinion concerning it is inadmissible.⁷⁶ The circumstances of each case must control the determination of these questions to a great extent. The decisions indicate that it is largely a matter for administrative discretion.⁷⁷ Although residence by

67. *Hunneman v. Phelps*, 199 Mass. 15, 85 N. E. 169 (1908).

68. *State v. Coates*, 22 Wash. 601, 61 Pac. 726 (1900); *People v. Haydon* (Cal. App. 1912), 123 Pac. 1102; *Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

69. *Hallowell v. Guntle*, 82 Ind. 554 (1882). See *Davis v. Foster*, 68 Ind. 238 (1879); *National Bank v. Scriven*, 63 Hun (N. Y.) 375, 18 N. Y. Suppl. 277, 44 N. Y. St. Rep. 331 (1892).

70. See *Lenox v. Fuller*, 39 Mich. 268 (1878).

71. *Vickers v. People*, 31 Colo. 491, 73 Pac. 845 (1903).

72. *Powers v. Presgroves*, 38 Miss. 227 (1859).

73. "It is certainly competent on cross-examination of a witness who testified as to defendant's good moral character to ask whether there have not been rumors or reports in the community as to his bad character with reference to particular transactions." *State v. Kimes*, 152 Iowa 240, 249, 132 N. W. 180 (1911), per McClain, J.

Practical Suggestions.— There is only one proper way to put in evidence of reputation

for veracity. The witness should be first introduced by showing through his residence or business relationship his opportunities for knowing about the person to be impeached and then he should be asked whether he knows what the reputation for truth and veracity of the party in question is. If his answer to this is in the affirmative he may then be asked what this reputation is.

74. 4 Chamberlayne, Evidence, §§ 3315-3317.

75. *Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. 72 (abstract) (1880); *R. v. Rowton*, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865). "Adequate knowledge of the prevailing opinion on the subject is a prerequisite to the admissibility of such evidence." *Allison's Exec. v. Wood*, 104 Va. 765, 771, 52 S. E. 559, 7 Am. & Eng. Ann. Cas. 721 (1906), per Whittle, J.

76. *State v. Thoenke*, 11 N. D. 386, 92 N. W. 480 (1903); *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523 (1887).

77. *Hadjo v. Gooden*, 13 Ala. 718 (1848) (witness lived twelve miles away, but stated

the character witness in the vicinity where the reputation in question obtains is commonly spoken of as being essential, it is simply a convenient term indicating more or less continued presence in the vicinity. It is the means and extent of the knowledge of the witness irrespective of residence which is logically controlling.⁷⁸ That the witness should be acquainted personally with the one whose character is under consideration is not logically essential. It is not necessary that he should have heard the majority of the members of the community express themselves in reference to the matter.⁷⁹

Cross-examination may freely examine into the extent and sources of knowledge⁸⁰ and the appellate court may reverse where a witness has not sufficient knowledge.⁸¹

§ 1039. [Proof of Character]; Knowledge of the Community.⁸²—The community or neighborhood in which an admissible reputation may exist must be one in which the person in question is well known.

It used to be said that this was the community where he resided⁸³ but in modern times a man may be less known where he lives than in the neighboring city where he works and it seems a better rule that his reputation where he is best known should be used.⁸⁴ The "community" means a place of such size as to make possible the growth of an unbiased reputation⁸⁵ and his reputation at the place of trial is of no moment as such.⁸⁶ Reputation at his former residence may be introduced where he has lived in his present abode but a short time.⁸⁷ Cross-examination may properly be concerned with the size and character of the community, the length of time he has spent there and the opportunity of the community for knowing the character of the person in question.

that he knew the reputation of the person in question in the latter's neighborhood. Competent); *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315 (1899) (witness resided in a town five miles from person in question. Competent); *People v. Seldner*, 62 App. Div. (N. Y.) 357, 71 N. Y. Suppl. 35 (1901) (witness knew party for fifteen years, knew a great many people who knew him and had conversed with them concerning him. Competent); *Com. v. Wilson*, 44 Pa. Super. Ct. 183 (1910) (witness had seen party only a few hours each year when on annual vacation visits and did not know any people who knew him. Incompetent).

78. *State v. Cunningham*, 130 La. 749, 58 So. 558, 559 (1912).

79. *Robinson v. State*, 16 Fla. 835 (1878); *Cunningham v. Underwood*, 116 Fed. 803, 53 C. C. A. 99 (1902). "If the witness has heard enough to enable him to say that he thinks he knows the prevailing opinion enter-

tained of him [person inquired about] by his acquaintances, he is competent to speak, subject to cross-examination, as to sources, extent, and correctness of his information." *Cunningham v. Underwood*, 116 Fed. 803, 811, 53 C. C. A. 99 (1902). per Lurton, J.

80. *State v. Holly*, 155 N. C. 485 (1911).

81. *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (1907).

82. 4 Chamberlayne, Evidence, §§ 3318-3326.

83. *Younger v. State*, 80 Neb. 201, 114 N. W. 170 (1907).

84. *State v. Henderson*, 29 W. Va. 147, 168, 1 S. E. 225 (1886), per Johnson, Pres.

85. *Thomas v. People*, 67 N. Y. 218, 224 (1876), in state prison.

86. *Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (1895).

87. *Pape v. Wright*, 116 Ind. 502, 510, 19 N. E. 459 (1888).

Evidence of good reputation can be rebutted only by evidence of bad reputation. Evidence of specific acts of misconduct is inadmissible for that purpose.⁸⁸

The trial judge is properly allowed a wide discretion in various details relating to the use of character and unless this discretion has been abused it will not be reversed on appeal.⁸⁹ He may for example limit the number of the witnesses⁹⁰ or exclude them entirely if the character is admitted by the other side.⁹¹

§ 1040. [Proof of Character]; Remoteness in Time.⁹²— It has been sometimes judicially intimated that the remoteness of the time when the reputation of which proof is offered existed should not be considered as affecting the admissibility of the evidence, but that it should be received in all cases and the jury allowed to give it whatever weight seems proper.⁹³ However, that the trial judge may in the exercise of his administrative function exclude evidence of a reputation which existed at a remote date seems reasonably clear upon authority.⁹⁴ This view is logically correct as otherwise the time of the court might often be occupied in considering almost, if not quite, worthless testimony.

§ 1041. [Proof of Character]; Absence of Controlling Motive to Misrepresent.⁹⁵— To render evidence of a person's reputation in a given community admissible, there should exist in that community no motive or cause to build up an apparent reputation because of prejudice or partisanship. In order that this result may be obtained the reputation which is received in evidence for the consideration of the jury must be one that was acquired by the person in question before the proceedings in which the reputation is sought to be used could have influenced it in any way, that is, the reputation must have been established *ante litem motam*.⁹⁶

An exception to the rule herein stated is commonly recognized in the case of a witness. Where the person whose reputation is sought to be shown is a witness, his reputation for truth and veracity may be shown down to the moment of testifying.⁹⁷ As the object of the rule excluding evidence of a reputation formed *post litem motam* is to avoid having the reputation colored or affected in any way as a result of the alleged existence of the facts upon

88. Bullock v. State, 65 N. J. L. 557, 47 Atl. 788, 86 Am. St. Rep. 668 (1900). See People v. Nunley, 142 Cal. 441, 76 Pac. 45 (1904).

89. State v. Potts, 88 Iowa 656, 43 N. W. 534, 5 L. R. A. 814 (1889).

90. State v. Albanes (Me. 1912), 83 Atl. 548.

91. Beard v. State, 44 Tex. Cr. App. 402, 71 S. W. 960 (1903).

92. 4 Chamberlayne, Evidence, § 3327.

93. State v. Lanier, 79 N. C. 622, 623

(1878). See also Jones v. State, 104 Ala. 30, 16 So. 135 (1893).

94. State v. Barr, 11 Wash. 481, 492, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154 (1895), per Hoyt, C. J.

95. 4 Chamberlayne, Evidence, §§ 3329-3330.

96. State v. Johnson, 60 N. C. (Winston's L.) 151, 152 (1863), per Battle, J.

97. Smith v. Hine, 179 Pa. St. 203, 36 Atl. 222 (1897).

which the liability of the defendant, in the action in which the reputation is sought to be used, is founded,⁹⁸ it must be that the *lis mota*, using the term in its broad sense, is initiated at the moment when those facts become known to the public, as at that moment discussion logically may be assumed to commence and the reputations of the various persons connected with the transaction to undergo change.⁹⁹

§ 1042. [Proof of Character]; Animals.¹— Common experience indicates that an animal will act even more consistently in harmony with its disposition or character than will one of the human race. This being the case, it follows that evidence of an animal's character in respect to a particular trait is of material assistance in determining how the animal conducted itself on a certain occasion. It would seem, therefore, that evidence of an animal's character, or what might more properly be called its disposition, should be received in all cases where the animal's conduct on a given occasion is in question.²

§ 1043. [Proof of Character]; Probative Force; Reputation.³— In theory, the probative force of the general reputation of a person in a community where he is well known as evidence of his character lies in the following more or less generally accepted ideas: that, under ordinary conditions, a person cannot conceal his real self from those with whom he frequently associates, that the character of one's associates is a natural and most interesting topic of conversation making inevitable an intelligent and generally unprejudiced discussion of the character of each member of a community by the other members, resulting in a crystallized general expression which sums up the moral worth of each individual in the community.

The test is often unreliable as the reputation of an individual may suffer from isolated imprudent acts or from false rumors while another more discreet may conceal his true character from the community. Furthermore modern city life has rendered all more ignorant as to the character of their neighbors than formerly, but still the practice of using reputation only as evidence of character presents a striking advantage in avoiding the introduction of collateral issues⁴ and conserving the time of the court and it is a fact which may be easily proved or disproved.⁵

98. *White v. Com.*, 80 Ky. 480, 486, 4 Ky. L. Rep. 373 (1882).

99. *State v. Malonee*, 154 N. C. 200, 202, 69 S. E. 786 (1910).

1. 4 Chamberlayne, Evidence, § 3331.

2. *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 269 (1897). The fact that the defendant knew that his dog had bitten a third party is enough to charge the defendant with knowledge of the vicious character of the dog even though the dog acted in self-defence as self-defence is not a

defence for a bite. *Tubbs v. Shears* (Okla. 1916), 155 Pac. 549, L. R. A. 1916 D 1032.

3. 4 Chamberlayne, Evidence, §§ 3332-3339.

4. "The danger of allowing a witness to testify directly as to moral character rather than as to general reputation in the community is that the witness' knowledge of character must almost necessarily be based on specific acts of immorality, and to allow such acts to be gone into with the consequent right of rebutting the testimony as to such specific

Such evidence may be tested on cross-examination in various ways as by a demand for specifications to support evidence of bad character⁶ or by inconsistent statements by the witness,⁷ or by specific facts showing the contrary of the character claimed.⁸

§ 1044. [Proof of Character]; Proof Other Than by Reputation; Inference by Observers.⁹—As a matter of principle, evidence of a probative force in the proof of character, superior at times to that of reputation in the community, might have been utilized and a rule, other than the one based upon the principle that “reputation is character” developed. Character might have been, and should properly be, regarded as provable by evidence of the effect of its manifestation upon the mind of an observer or upon that of a jury. It is settled, however, that this class of evidence is inadmissible to establish character,¹⁰ either as part of an original case or on rebuttal.¹¹ This is the more remarkable as the early law admitted this species of evidence in the present connection.¹² It is of no consequence under the rule that the observer is entirely competent to form an illuminating opinion and has had adequate opportunities for observing the conduct of the person in question.¹³

Cogent arguments against its use are the danger of raising collateral issues,¹⁴ or creating unfair surprise,¹⁵ or a prejudice.¹⁶

§ 1045. [Proof of Character; Proof Other Than by Reputation]; Particular Facts.¹⁷—Finally, the law of evidence might, with good reason, admit as proof of actual character not only the inferences of observers and probative instances of the manifestation of the trait in question, but also probative individual facts which tend circumstantially to establish the existence of a material trait. Proof of character is, however, confined to proof of reputation. Specific facts and circumstances, though tending to prove the reputa-

acts would be to introduce immaterial collateral issues and complicate the trial.” State v. Blackburn (Iowa 1907), 110 N. W. 275, 277, per McClain, J.

5. Barton v. Morphey, 13 N. C. (2 Dev. L.) 520, 521 (1830).

6. Leonard v. Allen, 11 Cush. (Mass.) 241 (1853); Sawyer v. Eifert, 2 Nott & M. (S. C.) 511, 10 Am. Dec. 633 (1820).

7. Jackson v. State, 78 Ala. 471 (1885); State v. Dove, 156 N. C. 653, 72 S. E. 792 (1911).

8. People v. Elliot, 163 N. Y. 11, 57 N. E. 103 (1900).

9. 4 Chamberlayne, Evidence, §§ 3340–3342.

10. People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650n., 12 Am. & Eng. Ann. Cas. 745 (1907).

11. State v. Grinden, 91 Iowa 505, 60 N. W. 37 (1894).

12. Jones’ Case, 31 How. St. Tr. 251, 309 (1809).

13. Hart v. McLaughlin, 51 App. Div. (N. Y.) 411, 64 N. Y. Suppl. 827 (1900); Sawyer v. People, 91 N. Y. 667, 1 N. Y. Cr. 249 (1883).

14. People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650n., 12 Am. & Eng. Ann. Cas. 745 (1907).

15. Bodwell v. Swan, 3 Pick. (Mass.) 376, 378, 15 Am. Dec. 228 (1825).

16. Coleman v. People, 55 N. Y. 81, 90 (1873).

17. 4 Chamberlayne, Evidence, §§ 3343–3345.

tion or confirm the statements of witnesses regarding it are excluded. Neither good ¹⁸ or bad ¹⁹ character can be proved by specific facts.

§ 1046. [Proof of Character; Proof Other Than by Reputation]; Animals; Illustrative Occurrences.²⁰—Evidence may be given of the behavior of an animal on particular occasions for the purpose of showing the possession of a trait relevant to the inquiry.²¹ In this way it may be proved, for example, that a horse is gentle ²² or is vicious ²³ or that a dog ²⁴ or a bull ²⁵ is vicious and dangerous to mankind. It is not necessary that the occurrences should have preceded the occasion upon which the existence of the trait in question is rendered important by the evidence.²⁶

Furthermore an observer may state the inference as to a relevant trait of character which he has gained from his observation of the animal.²⁷ The arguments which exclude this evidence in case of individuals of collateral issues, unfair surprise, and prejudice are not so weighty in case of animals.

§ 1047. Weight.²⁸—Great variety of opinion is manifested by courts as to what probative weight should properly be attached to the inference of conduct from character. So great is the variety which different cases present in this particular that generalization can seldom be helpful to any marked degree. It may, however, not be entirely without value to suggest that while the inference of conduct from character is, when the *res gestae* of any particular case are established by direct evidence, at best but a deliberative one, it may, when the *res gestae* are to be proved by circumstantial evidence, be more highly probative, especially in connection with the corroborative influence of other facts. The evidentiary weight of the inference will be found, moreover, to increase in proportion as the psychological element becomes constituent or probative.

18. *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256 (1890); *Taylor v. State*, 120 Ga. 857, 48 S. E. 361 (1904), honorable discharge as soldier.

19. *People v. Christy*, 65 Hun (N. Y.) 349, 20 N. Y. Suppl. 279, 8 N. Y. Cr. 480, 47 N. Y. St. Rep. 924 (1892), keeping disorderly house; *State v. Castle*, 133 N. C. 769, 46 S. E. 1 (1903); *Cheney v. State*, 7 Ohio 222 (1835); *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523 (1887). Proof of other offenses, see note, *Bender ed.*, 186 N. Y. 4, 15.

20. 4 Chamberlayne, Evidence, §§ 3346-3348.

21. *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296 (1897).

22. *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. 643 (1899).

23. *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185 (1865); *Kennon v. Gilmer*, 131

U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110 (1888), sustaining this point in *Kennon v. Gilmer*, 5 Mont. 257, 6 Pac. 847, 51 Am. Rep. 45 (1885).

24. *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296 (1897); *Kessler v. Lockwood*, 62 Hun 619, 18 N. Y. Suppl. 677, 42 N. Y. St. Rep. 563 (1891); *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50 (1892).

25. *Rogers v. Rogers*, 4 N. Y. St. Rep. 373 (1887).

26. *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110 (1888), sustaining the point in *Kennon v. Gilmer*, 5 Mont. 257, 6 Pac. 847, 51 Am. Rep. 45 (1885).

27. *Sydleman v. Beckwith*, 43 Conn. 9 (1875); *Noble v. St. Joseph, etc., Ry. Co.*, 98 Mich. 249, 57 N. W. 126 (1893).

28. 4 Chamberlayne, Evidence, §§ 3349-3353.

CHAPTER XLIX.

PUBLIC DOCUMENTS.

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§ 1048. **Public Documents; Definition of.**—Public documents may properly be defined as records kept or writings executed by public functionaries as such in the executive, legislative and judicial departments of a government within which would be included acts of state, such as executive messages and proclamations, records of the executive departments, legislative acts and proceedings, judicial records and generally transactions which official persons in the performance of their duties as such are required, either expressly or impliedly, to enter of record.¹

§ 1049. **[Public Documents]; Principle Controlling Admissibility.**²—The fundamental principle underlying the admission of this class of evidence is that the writings are made by an accredited public official in the performance of an express or implied mandate of the law; express in the sense that the law in so many words requires the making of them; implied where in the performance of the duties imposed by law it is necessary to make them. With this duty thus imposed its proper performance is presumed in view of the fact that they are made under the sanction either of an oath or under that of official duty.³

1. 5 Chamberlayne, Evidence, § 3354. Public documents have been defined as "acts of public functionaries, in the executive, legislative and judicial departments of government; including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowl-

edge and observation. Foreign acts of state and the judgments of foreign courts also belong to the class of public documents." Taylor, Ev., § 1479. See also. Greenleaf. Ev., § 470. 5 Chamberlayne. Evidence, § 3355. What are public records, see note, Bender ed., 138 N. Y. 399.

2. 5 Chamberlayne, Evidence, § 3355.

3. Ferguson v. Clifford, 37 N. H. 86

§ 1050. [Public Documents]; Objection That They Should Not be Removed.— The objection to the admission of the originals on the ground that they should not be removed from their proper depository is accorded little weight.⁴ While their removal is not to be commended, yet, on the other hand, their rejection for any such reason is not favored.⁵

§ 1051. [Public Documents]; Equally Admissible as Copies.— The authenticity of a record having been established to the satisfaction of the presiding judge,⁶ it will be received in evidence in proof of the facts stated therein, being equally admissible as a transcript or copy thereof would be.⁷ The latter purports to correctly transcribe matters contained in the former and can certainly be placed on no higher plane, if as high a one, as the original.⁸ Nor is it material that a statute provides that copies of a record shall be received and is silent in regard to the record itself,⁹ such a provision not being considered as exclusionary¹⁰ or restrictive but rather as cumulative.¹¹

§ 1052. [Public Documents]; Where not Kept in Strict Conformity to Statutory Requirements.— Some minor defect in the making of a record not required by law to be kept or a non-compliance with some express provision of law, which may be regarded as directory merely, will not generally be considered as a fatal defect justifying the exclusion of the writing.¹² This principle is illustrated in records of judicial proceedings¹³ as well as in other cases.

§ 1053. [Public Documents]; Authentication; Necessity of.— A record offered as an original should be properly and sufficiently authenticated. It is essential that the writing should be shown to be that which it purports to be. When this is satisfactorily established it will be received; otherwise it will be re-

(1858): *Gaines v. Relf*, 12 How. (U. S.) 472, 570, 13 L. ed. 1071 (1851). See *Sturla v. Freccia*, 5 App. Cas. (D. C.) 623 (1880).

4. *Stevenson v. Moody*, 85 Ala. 33, 4 So. 595 (1887); *Gray v. Davis*, 27 Conn. 447; 5 Chamberlayne, Evidence, § 3357.

5. *Lewis v. Bradford*, 10 Watts (Pa.) 67 (1840); *Garrigues v. Harris*, 17 Pa. St. 344 (1851). Thus originals from a notary's office may be received. *Priou v. Adams*, 5 Mart. N. S. (La.) 691 (1827).

6. *State v. Voight*, 90 N. C. 741 (1884).

7. *Sellers v. Page*, 127 Ga. 633, 56 S. E. 1011 (1906); *Carp v. Queen Ins. Co.*, 203 Mo. 295, 101 S. W. 78 (1906); *People v. Gray*, 25 Wend. (N. Y.) 465 (1841); *Harmening v. Howland*, 25 N. D. 38, 141 N. W. 131 (1913); *Manning v. State*, 46 Tex. Cr. 326, 81 S. W. 957 (1904); 5 Chamberlayne, Evidence, § 3357, n. 2, and cases cited.

8. *Gray v. Davis*, 27 Conn. 447 (1858);

Manning v. State, *supra*; *Dobbs v. Justices' Inferior Court*, etc., 17 Ga. 624 (1855).

9. *Green v. Indianapolis*, 25 Ind. 490 (1865); *Miller v. Hale*, 26 Pa. 432 (1856); *Sheehan v. Davis*, 17 Ohio St. 571 (1867).

10. *Miller v. Hale*, *supra*.

11. *Rainey v. State*, 20 Tex. App. 455 (1886). Thus, where the purpose is to prove the doings of selectmen of a town the original record may be introduced. *Jay v. Carthage*, 48 Me. 353 (1860). So a pardon is properly proved by the production of the charter of pardon itself under the great seal of the state. *State v. Blaisdell*, 33 N. H. 388 (1856).

12. *People v. Eureka Lake and Yuba Canal Co.*, 48 Cal. 143 (1874); *Mason v. Belfast Hotel Co.*, 89 Me. 384, 36 Atl. 624 (1896); 5 Chamberlayne, Evidence, § 3358, n. 1, and cases cited.

13. See § 1059; 5 Chamberlayne, Evidence, § 3373, *infra*.

jected,¹⁴ unless the necessity of proof is dispensed with by the parties admitting its authenticity.¹⁵

Execution Denied.—Where, though a paper or record thereof is produced from the proper official custody, its execution is denied, neither it nor the record will be received without further proof of the genuineness of the instrument.¹⁶

§ 1054. [Public Documents]; Authentication; Mode of.¹⁷—If the law prescribes a certain form for proving a record which is adopted by the proponent there should be a compliance therewith.¹⁸ As a general rule, however, an instrument or record need not, in all cases, necessarily show upon its face the proper authentication.¹⁹ Proof of the custody from whence it comes may be satisfactory to the tribunal in which it is offered.²⁰ Similarly an admission to the effect that the writing comes from the proper depository may satisfy the requirement²¹ and dispense with the necessity of further authentication. Genuineness of documents may also be sufficiently shown by the testimony of the proper custodian that they are authentic,²² or, where he cannot testify to this effect, the testimony of a prior holder of the same office may be received.²³ Nor will the fact of an irregularity in the official oath of the custodian of records affect their admissibility where their genuineness is sworn to by him.²⁴

14. *Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394 (1890); *People v. Etter*, 81 Mich. 570, 45 N. W. 1109 (1890); *Alexander v. Campbell*, 74 Mo. 142 (1881); *Jackson v. Miller*, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316 (1830); *Keim v. Rankin*, 40 Wash. 111, 82 Pac. 169 (1905); 5 Chamberlayne, Evidence, § 3359, n. 1, and cases cited.

15. *Miller v. Hale*, 26 Pa. 432 (1856). Thus a paper marked "filed in the county clerk's office" but not signed or certified, there being no other evidence showing where it came from or when it was made, was rejected. *Atchison & N. R. Co. v. Maquilkin*, 12 Kan. 301 (1873). The fact, however, that the officials designated do not sign the record, as provided in a statute simply operates, where such failure is not made fatal to admissibility, to impose upon the proponent the obligation to show by other evidence the authenticity of the record. *People v. Eureka Lake & Yuha Canal Co.*, 48 Cal. 143 (1874). Similarly, the absence of an official seal will not constitute a sufficient reason for the rejection of the instrument, where its authenticity may be established by parol. *Glaspie v. Keator*, 56 Fed. 203, 5 C. C. A. 474 (1893).

16. *Craw v. Abrams*, 68 Neb. 546, 94 N. W. 639, 97 N. W. 296 (1903); 5 Chamberlayne,

Evidence, § 3360. It would seem, however, that where the identity of the purported signers of the instrument is not in question and the record is made in conformity to law, it or a copy thereof should be received, *Kello v. Maget*, 18 N. C. 414 (1835), it being open to the alleged obligors to show that though it purports to have been executed by them, it, in fact, never was. *Short v. Currie*, 53 N. C. (8 Jones L.) 42 (1860).

17. 5 Chamberlayne, Evidence, § 1054.

18. *Coler v. Board of Com'rs of Santa Fe County*, 6 N. M. 88, 27 Pac. 619 (1891). See also, *Morgan County Bank v. People*, 21 Ill. 304 (1850).

19. *Glaspie v. Keator*, 56 Fed. 203, 5 C. C. A. 474 (1893).

20. *Sumner v. Lebee*, 3 Me. 223 (1824); *Richardson v. Smith*, 1 Allen (Mass.) 541 (1861).

21. *Little v. Downing*, 37 N. H. 355 (1858).

22. *Stewart v. Conner*, 9 Ala. 803 (1846); *Williams v. Jarrot*, 6 Ill. 120 (1844); *Pembroke v. Allenstown*, 41 N. H. 365 (1860).

23. *Sanborn v. School Dist. No. 10*, 12 Minn. 17 (1866).

24. *Mason v. Belfast Hotel Co.*, 89 Me. 384, 36 Atl. 624 (1896). See also *Day v. Peasley*, 54 Vt. 310 (1881).

In case, also, of a mutilation as where the certificate of authentication has been torn off, the necessary proof may be supplied by the testimony of the clerk in whose custody it had been placed.²⁵ The testimony of a third person is also frequently received for the purpose of identifying and establishing the genuineness of a record or instrument offered in evidence.²⁶

§ 1055. [Public Documents]; Legislative Acts; Domestic.²⁷— State public laws need not ordinarily be authenticated when offered in evidence in State courts since such courts take judicial notice of such public laws and of such other statutes as the legislature or the constitution may require that they shall know.²⁸ Private statutes, however, with some exceptions²⁹ are not judicially known to the courts,³⁰ and must be proved before they will be admitted, in accordance with the requirements of the particular state. Officially printed copies are generally admissible under express provision of statute.³¹

Foreign.— Courts do not judicially know foreign written³² or unwritten³³ laws, but their existence is a matter of fact³⁴ which must be proved. This may be done by a copy properly authenticated in the case of written laws or by the parol testimony of experts in case of the unwritten.³⁵ A mode of proving the former laws is by the production of a book in which they are printed with proof that such book was officially published by the government whose laws they purport to contain.³⁶ This method has been recognized in legislative enactments in many States. Exclusive thereof, however, the courts in some jurisdictions early began to receive such copies in evidence, both for the purpose of proving the laws of a sister State and those of a foreign country.³⁷

Sister State.— The courts of one State do not take judicial notice of the statutes of another State,³⁸ they being considered as foreign laws,³⁹ of which some satisfactory authentication will be required, the existence of such laws

25. *Thompson v. Autry* (Tex. Civ. App. 1900), 57 S. W. 47.

26. *Acme Brewing Co. v. Central R. & B. Co.*, 115 Ga. 494, 42 S. E. 8 (1902); *Cuttle v. Brackway*, 24 Pa. 145 (1854); *Hathaway v. Addison*, 48 Me. 440 (1860); 5 Chamberlayne, Evidence, § 3361, n. 9, and cases cited.

27. 5 Chamberlayne, Evidence, § 3362.

28. § 329, *supra*; 1 Chamberlayne Evidence, § 605.

29. §§ 329, *supra*; 1 Chamberlayne, Evidence, §§ 609, 610.

30. §§ 329 *et seq.*; 1 Chamberlayne, Evidence, §§ 609 *et seq.*

31. 5 Chamberlayne, Evidence, § 3362; *Biddis v. James*, 6 Binn (Pa.) 321 (1814).

32. § 328, *supra*; 1 Chamberlayne, Evidence, § 601.

33. § 323, *supra*; 1 Chamberlayne, Evidence, § 589.

34. § 61, *supra*; 1 Chamberlayne, Evidence,

§ 135. See also, *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. 216 (1886); *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161 (1891); *Lincoln v. Battle*, 6 Wend (N. Y.) 475 (1831); *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242 (1885); 5 Chamberlayne, Evidence, § 3363, n. 3, and cases cited.

35. *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287 (1867); *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. ed. 473 (1852).

36. *Ennis v. Smith*, *supra*; *The Pawashick*, 2 Lowell (U. S.) 142 (1872).

37. *The Pawashick*, *supra*; *Jones v. Maffett*, 5 Serg. & R. (Pa.) 523, 532 (1820).

38. § 329, *supra*; 1 Chamb., Ev., § 614.

39. *Hempstead v. Reed*, 6 Conn. 480 (1827); *Bayley's Adm. v. Chubb*, 16 Gratt. (Va.) 284 (1862); *Hanley v. Donoghue*, *supra*.

being a question of fact.⁴⁰ The provision in the Act of Congress of May 26th, 1790, that "The acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto"⁴¹ is considered as only an affirmative act⁴² and not exclusive of other methods,⁴³ as for instance by a sworn copy⁴⁴ or by some mode provided by State law.⁴⁵ An officially printed edition of the statutes is also in many cases received,⁴⁶ sometimes by virtue of statutory enactment,⁴⁷ though it seems that to authorize admission in evidence of such a publication it must appear to have been officially printed.⁴⁸

§ 1056. [Public Documents]; Ordinances.⁴⁹—The general rule seems to be to regard the printed, bound volume of ordinances published by the authority of a city as *prima facie* evidence of the existence of the enactments,⁵⁰ especially where the book or pamphlet contains a proper certification of its authenticity,⁵¹ although a seal or attestation is regarded as unnecessary where the ordinances are published by municipal authority.⁵² A printed copy read in evidence from a newspaper and purporting to be published by authority of the corporation has been held sufficient,⁵³ and also a book purporting to contain all the ordinances and shown to be in the custody of the corporation.⁵⁴

40. *Miller v. Macveagh*, 40 Ill. App. 532 (1891); *Moyt v. McNeil*, 13 Minn. 390 (1868); *Ingraham v. Hart*, 5 Ohio 255 (1842).

41. The attestation of a public officer is not required as in the case of when other public documents of other states are offered in evidence. *U. S. v. Johns*, 4 Dall. (U. S.) 412 (1806).

42. *Ellmore v. Mills*, 1 Hayw. (N. C.) 359 (1796).

43. *Rothrock v. Perkinson*, 61 Ind. 39 (1878); *Emery v. Berry*, 28 N. H. 473 (1854); *Martin v. Payne*, 11 Tex. 292 (1854); 5 Chamb., Ev., § 3364, n. 6, and cases cited.

44. *Buskirk v. Mulock*, 18 N. J. L. 184 (1840); *Smith v. Potter*, 27 Vt. 304 (1855).

45. *Merrifield v. Robbins*, 8 Gray (Mass.) 150 (1857); *U. S. Vinegar Co. v. Foehrenbach*, 74 Hun 435, 26 N. Y. Supp. 632, *aff'd* 148 N. Y. 58, 42 N. E. 403 (1895).

46. *Smith v. Potter*, 27 Vt. 304 (1855); *The Pawashick*, *supra*; *Emery v. Berry*, *supra*; *Mullen v. Morris*, 2 Pa. 85 (1845); 5 Chamb., Ev., § 3364, n. 9, and cases cited.

47. *Merrifield v. Robbins*, *supra*.

48. *Wilt v. Culter*, 38 Mich. 189, 196 (1878); *Jones v. Maffett*, *supra*; *Van Buskirk v. Mulock*, *supra*; *Martin v. Payne*, *supra*.

49. 5 Chamberlayne, Evidence, § 3365.

50. *Brighton v. Miles*, 151 Ala. 479, 44 So. 394 (1907); *McGregor v. Lovington*, 48 Ill. App. 208 (1892); *Boston v. Coon*, 175 Mass. 283, 56 N. E. 287 (1900); *Campbell v. St. Louis & Sub. R. Co.*, 175 Mo. 161, 75 S. W. 86 (1903); 5 Chamb., Ev., § 3365, n. 1, and cases cited. But see *District of Columbia v. Johnson*, 1 Mackey (D. C.) 51 (1881). See *Larkin v. Burlington, etc., R. Co.*, 85 Iowa 492, 52 N. W. 480 (1892).

51. *Heno v. Fayetteville*, 90 Ark. 292, 119 S. W. 287 (1909); *Logue v. Gillick*, 1 E. D. Smith (N. Y.) 398 (1852); *St. Louis S. W. Ry. Co. v. Garber*, 51 Tex. Civ. App. 70, 111 S. W. 227 (1908); 5 Chamb., Ev., § 3365, n. 2, and cases cited.

52. *St. Louis v. Foster*, 52 Mo. 513 (1873). Their admissibility is not affected by the fact that the publication is not directly authorized by law. *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576 (1894); *McCaffrey v. Thomas*, 4 Pen. (Del.) 437, 56 Atl. 382 (1903); or that by the terms of some enactment a different mode of proof is designated. *Birmingham v. Tayloe*, *supra*. Nor need the fact of their passage be shown. *Byars v. Mt. Vernon*, 77 Ill. 467 (1875).

53. *Block v. Jacksonville*, 36 Ill. 301 (1865).

54. *Birmingham v. Tayloe*, *supra*; *Grafton v. St. Paul M. & M. Ry. Co.*, 16 N. D. 313,

Necessity of Authentication.—Satisfactory proof of the authenticity of an ordinance is required.⁵⁵ A volume offered in evidence as containing such acts should show that it purports to be published by the proper authority.⁵⁶ A printed statement without any showing of any official authorization for its publication is insufficient.⁵⁷

Statutes; Requiring Keeping of Record or Journal.—Where a statute requires that a municipal corporation shall keep a record or journal of its proceedings in which all acts and ordinances of the corporation shall be recorded, the original record book of the ordinances of the city, containing the ordinance in question is admissible⁵⁸ when kept in the office of the city clerk,⁵⁹ town clerk⁶⁰ or other designated official or produced from the custody of some other official in whose keeping it properly belongs⁶¹ and by whom it should be identified.⁶² The adoption of an ordinance may also be proved by the minutes of the common council kept by the clerk.⁶³

As to Admission in Evidence of Bound Volumes.—A charter or statutory provision that printed volumes of the ordinances of the city shall be evidence in all courts, places them as to all suits brought for a violation of them on a similar footing to statutes so far as relates to the method of proving their contents.⁶⁴

§ 1057. [Public Documents]; Papers and Documents Relating to Affairs of State.⁶⁵—The admission of publications printed by legislative authority containing matters relating to affairs of state has been frequently objected to on the ground that the originals should be produced. The courts have, however, not regarded this objection as tenable and have generally considered them as equally admissible as the originals.⁶⁶ Thus the journals of the House of

113 N. W. 598 (1907). A record book of the proceedings of a municipal corporation in which printed ordinances have been pasted has been admitted. *Ewbanks v. Ashley*, 36 Ill. 177 (1864). A document which professes on its face to be the original ordinance and which is properly authenticated may also be received. *Eichenland v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590 (1893); where properly filed and produced from the proper custody. *Troy v. Atchison & A. N. R. Co.*, 11 Kan. 519 (1873).

55. *Kelly v. State*, 160 Ala. 48, 49 So. 535 (1909).

56. *Taylor v. Illinois Cent. R. Co.*, 154 Ill. App. 222 (1910); *Christensen v. Tate*, 87 Neb. 848, 128 N. W. 622 (1910); 5 Chamb., Ev., § 3366, n. 2, and cases cited.

57. *International & G. N. R. Co. v. Hall*, 35 Tex. Civ. App. 545, 81 S. W. 82 (1904).

58. *Barnes v. Alexander City*, 89 Ala. 602 (1889); *Merced County v. Fleming*, 111 Cal.

46, 43 Pac. 392 (1896); *Boyer v. Yates City*, 47 Ill. App. 115 (1892); *Jackson v. Kansas City, etc., R. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650 (1900); 5 Chamb., Ev., § 3367, n. 2, and cases cited.

59. *Selma St. & S. R. Co. v. Owen*, 132 Ala. 420, 31 So. 598 (1901).

60. *Tipton v. Norman*, 72 Mo. 380 (1880).

61. *Merced County v. Fleming*, *supra*; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49 (1892).

62. *Greeley v. Hamman*, 17 Colo. 30, 28 Pac. 460 (1891); *Met. St. R. Co. v. Johnson*, *supra*.

63. *Kennedy v. Newman*, 1 Sandf. (N. Y.) 187 (1848).

64. *Napman v. People*, 19 Mich. 352 (1869); *Missouri K. & T. R. Co. v. Owens* (Tex. Civ. App. 1903), 75 S. W. 579; 5 Chamb., Ev., § 3368, and cases cited.

65. 5 Chamberlayne, Evidence, § 3369.

66. *Whiton v. Albany City Ins. Co.*, 109

Lords were early admitted not only to prove the King's address but the address of the house to the crown,⁶⁷ as in fact were the journals of either house to show the action of that house upon matters before it.⁶⁸ Likewise legislative journals,⁶⁹ as for example the journal of the House of Representatives of the United States,⁷⁰ are admissible. Similarly a State register containing the proclamation of a governor has been received to show both the existence of the proclamation and the facts stated therein.⁷¹ Appendices to the report of a State adjutant-general printed by the State printer have also been received.⁷² So a book printed in pursuance of a legislative act authorizing it is a public document and admissible in proof of facts asserted therein⁷³ and likewise as to similar volumes or papers printed by authority of the national legislative body,⁷⁴ containing copies of public documents communicated to either House of Congress by the President of the United States⁷⁵ or by the Secretary of State. American state papers published by order of Congress⁷⁶ have also been admitted in evidence in the investigation of claims to land,⁷⁷ the copies which they contain of legislative and executive documents being as good evidence as the originals from which they were copied⁷⁸ and in fact entitled to the highest authenticity.⁷⁹ Similarly a compendium of the census compiled pursuant to act of Congress and printed at the government printing office is admissible to show the population of a town.⁸⁰ The existence of a blockade is similarly *prima facie* shown by a sentence of condemnation for an attempt to violate it.⁸¹ Likewise official papers of the Confederate government preserved by the United States government in the bureau known as the Confederate Archives Office or copies thereof are admissible.⁸² A government gazette is not, however, admissible to prove facts of a private nature, it being confined to those cases where public acts of government or matters of state are involved.⁸³

Mass. 24 (1871); *Bryan v. Forsyth*, 19 How. (U. S.) 334, 15 L. ed. 674 (1856); 5 Chamb., Ev., § 3369, n. 1, and cases cited.

67. *Rex v. Franklin*, 9 St. R. 259 (1731).

68. *Root v. King*, 7 Cow. (N. Y.) 613 (1827); *Jones v. Randall*, 1 Cowp. 17 (1774).

69. *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323 (1907); *Post v. Supervisors*, 105 U. S. 667, 26 L. ed. 1204 (1881); 5 Chamb., Ev., § 3369, n. 9, and cases cited.

70. *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621 (1846).

71. *Lurton v. Gilliam*, 2 Ill. 577, 33 Am. Dec. 430 (1839).

72. *Milford v. Greebush*, 77 Me. 335 (1885).

73. *Worcester v. Northborough*, 140 Mass. 397, 5 N. E. 270 (1886).

74. *Whiton v. Albany City Ins. Co.*, *supra*; *Lawless v. Roddis*, 36 Okl. 616, 129 Pac. 711 (1913). See also, *In re Yankton-Clay*

County Drainage Ditch, 30 S. D. 79, 137 N. W. 608 (1912).

75. *Radcliffe v. United Ins. Co.*, 7 Johns. (N. Y.) 38, 50 (1810).

76. *Dutillet v. Blanchard*, 14 La. Ann. 97 (1859).

77. *Doe v. Roe*, 13 Fla. 602 (1871); *Nixon v. Porter*, 34 Miss. 697, 69 Am. Dec. 408 (1858); 5 Chamb., Ev., § 3369, n. 17, and cases cited.

78. *Dutillet v. Blanchard*, *supra*.

79. *Watkins v. Holman*, 16 Pet. (U. S.) 25, 10 L. ed. 873 (1842).

80. *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652 (1888). See also, 5 Chamb., Ev., § 3369, n. 20, and cases cited.

81. *Radcliffe v. United Ins. Co.*, *supra*.

82. *Oakes v. U. S.*, 174 U. S. 778, 19 S. Ct. 864, 43 L. ed. 1169 (1898).

83. *Del. Hoyo v. Brundred*, 20 N. J. L. 328 (1844).

§ 1058. [Public Documents]; Compelling Production of.⁸⁴— In the absence of any statute which may be controlling of the question, the power of the court to compel the production of public documents while recognized will not except in very few instances⁸⁵ be exercised.⁸⁶

84. 5 Chamberlayne, Evidence, § 3369a.

85. State v. Smithers, 14 Kan. 629 (1875); Treasurer v. Moore, 3 Brev. (S. C.) 550 (1815).

86. *In re Lester*, 77 Ga. 143 (1886); Dunham v. Chicago, 55 Ill. 357 (1870); State v. Baker, 35 Nev. 1,300, 126 Pac. 345 (1912);

Corbett v. Gibson, 16 Blatchf. (U. S.) 334 (1879); Bank v. Springer, 14 Can. S. Ct. 716, 13 Ont. App. 390, 7 Ont. 309 (1887); 5 Chamb., Ev., § 3369a, n. 2, and cases cited. For the reasons underlying the action of the courts, see 5 Chamb., Ev., § 3369a.

CHAPTER L.

JUDICIAL RECORDS.

Judicial records; administrative requirements, 1059.

In same court and in another court, 1060.

Minutes or memoranda; when admissible, 1061.

Judicial records; effect when perfected, 1062.

extent to which admissible, 1063.

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§ 1059. **Judicial Records; Administrative Requirements.**¹—The judicial record itself, which consists of the history of a suit or judicial proceeding from its commencement to its termination,² is of course to be regarded as the primary proof of any fact contained therein.³ Proof of its authenticity is in all cases a prerequisite to its admission in evidence.⁴ This may be shown either by testimony by the keeper of the records, ordinarily the clerk, to the effect that it is a paper of record from his office or by a proper certificate from his office to the same effect.⁵ Testimony of the judge out of whose court the record is produced,⁶ or the testimony of any competent witness who could identify the record as the original,⁷ may likewise be received for this purpose. This principle applies not only to the record as a whole but where parts of it

1. 5 Chamberlayne, Evidence, §§ 3370–3374.

2. Davidson v. Murphy, 13 Conn. 213 (1839); Burge v. Gandy, 41 Neb. 149, 59 N. W. 359 (1894).

3. Harper v. Rowe, 53 Cal. 233 (1878); Day v. Moore, 13 Gray (Mass.) 522 (1859); 5 Chamb., Ev., § 3370. Recitals in record may establish jurisdictional facts. See note, Bender, ed., 16 N. Y. 180. Pleadings as evidence. See note, Bender, ed., 116 N. Y. 423.

Where a coroner's verdict in an inquest is required to be sealed up and returned to court and filed it thus becomes a public record and as such is proper to be considered in another proceeding. Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167 (1913). The record of the coroner's verdict is not admissible in evidence in an action on an insurance policy unless put in by the insured as part of his proof of death

in which case it would be admissible as an admission against interest. Krogh v. Modern Brotherhood, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404 (1913).

4. Carp v. Queens Ins. Co., 203 Mo. 295, 101 S. W. 78 (1906); Tully v. Lewitz, 98 N. Y. Supp. 829, 50 Misc. 350 (1906); 5 Chamb., Ev., § 3371, n. 1.

5. Carp v. Queens Ins. Co., *supra*; Garrigues v. Harris, 17 Pa. 344 (1851); 5 Chamb., Ev., § 3371, n. 2.

6. Odiorne v. Bacon, 6 Cush. (Mass.) 185 (1850); Kolterman v. Chilvers, 82 Neb. 216, 117 N. W. 405 (1908); 5 Chamb., Ev., § 3371, n. 3.

7. McLeod v. Crosby, 128 Mich. 641, 87 N. W. 883 (1901); State v. Chambers, 70 Mo. 625 (1879); 5 Chamb., Ev., § 3371, n. 4. A statement of counsel that he has the record in court is not sufficient. Azzara v. Waller, 88 N. Y. Supp. 1040 (1904).

are offered in evidence, as for instance an execution,⁸ though in the latter case it has been held sufficient if the officer in whose hands the execution was and by whom the return was made identifies it as the one under which he acted.⁹ Such a record or a part thereof offered in evidence must be competent and material to the issue in order to be admitted.¹⁰ A judicial record will not be excluded because of some mere defect or informality in connection with the making of the record or the papers which form a part thereof. If the defect is not one which affects the validity of the writing it may well be received.¹¹ Thus, a record of judicial proceedings has been admitted where the judge or clerk neglected or failed to sign the same as required by statute,¹² though not registered with the official designated by law,¹³ though the complaint in a judgment roll was not verified,¹⁴ and though papers constituting a judgment roll were never attached together in the form of a roll as required by statute.¹⁵ There should, however, be some evidence showing jurisdiction of the court.¹⁶ A record is admissible though obtained in an irregular manner,¹⁷ as where it has been improperly permitted by the clerk to be removed,¹⁸ or even though it has been illegally removed.¹⁹

§ 1060. In Same Court and in Another Court.—An original judicial record is admissible in the same court,²⁰ which is presumed to know its own proceedings and records²¹ and will take judicial notice thereof.²² In any action in which any fact of record in a judicial proceeding in another court is relevant such fact may be established by the production of the original record of such proceeding.²³ Nor will it be any objection to the admission of the proof offered that the original and not a certified copy is produced²⁴ even though it

8. *Davis v. Ransom*, 26 Ill. 100 (1861); *Benjamin v. Shea*, 83 Iowa 302, 49 N. W. 989 (1891).

9. *Hildreth v. Lowell*, 11 Gray (Mass.) 345 (1858).

10. *Numbers v. Shelly*, 78 Pa. 426 (1875); 5 Chamb., Ev., § 3372, nn. 1, 2.

11. See § 1052, *supra*; 5 Chamb., Ev., § 3358.

12. *Farley v. Lewis*, 102 Ky. 234, 44 S. W. 114, 19 Ky. L. Rep. 1255 (1897); *Eastman v. Harteau*, 12 Wis. 267 (1860); 5 Chamb., Ev., § 3373, nn. 2, 3.

13. *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811 (1901).

14. *Johnson v. Puritan Min. Co.*, 19 Mont. 30, 47 Pac. 337 (1896).

15. *Sharp v. Sumley*, 34 Cal. 611 (1868).

16. *Gould v. U. S.*, 209 Fed. 730, 126 C. C. A. 454 (1913).

17. *Brooks v. Daniels*, 22 Pick. (Mass.) 498 (1839); *McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107 (1892); 5 Chamb., Ev., § 3374, n. 1.

18. *Stevison v. Earnest*, 80 Ill. 513 (1875).

19. *People v. Alden*, 113 Cal. 264, 45 Pac. 327 (1896).

20. *Manning v. Webb*, 136 Ga. 881, 72 S. E. 401 (1911); *State v. Logan*, 33 Md. 1 (1870); *Garrigues v. Harris*, *supra*; 5 Chamb., Ev., § 3375, n. 1.

21. *Ward v. Saunders*, 28 N. C. 382 (1846). See also, § 344, *supra*; 1 Chamb., Ev., §§ 683, 684.

22. *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837 (1886); *Wallis v. Beauchamp*, 15 Tex. 303 (1855); 5 Chamb., Ev., § 3375, notes 3-11.

23. *Rogers v. Riverside Land, etc., Co.*, 132 Cal. 9, 64 Pac. 95 (1901); *Odiorne v. Bacon*, *supra*; *Osburn v. State*, 7 Ohio 212 (1835); *Garrigues v. Harris*, *supra*; 5 Chamb., Ev., § 3376, n. 1. *Contra*: *Cramer v. Truitt*, 113 Ga. 967, 39 S. E. 459 (1901); *Goldsmith v. Kilbourn*, 46 Md. 289 (1876); *Oglesby v. Forman*, 77 Tex. 647, 14 S. W. 244 (1890).

24. *McAllister v. People*, 28 Colo. 156, 63 Pac. 308 (1900); *Carp v. Queen Ins. Co.*,

has been provided by statute that proof of the records of one court in those of another may be so made.²⁵

§ 1061. **Minutes or Memoranda; When Admissible.**²⁶—Where the final record has not been completed, minutes and entries which are to be used in extending it will often be admitted.²⁷ Though perhaps not conclusive until perfected,²⁸ it is to be regarded as the strongest sort of presumptive evidence.²⁹ The original papers have also been received as competent evidence where it is not shown that the final record has been perfected.³⁰ Minutes have frequently been admitted as sufficient evidence of the facts recited where there is no record required to be kept³¹ or where the judgment record need only be made if required by one of the parties.³²

When Not Admissible.—There are several decisions which might be taken as authority for a rule that minutes and entries made prior to the final extension of the record will not be received in evidence.³³ This principle of exclusion has been applied to minutes kept by a judge merely for his own convenience³⁴ as where he has made some memoranda of this character on his calendar³⁵

supra; Manning v. State, 46 Tex. Cr. 326, 81 S. W. 957 (1904); 5 Chamb., Ev., § 3376, n. 2

25. Gray v. Davis, 27 Conn. 447 (1858); Lipscomb v. Postell, 38 Miss. 476, 77 Am. Dec. 651 (1860). In an action against a city for causing the destruction of the plaintiff's building by fire the record of a suit for the same fire against a contractor is not admissible in evidence. Johnson Co. v. Philadelphia, 236 Pa. 510, 84 Atl. 1014, 42 L. R. A. (N. S.) 512 (1912). Only clear and direct evidence is sufficient to cause the conviction for perjury of one for giving testimony which resulted in his acquittal of a previous crime. Allen v. United States, 114 C. C. A. 357, 194 Fed. 664, 39 L. R. A. (N. S.) 385 (1912). Admissibility of judgment as between other parties. See note, Bender, ed., 145 N. Y. 607. Validity of a foreign judgment in rem, Vol. 28, N. Y. Rpts. Bender, ed., note, p. 511. Conclusiveness of foreign judgment, Vol. 26, N. Y. Rpts., Bender, ed., note, p. 1103. Enforceability of judgments in another state, Vol. 22, N. Y. Rpts., Bender, ed., note, p. 556. Effect of foreign judgment raised here, Vol. 3, N. Y. Rpts., Bender, ed., note, p. 207. Discharge not prevent action here on foreign judgment, Vol. 1, N. Y. Rpts., Bender, ed., note, p. 419.

26. 5 Chamberlayne, Evidence. §§ 3377: 3379

27. Townsend v. Way, 5 Allen (Mass.) 426 (1862); State v. Warady, 78 N. J. L. 687, 75 Atl. 977 (1909); Chapman v. Seely,

8 Ohio Cir. Ct. 179, 4 Ohio Cir. Dec. 395 (1891); 5 Chamb., Ev., § 3377, n. 1.

28. Governor v. Bancroft, 16 Ala. 605 (1849).

29. Gaskill v. State, 64 Ga. 562 (1880); Read v. Sutton, 2 Cush. (Mass.) 115 (1848). The recovery of a judgment may be so shown, McGrath v. Seagrave, 2 Allen (Mass.) 443 (1861); as may also a conviction for an offense, Gandy v. State, 86 Ala. 20, 5 So. 420 (1888); and a discharge in bankruptcy, Servian v. Rohr, 66 Md. 95, 5 Atl. 867 (1886)

30. Wharton v. Thomason, 78 Ala. 45 (1884); Sharp v. Lumley, 34 Cal. 611 (1868); Morgan v. Burnett, 18 Ohio 535 (1849).

31. Com. v. Bolkom, 3 Pick. (Mass.) 281 (1825); Prentiss v. Holbrook, 2 Mich. 372 (1852); 5 Chamb., Ev., § 3378, n. 1.

32. Emery v. Whitwell, 6 Mich. 474 (1859).

33. Traylor v. Epps, 11 Ga. App. 497, 75 S. E. 828 (1912); State v. Baldwin, 62 Minn. 518, 65 N. W. 80 (1895); Handly v. Greene, 15 Barb. (N. Y.) 601 (1853); 5 Chamb., Ev., § 3379, n. 1. Compare Haddon v. Lundy, 59 N. Y. 320 (1874), holding that original minutes from which the entries are made by a surrogate in a book as required by law are evidence of a higher character even than the book itself.

34. McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388 (1864).

35. Miller v. Wolf, 63 Iowa 233, 18 N. W. 889 (1884).

or on the papers in the case,³⁶ though it would seem that they might be used as memoranda to refresh the memory of the judge³⁷ in the absence of other or higher evidence.³⁸

§ 1062. **Judicial Records; Effect When Perfected.**³⁹—Where the record has been perfected it or a certified copy thereof then becomes the only evidence of the judgment and other facts which should appear thereon⁴⁰ in the absence of evidence that such record has been lost or destroyed,⁴¹ in which case it would seem that secondary evidence in the form of docket entries,⁴² clerk's memorandum⁴³ and the like may be received.

§ 1063. **[Judicial Records]; Extent to Which Admissible.**⁴⁴—A judicial record when produced from the proper custody may be introduced as proof of any fact or facts, properly incorporated, which are relevant in the trial of the particular matter in controversy. Thus for the purpose of ascertaining what was in issue and determined by a former judgment,⁴⁵ or for some other purpose relevant to the issue involved between the parties,⁴⁶ all entries and papers in a record which are relevant to the issue are properly admitted.⁴⁷ Although there may not be an identity of parties, a record may be admitted as a circumstance from which to infer a given consequence.⁴⁸ The dismissal of a cause does not operate to remove the papers from the record so as to exclude their use as evidence.⁴⁹

Executions and Returns.—The returns of an officer upon process which has been placed in his hands for service become, when the papers have been filed in the record, a part thereof and are admissible in evidence.⁵⁰ Such returns

36. *Gilbert v. McEachen*, 38 Miss. 469 (1860).

37. *Grimm v. Hamel*, 2 Hilt. (N. Y.) 434 (1859).

38. *Keller v. Killion*, 9 Iowa 329 (1859). Stenographer's notes are to be given no more force than minutes made by the judge. *Edwards v. Heuer*, 46 Mich. 95, 8 N. W. 717 (1881).

39. 5 Chamberlayne, Evidence, § 3380.

40. *Goggans v. Myrick*, 131 Ala. 286, 31 So. 22 (1901); *Baxter v. Pritchard*, 113 Iowa 422, 85 N. W. 633 (1901); 5 Chamb., Ev., § 3380, n. 1.

41. *Waterbury Lumber, etc., Co. v. Hinckley*, 75 Conn. 187, 52 Atl. 739 (1902); *Baxter v. Pritchard*, *supra*.

42. *Ellis v. Huff*, 29 Ill. 449 (1862); *Buchanan v. Moore*, 10 Serg. & R. (Pa.) 275 (1823).

43. *Brown v. Campbell*, 33 Gratt. (Va.) 402 (1880).

44. 5 Chamberlayne, Evidence, §§ 3381: 3385.

45. *Ward v. Sire*, 52 App. Div. 443, 65 N. Y. Supp. 101 (1900).

46. *James v. Conklin*, 158 Ill. App. 640 (1910); *Bartlett v. Decreet*, 4 Gray (Mass.) 111 (1855); *Rapley v. McKinney's Estate*, 143 Mich. 508, 107 N. W. 501 (1906); *Durr v. Wildish*, 108 Wis. 401, 84 N. W. 437 (1900); 5 Chamb., Ev., § 3381, n. 2.

47. *Wallace v. Jones*, 93 Ga. 419, 21 S. E. 89 (1893); *Cahill v. Standard Marine Ins. Co.*, 204 N. Y. 190, 97 N. E. 486 (1912); *Knapp v. Miller*, 133 Pa. 275, 19 Atl. 555 (1890); 5 Chamb., Ev., § 3381, n. 3.

48. *Van Rensselaer v. Akin*, 22 Wend. (N. Y.) 549.

49. *Woods v. Kessler*, 93 Ind. 356 (1883); *Lyster v. Stickney*, 12 Fed. 609, 4 McCrary 109 (1882).

50. *State v. Lang*, 63 Me. 215 (1874); *Heyfron v. Mahoney*, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757 (1890); *Shoup v. Marks*, 128 Fed. 32, 62 C. C. A. 540 (1904); 5 Chamb., Ev., § 3382, n. 1.

are those of a public officer of an official act in the performance of his official duty and which he is by law bound to make.⁵¹ Where the officer to whom a writ is delivered has been prevented, without negligence or fault on his part, from obeying the mandate of the writ, a return endorsed upon the writ is a sufficient return and evidence of that which it recites.⁵² The endorsement by the officer must in all cases be one which he is authorized to make.⁵³ An original execution has also been admitted in evidence to show that it was incorrectly copied into the record,⁵⁴ or in proof of some other relevant fact.⁵⁵ Where the execution has been lost, the execution docket kept by the clerk containing entries in regard thereto is admissible.⁵⁶

Incidental Matters.—Papers which are incidentally connected with the proceedings such as bills of exceptions,⁵⁷ affidavits,⁵⁸ depositions in courts of probate,⁵⁹ a report of a surveyor attached to the record of an action of ejectment,⁶⁰ matters of evidence⁶¹ and a paper purporting to be the opinion of a judge but not signed or in any way authenticated,⁶² will not be received in evidence as a part of the record.

Matters not Properly Part of.—The record as a whole imports verity. It therefore follows that every part of it will be received to prove that which it legitimately sets forth.⁶³ It will not, however, be admitted as proof of any entry or statement which is not properly a part thereof.⁶⁴ Thus where the statute provides what shall form the judgment roll, papers which are not among those specified cannot be made a part thereof by being joined to it.⁶⁵

Pleadings.—The pleadings constitute a part of the record and as such are admissible.⁶⁶

§ 1064. [Judicial Records]; Justices of the Peace.⁶⁷—Records kept by justices of the peace of proceedings before them have, where properly authen-

51. *Bechstein v. Sammis*, 10 Hun (N. Y.) 585 (1877), and are received though made after the commencement of the action in which they are offered.

52. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811 (1899).

53. *Kimmel v. Meier*, 106 Ill. App. 251 (1902); *Wardwell v. Patrick*, 1 Bosw. (N. Y.) 406 (1857); 5 Chamb., Ev., § 3382, n. 5.

54. *Perry v. Whipple*, 38 Vt. 278 (1865).

55. *Nelson v. Brisbin*, 5 Neb. (Unoff.) 496, 98 N. W. 1087 (1904).

56. *Williams v. Lyon*, 181 Ala. 531, 61 So. 299 (1913); *Ellis v. Huff*, 29 Ill. 449 (1862).

57. *O'Neill v. Calhoun*, 67 Ill. 219 (1873); *State v. Hawkins*, 81 Ind. 486 (1882); 5 Chamb., Ev., § 3383, n. 1.

58. *Dempster Mill Mfg. Co. v. Fitzwater*, 6 Kan. App. 24, 49 Pac. 624 (1897).

59. *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651 (1860).

60. *Patton v. Kennedy*, 1 A. K. Marsh. (Ky.) 389, 10 Am. Dec. 744 (1818).

61. *Mestier v. New Orleans, etc., R. Co.*, 16 La. Ann. 354 (1861).

62. *Wixson v. Devine*, 67 Cal. 341, 7 Pac. 776 (1885).

63. *State v. Hawkins*, *supra*; *Numbers v. Shelly*, 78 Pa. 426 (1875); 5 Chamb., Ev., § 3384, n. 1.

64. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484 (1859); *Colton Land & W. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878 (1893).

65. *Colton Land & W. Co. v. Swartz*, *supra*.

66. *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793 (1900); *Keller v. Morton*, 117 N. Y. Supp. 200, 63 Misc. 340 (1909); *Com. v. Monongahel Bridge Co.*, 216 Pa. 108, 64 Atl. 909 (1906); 5 Chamb., Ev., § 3385.

67. 5 Chamberlayne, Evidence, §§ 3386: 3390.

ticated and proved,⁶⁸ been received in proof of the facts stated therein,⁶⁹ especially in those jurisdictions where such a court is one of records. Likewise minutes⁷⁰ kept by justices of the peace have been admitted, as have also their files⁷¹ and dockets,⁷² though in Vermont it has been the rule to refuse to receive the files and minutes if the justice is alive, it being declared that the only appropriate evidence is the record or a copy thereof.⁷³

Administrative Requirements.—When in an action before a justice of the peace his own docket is offered in evidence the rule prevails that it is unnecessary to introduce proof of its identity or of the official character of the justice.⁷⁴ As in other cases, however, the record must be identified by evidence to the satisfaction of the presiding judge when it is offered in another court.⁷⁵ This may be done by the oath of the justice establishing the identity and authenticity of the record,⁷⁶ or in the case of two justices by the oath of one of them to the same effect,⁷⁷ or by the testimony of any competent witness.⁷⁸ Where the justice is dead it has been regarded as proper to prove the fact of his death and to produce the original minutes in his handwriting with proof in verification of them.⁷⁹ In some cases proof of the handwriting of the justice has been required;⁸⁰ in others it has not.⁸¹ The fact that authenticated copies of the record of a justice of the peace are admissible does not exclude the original.⁸²

Duty Imposed by Statute.—The fact that no statute imposes the duty upon a justice of the peace to keep a record or docket does not affect its admissibility.⁸³ Where by express provision of law the duty is imposed upon a justice of the peace of keeping a record or docket and it is specified what shall be entered thereon, it or a transcript thereof is then only admissible as evidence

68. *Baur v. Beall*, 14 Colo. 383, 23 Pac. 345 (1890).

69. *People v. Ham*, 73 Ill. App. 533 (1897); *Knapp v. Miller*, 133 Pa. 275, 19 Atl. 555 (1890); 5 Chamb., Ev., § 3386, n. 1. Its statements cannot be collaterally questioned. *Church v. Pearne*, 75 Conn. 350, 53 Atl. 955 (1903).

70. *Folsom v. Cressey*, 73 Me. 270 (1882); *Pollock v. Hoag*, 4 E. D. Smith (N. Y.) 473 (1855).

71. *Keenan v. Washington Liquor Co.*, 8 Ida. 383, 69 Pac. 112 (1902).

72. *Downey v. People*, 117 Ill. App. 591 (1905); *State v. Gallamore*, 83 Kan. 412, 111 Pac. 472 (1910); *McGrath v. Seagrave*, 2 Allen (Mass.) 443, 79 Am. Dec. 797 (1861); 5 Chamb., Ev., § 3386, n. 6.

73. *Nye v. Kellam*, 18 Vt. 594 (1846). See *Gibson v. Holmes*, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451 (1905).

74. *Groff v. Griswold*, 1 Den. (N. Y.) 432 (1845).

75. *Bridges v. Branam*, 133 Ind. 488, 33 N. E. 271 (1892); *Michaels v. People*, 208 Ill. 603, 70 N. E. 747 (1904); 5 Chamb., Ev., § 3387, n. 2.

76. *Chapman v. Dodd*, 10 Minn. 350 (1865); *Pollock v. Hoag*, *supra*.

77. *Scott v. McCrary*, 1 Stew. (Ala.) 315 (1828).

78. *Cole v. Curtis*, 16 Minn. 182 (1870); *State v. Chambers*, 70 Mo. 625 (1879).

79. *Baldwin v. Prouty*, 13 Johns. (N. Y.) 430 (1816).

80. *Patterson v. Freeman*, 132 N. C. 357, 43 S. E. 904 (1903).

81. *Neal v. Keller*, 19 Kan. 111 (1877).

82. *Folsom v. Cressey*, *supra*; *Miller v. State*, 61 Ind. 503 (1878); *State v. Chambers*, *supra*; 5 Chamb., Ev., § 3388.

83. *Chapman v. Dodd*, *supra*. See *Ruggles v. Gaily*, 2 Rawle (Pa.) 232 (1828).

of the facts authorized to be entered therein.⁸⁴ The failure, however, of the justice to enter up his judgments in the precise mode and form prescribed by statute will not vitiate the effect of the record as evidence.⁸⁵

§ 1065. [Judicial Records]; Probate Courts.⁸⁶—The records of probate courts concerning matters properly within their jurisdiction may be received as evidence of those matters so recorded therein as in cases of other courts of record.⁸⁷ Thus probate records will be received to prove the appointment of an administrator without accounting for the non-production of the original letters;⁸⁸ the final settlement of an administrator;⁸⁹ the death of the testator;⁹⁰ the filing and allowance of a claim against an estate;⁹¹ the inventorying of a debt and the acts of an executor and guardian;⁹² an order for the specific performance by the executor of a contract made by the testator;⁹³ to show minority of wards at a certain date;⁹⁴ issuance of letters of guardianship;⁹⁵ the appointment of a person as guardian of a *non compos*;⁹⁶ the inventory and appraisement of an estate as tending to prove its value.⁹⁷ and other matters of a like nature. As in other cases, the record will not be received in evidence as proof of any matter which does not properly belong there.⁹⁸

84. *People v. Hayes*, 63 Ill. App. 427 (1896); *Armstrong v. State*, 21 Ohio St. 357 (1871); 5 Chamb., Ev., § 3390, n. 1.

85. *Reed v. Whitton*, 78 Ind. 579 (1881). Nor will failure of justice on removing from the town to deposit his docket book with the town clerk. *Carshore v. Huyck*, 6 Barb. (N. Y.) 583 (1849).

86. 5 Chamberlayne, Evidence, § 3391.

87. *Cox v. Cody*, 75 Ga. 175 (1885); *Ford v. Ford*, 117 Ill. App. 502 (1905); *Lalor v. Tooker*, 130 App. Div. 11, 114 N. Y. Supp 403 (1909); *Com. v. Levi*, 44 Pa. Super. Ct. 253 (1910); 5 Chamb., Ev., § 3391, n. 1.

88. *McRory v. Sellars*, 46 Ga. 550 (1872); *Davis v. Turner*, 21 Kan. 131 (1878); 5 Chamb., Ev., § 3391, n. 2.

89. *Lalnette's Heirs v. Lipscomb*, 52 Ala. 570 (1875).

90. *Randolph v. Bayne*, 44 Cal. 366 (1872).

91. *Jordon v. Bevans*, 10 Kan. App. 428, 61 Pac. 985 (1900).

92. *Eckford v. Hogan*, 44 Miss. 398 (1870).

93. *Williams v. Mitchell*, 112 Mo. 300, 20 S. W. 647 (1892).

94. *Richards v. Swan*, 7 Gill (Md.) 366 (1848).

95. *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136 (1881).

96. *Thomas v. Hatch*, 3 Sumn. (U. S.) 170 (1838).

97. *Smalley v. Paine* (Tex. Civ. App. 1910), 130 S. W. 739; *Bailey v. Robison*, 233 Ill. 614, 84 N. E. 660 (1908).

98. *Wilson v. Johnson*, 152 Ala. 614, 44 So. 539 (1907).

CHAPTER LI.

COPIES AND TRANSCRIPTS; JUDICIAL RECORDS.

Copies and transcripts; judicial records, 1066.

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§ 1066. **Copies and Transcripts; Judicial Records.**¹— It is a general rule that where the judgment, decree or proceeding of a court of record is to be proved it must be done by producing the original,² which may be regarded as primary proof,³ or by a copy duly authenticated, the latter being the usual mode.⁴ Proof by copy may be of three kinds, (1) exemplification, (2) copies made by an authorized officer, commonly called office copies and (3) sworn or examined copies.⁵ In order to render a copy of a record admissible the essential requirements are that it should appear to the satisfaction of the presiding judge that the record from which it was made came out of the proper custody,⁶ and that the copy should only contain matters which should properly be entered upon the record,⁷ and which it is the duty of the official to record.

§ 1067. **Exemplifications.**⁸— An exemplified copy, which is one of the modes

1. 5 Chamberlayne, Evidence, § 3392.

2. Jackson v. Robinson, 4 Wend. (N. Y.) 436 (1830).

3. Harper v. Rowe, 53 Cal. 233 (1878); Day v. Moore, 13 Gray (Mass.) 522 (1859).

4. Ramsey v. Flowers, 72 Ark 316, 80 S. W. 147 (1904); Abington v. North Bridgewater, 23 Pick. (Mass.) 170 (1839); Packard v. Hill, 7 Cow. (N. Y.) 434 (1827). The rule applies to copies of executions. Cannon v. Gorham, 136 Ga. 167, 71 S. E. 142 (1911);

Dooley v. Wolcott, 4 Allen (Mass.) 406 (1862); Benedict v. Heineberg, 43 Vt. 231 (1870); 5 Chamb., Ev., § 3392, n. 3.

5. Stewart v. Swanzy, 23 Miss. 502 (1852); Stamper v. Gay, 3 Wyo. 322, 23 Pac. 69 (1890).

6. Garrigues v. Harris, 17 Pa. 344 (1851).

7. Globe Mut. L. Ins. Ass'n v. Meyer, 118 Ill. App 155 (1905); 5 Chamb., Ev., § 3393.

8. 5 Chamberlayne, Evidence, § 3394.

of proving a judicial record,⁹ was obtained "at common law by removing the record into the court of chancery by *certiorari*. The great seal was attached to a copy, which was transmitted by a *mittimus* to the court in which it was to be used as evidence."¹⁰ In this country it is not necessary to remove the record from an inferior to a superior court by *certiorari* even on plea of *nul tiel record* but an exemplification is sufficient.¹¹

§ 1068. **Examined or Sworn Copies.**¹²—An examined or sworn copy which is proved by producing a witness, possibly an unofficial one,¹³ who has compared the copy with the original record, word for word, or who has examined the copy while another person read the original¹⁴ is one of the ordinary methods, independent of any statute, of proving a public document or record.¹⁵ A sworn copy of a copy has been rejected,¹⁶ though where the original was in a dilapidated condition and copies thereof had been used for many years in place of the original for public reference a copy was admitted.¹⁷ It must appear that the copy offered has been properly examined and compared with the original.¹⁸

§ 1069. **Office or Certified Copies.**¹⁹—Certified copies made by the officer in custody of judicial records and known as office copies is another mode of proof in many jurisdiction being made so by express provisions of a statute." though according to the earlier authorities, the admission of an office copy seems to have been restricted to those cases where the trial was in the same court and in the same cause²¹ and possibly where the trial was in another court but in the same cause in which the answer was put in.²² A statute authorizing the admission of certified copies of judicial records is not exclusionary of proof by the original unless it so provides.²³ The general rule prevails that

9. *Weaver v. Tuten*, 138 Ga. 101, 74 S. E. 835 (1912); *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514 (1811); *Spaulding v. Vincent*, 24 Vt. 501 (1852); 5 Chamb., Ev., § 3394, n. 1.

10. *West Jersey Traction Co. v. Board of Public Works*, 57 N. J. L. 313, 30 Atl. 581 (1894).

11. *Id.*; *Vail v. Smith*, 4 Cow. (N. Y.) 71 (1825).

12. 5 Chamberlayne, Evidence, §§ 3395, 3396.

13. *State v. Lynde*, 77 Me. 561, 1 Atl. 887 (1885); *State v. Collins*, 68 N. H. 299, 44 Atl. 495 (1895).

14. *West Jersey Traction Co. v. Board of Public Works*, *supra*.

15. *People v. Lyons*, 168 Ill. App. 396 (1912); *State v. Collins*, *supra*; *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 116 (1849); *Lyön*

v. McCadden, 15 Ohio 551 (1846); 5 Chamb., Ev., § 3395, n. 3.

16. *Grimes v. Bastrop*, 26 Tex. 310 (1862).

17. *New York, etc., R. Co. v. Horgan*, 26 R. I. 448, 59 Atl. 310 (1904).

18. *Foster v. People*, 121 Ill. App. 165 (1905); *Kellogg v. Kellogg*, *supra*; 5 Chamb., Ev., § 3396, nn. 1, 2, 3.

19. 5 Chamberlayne, Evidence, §§ 3397-3403.

20. *Craig v. Encey*, 78 Ind. 141 (1881). *Com. v. Quigley*, 170 Mass. 14, 48 N. E. 782 (1897); *Bailey v. Fransioli*, 101 App. Div. 140, 91 N. Y. Supp. 852 (1905); 5 Chamb., Ev., § 3397, n. 1.

21. *West Jersey Traction Co. v. Board of Public Works*, *supra*.

22. *Kellogg v. Kellogg*, *supra*.

23. *McAllister v. People*, 28 Colo. 156, 63 Pac. 308 (1900); *Vose v. Manly*, 19 Me. 331 (1841); 5 Chamb., Ev., § 3398.

the official who has the legal custody of the records of a court, ordinarily the clerk of the court, he being the person usually entrusted with the duty of keeping the records,²⁴ is the one who is authorized to give certified copies of them, and a certificate by the judge is not sufficient.²⁵ Unless authority to the contrary exists by virtue of some statute²⁶ it will be required that the clerk shall not in his certificate state that a certain fact appears of record or that in his opinion a certain legal import or effect results from what is there entered. His duty in such case is to furnish a copy of what the record itself contains.²⁷ The presiding judge will therefore exclude a certificate to the effect that a judgment has been rendered,²⁸ affirmed,²⁹ reversed,³⁰ that an abstract thereof has been indexed,³¹ or that an execution thereon has been issued and returned,³² the only proper and competent evidence of such facts being a transcript or copy of the record. Similarly a certificate to the effect that a case has been dismissed,³³ or that the foregoing contains all that is material to the controversy,³⁴ will be rejected. Certificates to the effect that letters of guardianship have been granted,³⁵ a claim allowed,³⁶ a will proved,³⁷ letters of administration granted,³⁸ that a person is public administrator³⁹ and of the death of a person, that his estate has been administered upon and who were his heirs⁴⁰ have been excluded. The clerk cannot certify to matters which are not properly and legally entered on the records.⁴¹

Authentication.—It is essential to the admissibility of a copy that it should be properly authenticated.⁴² Statutory requirements should be at least substantially complied with.⁴³ If it is required that a copy shall be authenticated by the seal of the court, an absence of such seal,⁴⁴ if the court has one,⁴⁵

24. *Lay v. Sheppard*, 112 Ga. 111, 37 S. E. 132 (1900); *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378 (1902); *Woolsey v. Saunders*, 3 Barb. (N. Y.) 301 (1848); 5 Chamb., Ev., § 3399, n. 1.

25. *Dibble v. Morris*, 26 Conn. 416 (1857). But see *Cockran v. State*, 46 Ala. 714 (1871).

26. *First Nat. Bank v. Lippman*, 129 Ala. 608, 30 So. 19 (1900); *Lansing v. Russell*, 3 Barb. Ch. (N. Y.) 325 (1848).

27. *Lamar v. Pearre*, 90 Ga. 377 (1892); *English v. Sprague*, 33 Me. 440 (1851); 5 Chamb., Ev., § 3400, n. 2.

28. *Lansing v. Russell*, *supra*; *Thompson v. Mann*, 53 W. Va. 432, 44 S. E. 246 (1903).

29. *Miller v. Vaughan*, 78 Ala. 323 (1884).

30. *Dothard v. Sherd*, 69 Ala. 135 (1881).

31. *Lindsey v. State*, 27 Tex. Civ. App. 540, 66 S. W. 332 (1901).

32. *Carr v. Youse*, 39 Mo. 346, 90 Am. Dec. 470 (1866).

33. *Lamar v. Pearre*, *supra*.

34. *Bellamy v. Hawkins*, 17 Fla. 750 (1880).

35. *Peebles v. Tomlinson*, 33 Ala. 336 (1858).

36. *Armstrong v. Boylan*, 4 N. J. L., 76 (1818).

37. *Staring v. Bowen*, 6 Barb. (N. Y.) 109 (1849).

38. *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372 (1835).

39. *Littleton v. Christy's Adm'r*, 11 Mo. 390 (1848).

40. *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687 (1895); 5 Chamb., Ev., § 3400, n. 15.

41. *Boardman v. Page*, 11 N. H. 431 (1840); *League v. Henecke* (Tex. Civ. App. 1894), 26 S. W. 729; 5 Chamb., Ev., § 3401.

42. *McGlasson v. Scott*, 112 Iowa 289, 83 N. W. 974 (1900); 5 Chamb., Ev., § 3402.

43. *Hagan v. Snider*, 44 Tex. Civ. App. 139, 98 S. W. 213 (1906).

44. *Brunt v. State*, 36 Ind. 330 (1871); *Burge v. Gandy*, 41 Neb. 149, 59 N. W. 359 (1894); 5 Chamb., Ev., § 3402, n. 3.

45. *Burge v. Gandy*, *supra*.

will be a sufficient reason for its exclusion. Ordinarily, however, in the absence of a statute, a transcript of a judicial record requires no seal as an essential to admissibility.⁴⁶ A certificate under private seal of the clerk has in some cases been received, there being no official seal of the court.⁴⁷ Where there is no provision of law as to what the certificate shall state, it is generally regarded as sufficient if it contains a statement indicating that the copy is a true copy.⁴⁸ In fact it must be shown to be such.⁴⁹ Where the statute prescribes what the certificate shall state, it will be received if it substantially satisfies the requirement of the statute in regard thereto.⁵⁰ Mere clerical errors will not be sufficient for the exclusion of a copy.⁵¹ Where the complete record is composed of several papers a copy thereof has been received where each paper is certified⁵² as well as where the certification is general and includes them all.⁵³ If, however, the papers certified do not constitute a complete copy they may be rejected.⁵⁴ The copy or certificate should identify the papers with certainty⁵⁵ so as to inform the court what is certified to.⁵⁶

§ 1070. **Justices' Courts.**⁵⁷— Though the justice's docket or record is the best evidence⁵⁸ a sworn or certified copy thereof has been received⁵⁹ with the same effect as the original,⁶⁰ on the ground of convenience,⁶¹ though in some instances its reception has been limited to those cases where the justice is dead or absent.⁶² Proof by this means is also frequently provided for by statute.⁶³ Such a certificate has been received in favor of the justice.⁶⁴ Such a statute

46. *Weis v. Levy*, 69 Ala. 209 (1881); *Conley v. State*, 85 Ga. 348, 11 S. E. 659 (1890); *Com. v. Quigley*, 170 Mass. 14, 48 N. E. 782 (1897); 5 *Chamb., Ev.*, 3402, n. 5.

47. *Torbett v. Wilson*, 1 *Stew. & P.* (Ala.) 200 (1831); *Gates v. State*, 13 Mo. 11 (1850).

48. *Glos v. Stern*, 213 Ill. 325, 72 N. E. 1057 (1904); *Com. v. Wait*, 131 Mass. 417 (1881); 5 *Chamb., Ev.*, § 3403, n. 1.

49. *Drumm v. Cessnum*, 58 Kan. 331, 49 *Pac.* 78 (1897).

50. *Cofer v. Schening*, 98 Ala. 338, 13 So. 123 (1892); *Old Wayne Mut. Life Assoc. v. McDonough*, 164 Ind. 321, 73 N. E. 703 (1904); 5 *Chamb., Ev.*, § 3403, n. 4.

51. *Daniel v. State*, 114 Ga. 533, 40 S. E. 805 (1901).

Signature of judge to the record.— Absence of on copy does not vitiate. *Anderson v. Ackerman*, 83 Ind. 481 (1883); *Stacks v. Crawford*, 63 Neb. 662, 88 N. W. 852 (1902). See *Elliott v. Cronk's Adm'rs.*, 13 *Wend.* (N. Y.) 35 (1834).

52. *Goldstone v. Davidson*, 18 Cal. 41 (1861).

53. *Sherburne v. Rodman*, 51 *Wis.* 474, 8 N.

W. 414 (1881); *Weaver v. Tuten*, 138 Ga. 101, 74 S. E. 835 (1912).

54. *Susquehanna, etc., R. & C. Co. v. Quick*, 68 Pa. 189 (1871).

55. *Pike v. Crehore*, 40 Me. 503 (1855).

56. *Clements v. Taylor*, 65 Ala. 363 (1880).

57. 5 *Chamberlayne, Evidence*, §§ 3404-3406.

58. *Hibbs v. Blair*, 14 Pa. 413 (1850).

59. *Com. v. Downing*, 4 *Gray* (Mass.) 29 (1855); *French v. Schreeve*, 18 N. J. L. 147 (1840); 5 *Chamb., Ev.*, § 3404, n. 2.

60. *Welsh v. Crawford*, 14 *Serg. & R.* (Pa.) 440 (1826).

61. *Hibbs v. Blair*, *supra*.

62. *Pratt v. Peckham*, 25 *Barb.* (N. Y.) 195 (1855) (under the statute).

63. *Foster v. People*, 121 Ill. App. 165 (1905); *Goodsell v. Leonard*, 23 *Mich.* 374 (1871); *Belgard v. McLaughlin*, 44 *Hun* (N. Y.) 557 (1887); 5 *Chamb., Ev.*, § 3404, n. 6.

64. *Maynard v. Thompson*, 8 *Wend.* (N. Y.) 393 (1832).

65. *Singer v. Atlantic Mills Co.*, 126 Ga. 45, 54 S. E. 821 (1906).

will not operate to exclude the original record.⁶⁵ In the absence of any statute one who certifies to copies of a justice's record must have been the legal custodian of it, which fact the certificate should show.⁶⁶ This is also true under the statute in several states.⁶⁷ In some states there are also provisions by statute requiring that a transcript of such a record must be made by the justice of the peace or his successor in office or by one having the legal custody of the docket or record.⁶⁸ In some jurisdictions a further authentication by some official is required by statute to the certificate given by a justice of the peace.⁶⁹ A certification by a justice should of course be to a copy of the record and not to the effect that a certain fact appears thereon.⁷⁰ The general principles respecting the form of certification of judicial records to the effect that the certificate should show or state that the copy is a true and complete one have also been applied to copies of justices' records.⁷¹ In some jurisdictions a seal is required to the certificate of a justice of the peace.⁷²

§ 1071. Probate Courts.⁷³—The records of probate or surrogates' courts, as in the case of those of other courts, may ordinarily be proved by exemplified⁷⁴ or certified copies.⁷⁵ Thus an exemplification⁷⁶ or certified copy of a will or of the record⁷⁷ has been received without accounting for the non-production of the original record,⁷⁸ while a sworn copy has been rejected.⁷⁹ Proceedings in a probate court may also be established by production of the original record notwithstanding proof by copy is permitted by statute, provided such statute is not exclusionary thereof.⁸⁰ The same principle applies in the case of probate records as in that of other records, viz.: that matters which do not properly belong there as a part thereof cannot become matter of record by their incorporation therein, and that a certificate of such matters does not by the certi-

66. *Stamper v. Gay*, 3 Wyo. 322, 23 Pac. 69 (1890).

67. *Anderson v. Miller*, 4 Blackf. (Ind.) 417 (1837); *Holcomb v. Tift*, 54 Mich. 647, 20 N. W. 627 (1884); 5 Chamb., Ev., § 3405, n. 2.

68. *Drumm v. Cessnum*, *supra*; *Wentworth v. Keazer*, 30 Me. 336 (1849); *McDermott v. Barnum*, 12 Mo. 204 (1853); *Maynard v. Thompson*, 8 Wend. (N. Y.) 393 (1832); 5 Chamb., Ev., § 3405, n. 4.

69. *Belton v. Fisher*, 44 Ill. 32 (1867); *Todd v. Johnson*, 50 Minn. 310, 52 N. W. 864 (1892); *Maynard v. Thompson*, *supra*; 5 Chamb., Ev., 3405, n. 6.

70. *English v. Sprage*, 33 Me. 440 (1851).

71. *Yeager v. Wright*, 112 Ind. 230, 13 N. E. 707 (1887); *Starbird v. Moore*, 21 Vt. 529 (1848); 5 Chamb., Ev., § 3406, n. 3.

72. *Greenberg v. People*, 125 Ill. App. 626 (1906); *Wolverton v. Com.*, 7 Serg. & R. (Pa.) 273 (1821).

73. 5 Chamberlayne, Evidence, §§ 3407, 3408.

74. *Smith v. Ross*, 108 Ga. 198, 33 S. E. 953 (1899).

75. *Lasco v. Casanenava*, 30 Cal. 560 (1866); *Hart v. Stone*, 30 Conn. 94 (1861); *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140 (1902); *Jackson v. Robinson*, 4 Wend. (N. Y.) 436 (1830); 5 Chamb., Ev., § 3407, n. 2.

76. *Rodney v. McLaughlin*, 97 Mo. 426, 9 S. W. 726 (1888); *Kenyon v. Stewart*, 44 Pa. 179 (1863).

77. *Chicago Terminal Transf. R. Co. v. Winslow*, 216 Ill. 166, 74 N. E. 815 (1905); *Fetes v. Volmer*, 58 Hun 1, 11 N. Y. Supp. 552 (1890); *Musgrave v. Angle*, 43 Can. S. Ct. 484 (1910); 5 Chamb., Ev., § 3407, n. 4.

78. *Hickman v. Gillum*, 66 Tex. 314, 1 S. W. 339 (1886).

79. *Ray v. Mariner*, 3 N. C. 385 (1806).

80. *Houze v. Houze*, 16 Tex. 598 (1856).

fication become admissible.⁸¹ The certificate to the copy of a will should of course be executed in compliance with the law relating thereto in order to be admissible.⁸² It must also be shown to the satisfaction of the presiding judge that a will which is certified to has been duly proved and recorded according to law in order to render the copy admissible.⁸³

§ 1072. **Federal Courts.**⁸⁴—The general rule seems to be that whenever a copy of a document from any department of the United States government would be received in evidence in the Federal courts it will also be admitted in the State tribunals.⁸⁵ The rule also is that the circuit or district court of each district is presumed to know the seals of every other circuit or district court of the United States.⁸⁶ Copies of records of the Federal courts whether of a circuit or district court are not, therefore, when offered in another circuit or district than that in which they are made,⁸⁷ or offered for evidence in a State⁸⁸ or territorial court,⁸⁹ subject to the provisions of the Federal statute relating to the authentication of the judicial records of one State when offered in the courts of another State; the copy being generally regarded as admissible when certified to by the clerk of the court under the seal of that court.⁹⁰ In some cases they have been received under State statutes⁹¹ or excluded because of noncompliance therewith.⁹² On the other hand, however, the fact that the act of congress respecting copies of records of a State court when offered in a court of another State does not apply to copies of records of Federal courts when introduced in a State court does not operate to exclude copies in the latter case because authenticated in accordance with that act,⁹³ which in fact is said to be the uniform practice in authenticating the records of Federal courts.⁹⁴ Where by statute the deputy clerk is authorized, in the absence of the clerk, to do and perform all duties pertaining to the office, a certificate by a deputy clerk has been received though it does not affirmatively appear that the clerk was absent, it being said that his absence will be presumed.⁹⁵ The

81. *Bowersock v. Adams*, 55 Kan. 681, 41 Pac. 971 (1895).

82. *Phillips v. Babcock Bros. Lumber Co.*, 5 Ga. App. 634, 63 S. E. (1908).

83. *Sutton v. Westcott*, 48 N. C. 283 (1856); *Lagow v. Glover*, 77 Tex. 448, 14 S. W. 141 (1890); 5 Chamb., Ev., § 3408, n. 2.

84. 5 Chamberlayne, Evidence, § 3409.

85. *Gilman v. Riopelle*, 18 Mich. 145 (1869); *Williams v. Wilkes*, 14 Pa. 228 (1850); *Edwards v. Smith* (Tex. Civ. App. 1911), 137 S. W. 1161; 5 Chamb., Ev., § 3409, n. 1.

86. *Turnbull v. Payson*, 95 U. S. 418, 24 L. ed. 437 (1877).

87. *National Acc. Soc. v. Spiro*, 94 Fed. 750, 37 C. C. A. 388 (1899); 5 Chamb., Ev., § 3409, n. 3.

88. *Allison v. Robinson*, 136 Ala. 434, 34 So. 966 (1902); *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793 (1900); *Pepoon v. Jenkins*, 2 Johns. Cas. (N. Y.) 119 (1800); *Turnbull v. Payson*, *supra*; 5 Chamb., Ev., § 3409, n. 4.

89. *Edwards v. Smith*, *supra*.

90. *Ganow v. Ashton*, 32 S. D. 453, 143 N. W. 383 (1913).

91. *Dean v. Chapin*, 22 Mich. 275 (1871); *Rosenfeld v. Siegfried*, 91 Mo. App. 169 (1901); *Hamon v. Foust* (Tenn. 1912), 150 S. W. 418; 5 Chamb., Ev., § 3409, n. 6.

92. *Pike v. Crehore*, 40 Me. 503 (1855).

93. *Ruford v. Hickman*, 4 Fed. Cas. No. 2,114a, Hempst. (U. S.) 232 (1834).

94. *O'Hara v. Mobile & O. R. Co.*, 76 Fed. 718, 22 C. C. A. 512 (1896).

95. *National Acc. Soc. v. Spiro*, *supra*.

certificate of the clerk should, as in other cases, be to a copy of the record and not to its legal effect.⁹⁶

§ 1073. *Of Other States.*⁹⁷— Congress, in the exercise of the power conferred upon it by the Constitution,⁹⁸ has provided a mode for the proof of the judicial records of one State in the courts of another in the following terms: “The records and judicial proceedings of the courts of any State, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form and such record and judicial proceedings so authenticated, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are, or shall be taken.”⁹⁹ A substantial compliance with this requirement has been considered sufficient¹ and a copy which has been so authenticated will be, in fact must be,² admitted, though it may not conform to the law of the State in which the judgment was rendered or the mode at common law. The method provided by the act of Congress for proving such records is cumulative³ being regarded as more convenient and less expensive,⁴ and not exclusive⁵ of other modes of proof. Therefore, proof in accordance with the common law mode,⁶ as by a sworn copy,⁷ a copy certified to by the officer whose duty it is by law to keep the original,⁸ or a copy, though not authenticated according to the act of Congress, if it is proved as a foreign record,⁹ has been received. The right of the states to pass legislation affecting this subject is also recognized. In many cases the provisions of the Federal act have been substantially adopted by the States.¹⁰ With this recognition of the power of the State, however, is imposed the qualification that Congress having exercised the authority vested in it by the Constitution,

96. *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758 (1901).

97. 5 Chamberlayne, *Evidence*, §§ 3410, 3411.

98. U. S. Const. Art. iv, § 1.

99. Act of Cong. May 26, 1790; U. S. Rev. Stat. § 905; U. S. Comp. Stat. 1901, p. 677.

1. *Horner v. Spelman*, 78 Ill. 206 (1875); *Taylor v. Heitz*, 87 Mo. 660 (1885).

2. *Nadel v. Campbell*, 18 Ida. 335, 110 Pac. 262 (1910); *Joslin v. Fuller*, 106 Ill. App. 43 (1911); *Murphy v. Marscheider*, 4 N. Y. Supp. 799 (1889); *Varn v. Arnold Hat Co.* (Tex. Civ. App. 1910), 124 S. W. 693; 5 Chamb., Ev., § 1910, n. 4.

3. *Goodwyn v. Goodwyn*, 25 Ga. 203 (1858).

4. *Hall v. Bishop*, 78 Ind. 370 (1881).

5. *Garden City Sand Co. v. Miller*, 157 Ill.

225, 41 N. E. 753 (1895); *State v. Hinchman*, 27 Pa. 479 (1856); 5 Chamb., Ev., § 3411, n. 3.

6. *Karr v. Jackson*, 28 Mo. 316 (1859); *Wolf v. King*, 49 Tex. Civ. App. 41, 107 S. W. 617 (1908); 5 Chamb., Ev., § 3411, n. 4.

7. *Smith v. Strong*, 14 Pick. (Mass.) 128 (1833); *Otto v. Trump*, 115 Pa. 425, 8 Atl. 786 (1886); *Tourtellot v. Booker* (Tex. Civ. App. 1913), 160 S. W. 293; 5 Chamb., Ev., § 3411, n. 5.

8. *Holyoke v. Holyoke's Estate*, 110 Me. 469, 87 Atl. 40 (1913).

9. *Lothrop v. Blake*, 3 Pa. 483 (1846).

10. *Bean v. Loryea*, 81 Cal. 151, 22 Pac. 513 (1889); *Phelps v. Tilton*, 17 Ind. 423 (1861); *Comstock v. Kerwin*, 57 Neb. 1, 77 N. W. 387 (1898); 5 Chamb., Ev., § 3411, n. 8.

no State may require a greater amount of proof than that prescribed by such act. Subject to this limitation, State enactments respecting the mode of proving such documents are equally valid¹¹ and may be followed. It is required, however, that there should be a compliance with its provisions in order to render a copy admissible under the act of Congress.¹² Likewise, in order to prove such a record under a State enactment, compliance with its provisions is required.¹³

§ 1074. **Attestation of the Clerk.**¹⁴—The act of Congress provides that the attestation shall be made by the clerk and this designation excludes an attestation by any other official as for instance a deputy clerk,¹⁵ in case it is sought to prove the record under that act, and a certificate by the judge that attestation is made by the proper officer will not cure such a defect.¹⁶ The act of Congress prescribes no requirement as to the form of attestation.¹⁷ The general rule seems to be that, in this respect, it should comply with the forms used in the State in which the record is and from which the copy comes.¹⁸ The certificate of the clerk need not state that he has the custody of the records as, the authentication being sufficient, the presumption arises that he is the legal custodian;¹⁹ nor need it state that the court is a court of record, as it will be presumed from the presence of a seal that it is such a court.²⁰ Likewise a copy of the record of a court of another State when duly authenticated is evidence not only of the acts of the court but of its jurisdiction²¹ and it is not essential to show by the copy or otherwise that the court had jurisdiction.²² Nor does the law require that the clerk should certify that the transcript is a full transcript of the whole proceedings.²³ His certificate that the transcript is truly copied from the record of the proceedings of the court is, where the

11. *People v. Miller*, 195 Ill. 621, 63 N. E. 504 (1902); *In re Ellis' estate*, 55 Minn. 401, 56 N. W. 1056 (1898); *Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757 (1901); *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42 (1887); 5 Chamb., Ev., 3411, n. 9.

12. *Mason v. Nashville, etc., Ry. Co.*, 135 Ga. 741, 70 S. E. 225 (1910); *Ayres v. Deering*, 76 Kan. 149, 90 Pac. 794 (1907); *Huie v. Devore*, 138 App. Div. 677, 123 N. Y. Supp. 12 (1910); 5 Chamb., Ev., § 3411, n. 11.

13. *Ayres v. Deering*, *supra*; *Barlow v. Steel*, 65 Mo. 611 (1877); *Comstock v. Kerwin*, *supra*; *Huie v. Devore*, *supra*; 5 Chamb., Ev., § 3411, n. 12.

14. 5 Chamberlayne, Evidence, §§ 3412–3416.

15. *Willock v. Wilson*, *supra*; *Williams v. Williams*, 53 Mo. App. 617 (1893); *Morris v. Patchin*, 24 N. Y. 394, 82 Am. Dec. 311, 397 (1862); 5 Chamb., Ev., § 3412, n. 1.

16. *Id. Contra: Young v. Thayer*, 1 Greene (Iowa) 196 (1848); *Steinke v. Graves*, 16 Utah 293, 52 Pac. 386 (1898).

17. *Morris v. Patchin*, *supra*.

18. *Forbes v. Davis*, 187 Ala. 71, 65 So. 516 (1914); *Morris v. Patchin*, *supra*; *Edwards v. Jones*, 113 N. C. 453, 18 S. E. 500 (1893); 5 Chamb., Ev., § 3413, n. 2.

19. *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877 (1891).

20. *Steamboat Thames v. Erskine*, 7 Mo. 213 (1841).

21. *Western Assur. Co. v. Walden*, 238 Mo. 49, 141 S. W. 595 (1911); *Ransom v. Wheeler*, 12 Abb. Pr. (N. Y.) 139 (1861); 5 Chamb., Ev., § 3413, n. 5.

22. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64 (1895).

23. *State v. Allen*, 113 La. 705, 37 So. 614 (1904).

transcript appears to be complete, all that is required.²⁴ A certification that the copy is a true copy imports that it is a complete copy.²⁵ A transcript, the authentication of which conforms to the provisions of the Federal act, will not be excluded because of the insertion of any unnecessary matter in connection with the attestation or certification.²⁶ Since the act of Congress requires a seal to the clerk's attestation it is of course an absolute essential that if the court has one it should be so annexed in order to render the copy admissible under that act,²⁷ or that it should appear by the certificate either of the clerk or the judge that the court has no seal,²⁸ in which case a copy attested by the private seal of the clerk may properly be received.²⁹ If a court is abolished and its records are transferred to another court, the certificate of the clerk of the latter court to the effect that he has been made the depository of the records of the other court with authority to certify transcripts of its proceedings, coupled with the judge's certificate to the effect that the certificate of the former is in due form and by the proper officer is regarded as sufficient under the Federal act,³⁰ without proving the laws of the State to that effect.³¹

§ 1075. **Certificate of the Judge.**³²— In the absence of the certificate of the judge, chief justice or presiding magistrate that the attestation is in due form there is a want of proper authentication which would require the exclusion of a copy of a judicial record of a sister State.³³ The absence of such a certificate creates a fatal defect which cannot be aided by the copy of the record³⁴ or by an additional certificate of the clerk.³⁵ In cases where the judge is also clerk of his own clerk, which frequently occurs in probate courts, the act of Congress is likewise applicable³⁶ and the judge may certify to a copy in both capacities, that is as clerk and judge,³⁷ in which case the transcript is properly received. The certificate should be so worded as to clearly indicate or

24. *Shilling v. Seigle*, 207 Pa. 381, 56 Atl. 957 (1904).

25. *Wells v. Wells*, 209 Mass. 282, 95 N. E. 245, 35 L. R. A. (N. S.) 561 (1911); *Shilling v. Seigle*, *supra*; *Joalin v. Fuller*, 166 Ill. App. 43 (1911); 5 Chamb., Ev., § 3413, n. 9.

26. *Erb v. Scott*, 14 Pa. 20 (1850); *Graham v. Froth*, 69 Kan. 861, 77 Pac. 92 (1904); 5 Chamb., Ev., § 3415, n. 1.

27. *Mason v. Nashville, etc., Ry. Co.*, *supra*; *Kirschner v. State*, 9 Wis. 140 (1859); 5 Chamb., Ev., § 3415, n. 1.

28. *Stewart v. Swanzy*, 23 Miss. 502 (1852).

29. *Strode v. Churchill*, 2 Litt. (Ky.) 75 (1822).

30. *Gatling v. Robbins*, 80 Ind. 184 (1856); *Capen v. Emery*, 5 Metc. (Mass.) 436 (1843); *Manning v. Hogan*, 26 Mo. 570 (1858); 5 Chamb., Ev., § 3416, nn. 1, 2.

31. *Id.*; *Darrah v. Watson*, 36 Iowa 116 (1872).

32. 5 Chamberlayne, Evidence, §§. 3417–3419.

33. *Mason v. Chattanooga, etc., R. Co.*, 135 Ga. 741, 70 S. E. 225 (1910); *Huie v. Devore*, *supra*; *Dodd v. Groll*, 19 Ohio Cir. Ct. 718 (1898); *Snyder v. Wise*, 10 Pa. 157 (1848); 5 Chamb., Ev., § 3417, n. 1.

34. *Elliott v. McClelland*, 17 Ala. 206 (1850).

35. *Taylor v. McKee*, 118 Ga. 874, 45 S. E. 672 (1903).

36. *Low v. Burrows*, 12 Cal. 181 (1859); *Cox v. Jones*, 52 Ga. 438 (1874); 5 Chamb., Ev., § 3417, n. 4.

37. *Rowe v. Barnes*, 101 Iowa 302, 70 N. W. 197 (1897); *State v. Hinchman*, 27 Pa. 479 (1856); *Keith Bros. & Co. v. Stiles*, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860 (1896); 5 Chamb., Ev., § 3417, n. 5.

show that the judge possesses the necessary official character which authorizes him to sign it.³⁸ It must also appear that he was presiding judge of the particular court from the record of which transcript comes,³⁹ which character he must possess at the time of giving the certificate,⁴⁰ otherwise it will be rejected.⁴¹ A certificate by some other judge, although of equal authority and rank within the State, will not satisfy the requirement of the act.⁴² The certificate of the judge that the attestation is in due form is authentic evidence of its correctness,⁴³ in fact, according to some decisions, is to be regarded as conclusive.⁴⁴ The judge need not go beyond the terms of the act and certify to any matter except that which the enactment specifies.⁴⁵ Where it appears from the face of the record as shown by the transcript offered or from the certificate to the transcript that the court is composed of more than one judge, a certificate signed by one judge without showing that he is the presiding judge or chief justice will be rejected.⁴⁶ Where, however, there is nothing on the face of the record adduced from which it may be inferred that the court from which the transcript comes is composed of more than one judge, it is held to be sufficient if the judge in his certificate describes himself as judge of the court, without stating that he is sole judge,⁴⁷ since the presumption is said to arise that he is the sole judge.⁴⁸ If the laws of the State creating the court do not make any precedence between judges of such court by providing for any chief justice or presiding justice but all are of equal rank, an authentication by one⁴⁹ of such judges or all⁵⁰ is proper. Where such a situation exists it may be shown by the certificate of the judge or by proving the statute of the State.⁵¹ Where a court is composed of several judges, each judge presiding in turn, a certificate signed by one as the judge who is presiding "in turn" will be received.⁵²

§ 1076. Justices' of the Peace.⁵³—The general rule seems to be that such courts having no clerks are not so constituted as to come within the provisions

38. *Geron v. Felder*, 15 Ala. 304 (1849); *Williams v. Williams*, 53 Mo. App. 617 (1893); 5 Chamb., Ev., § 3418, n. 1.

39. *Hope v. First Nat. Bank* (Ga. 1914), 86 S. E. 929; *Barlow v. Steel*, 65 Mo. 611 (1877); *Huie v. Devore*, *supra*; 5 Chamb., Ev., § 3418, n. 2.

40. *Lothrop v. Blake*, 3 Pa. 483 (1846).

41. *Id.*; *Stewart v. Gray*, 23 Fed. Cas. No. 13,428a, *Hempst.* (U. S.) 94 (1830).

42. *Huie v. Devore*, *supra*.

43. *Lewis v. Sutliff*, 2 Greene (Iowa) 186 (1849).

44. *Hatcher v. Rocheleau*, 18 N. Y. 86 (1858); *Edwards v. Jones*, *supra*.

45. *Duconnum v. Hysinger*, 14 Ill. 249 (1852); *Waynes v. Cowen*, 15 Kan. 637 (1875), 5 Chamb., Ev., § 3418, n. 8.

46. *Rich v. Cohen*, 114 N. Y. Supp. 672, 61 Misc. 148 (1908); *Van Storch v. Griffin*, 71 Pa. 240 (1872); 5 Chamb., Ev., § 3419, n. 1.

47. *Willock v. Wilson*, 178 Mass. 68 (1901); *Keyes v. Mooney*, 13 Or. 179, 9 Pac. 400 (1886); 5 Chamb., Ev., § 3419, n. 2.

48. *Willock v. Wilson*, *supra*; *People v. Smith*, 121 N. Y. 578, 24 N. E. 852 (1890).

49. *Woodley v. Findlay*, 9 Ala. 716 (1846). Compare, *Rich v. Cohen*, *supra*.

50. *Id.*; *Arnold v. Frazier*, 5 Strobb. (S. C.) 33 (1850).

51. *Huff v. Campbell*, 1 Stew. (Ala.) 543 (1828). See *Orman v. Neville*, 14 La. Ann. 392 (1859).

52. *Taylor v. Kilgore*, 33 Ala. 214 (1858).

53. 5 Chamberlayne, Evidence, § 3420.

of the act of Congress,⁵⁴ not having the machinery to comply with all the requisitions of the act.⁵⁵ Nor will the requirement as to an attestation by the clerk of the court from whence the record comes be satisfied by a certificate of the clerk of some other court.⁵⁶ Where, however, under the laws of another State, a transcript of a judgment rendered by a justice of the peace becomes when filed in a designated court of record of that State, a judgment of the latter court, it would seem that a duly authenticated copy of the record of such court should be received,⁵⁷ upon proof of the law which so provides.⁵⁸ Congress not having provided a method for proving such proceedings resort must, in the absence of some statutory provision, be had to the procedure at common law,⁵⁹ transcripts so authenticated being admissible.⁶⁰ In many states provision is made by statute which governs the mode of proving proceedings before a justice of the peace in another State.⁶¹ In such cases there should be a compliance with the provisions of the law.⁶²

§ 1077. Probate Courts.⁶³—The record of a court of probate in one State may, when relevant, be proved in the courts of another State in accordance with the provisions of the Federal act.⁶⁴ Thus it is generally held that proceedings in connection with the probate of a will are “judicial proceedings” within the meaning of that term as used in the enactment and that a record thereof may be proved either as there provided⁶⁵ or as may be allowed by the law of the State in which offered.⁶⁶ So the appointment of a guardian in another State may be proved in either way.⁶⁷ Where lands are situated within the State in which the copy is offered in evidence, it seems, according to the weight of authority, that the copy will be admitted for the purpose of proving title⁶⁸ without the will being probated in the State in which the transcript is offered.

54. *Warren v. Flagg*, 2 Pick. (Mass.) 448 (1824); *Winham v. Kline*, 77 Mo. App. 36 (1898); *Stockwell v. Coleman*, 10 Ohio St. 34 (1859); 5 Chamb., Ev., § 3420, n. 1.

55. *Ransom v. Wheeler*, 12 Abb. Pr. (N. Y.) 139 (1861).

56. *Trader v. McKee*, 2 Ill. 558 (1839); *Mahurin v. Bickford*, 6 N. H. 567 (1834); 5 Chamb., Ev., § 3420, n. 3.

57. *Rowley v. Carron*, 117 Pa. 52, 11 Atl. 435 (1887).

58. *Hinman v. Missouri, K. & T. Ry. Co.*, 83 Kan. 35, 110 Pac. 102 (1910).

59. *Blackwell v. Glass*, 43 Ark. 209 (1884); *State v. Bartlett*, 47 Me. 396 (1860); *Strecker v. Railson*, 16 N. D. 68, 111 N. W. 612 (1907); 5 Chamb., Ev., § 3420, n. 6.

60. *Winham v. Kline*, *supra*; *Mahurin v. Bickford*, *supra*.

61. *Sloane v. Wolfsfeld*, 110 Ga. 70, 35 S. E.

344 (1899); *Tomlin v. Woods*, 125 Iowa 367, 101 N. W. 135 (1904); *Bent v. Glaenger*, 17 Misc. 569, 40 N. Y. Supp. 657 (1896); 5 Chamb., Ev., § 3420, n. 8.

62. *Gay v. Lloyd*, 1 Greene (Iowa) 78 (1847); *Warren v. Flagg*, *supra*.

63. 5 Chamberlayne, Evidence, § 3421.

64. *Spencer v. Langdon*, 21 Ill. 192 (1859); *Washabaugh v. Entriiken*, 34 Pa. 74 (1859); *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621 (1895); 5 Chamb., Ev., § 3421, n. 1.

65. *First Nat. Bank of Memphis v. Kidd*, 20 Minn. 234 (1873); *Keith v. Keith*, 80 Mo. 125 (1883); *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803 (1894); 5 Chamb., Ev., § 3421, n. 2.

66. *Gardner v. Ladue*, 47 Ill. 211, 95 Am. Dec. 487 (1868).

67. *Brack v. Morris*, 90 Kan. 64, 132 Pac. 1183 (1913).

68. *Beatty v. Mason*, 30 Md. 409 (1868);

§ 1078. *State Courts in Federal Courts.*—The record of a judgment in a State court in order to be admissible in a Federal court, should be certified in accordance with the mode prescribed by section 905 of the Federal statutes. The certificate should show that the person signing it as judge was, at the time of so signing, the judge, chief justice or presiding magistrate of the court in which the judgment is of record.⁷¹ The certificate of the presiding judge that the attestation is in due form is also held essential.⁷² The act does not apply when the record of a judgment rendered in a State court is offered in evidence in a Federal court sitting in the same State.⁷³

§ 1079. *Foreign Courts.*⁷⁴—Owing to inability to produce the record of the proceedings in a foreign court,⁷⁵ the record being regarded as the best evidence,⁷⁶ proof may be made either by a sworn copy made by one who compared it with the original⁷⁷ or by an exemplified copy, certified with the great seal of State,⁷⁸ or by the certificate of an officer authorized by law, which certificate itself must be properly authenticated.⁷⁹ These are said to be the usual if not the only modes.⁸⁰ In some States statutes prescribe requirements for admission of copies of foreign judicial proceedings.⁸¹

Barstow v. Sprague, 40 N. H. 27 (1859); *Kelly v. Ross*, 44 N. C. 277 (1853); 5 *Chamb., Ev.*, § 3421, n. 8.

69. 5 *Chamberlayne*, Evidence, § 3422.

70. Act of Cong. May 26, 1790; U. S. Rev. Stat. § 905; U. S. Comp. Stat. 1901, p. 677.

71. *United States v. Biebusch*, 1 Fed. 213, 1 *McCrary* (U. S.) 42 (1880); 5 *Chamb., Ev.*, § 3422, n. 2.

72. *Tooker v. Thompson*, 24 Fed. Cas. No. 14,097, 3 *McLean* 92 (1842).

73. *Mewster v. Spalding*, 17 Fed. Cas. No. 9,513, 6 *McLean* 24 (1853).

74. 5 *Chamberlayne*, Evidence, § 3423.

75. *Spaulding v. Vincent*, 24 *Vt* 501 (1852).

76. *Wickersham v. Johnston*, 104 *Cal.* 407, 38 *Pac.* 89 (1894).

77. *Buttrick v. Allen*, 8 *Mass.* 272 (1811);

Pickard v. Bailey, 26 N. H. 152 (1852); *Lincoln v. Battelle*, 6 *Wend.* (N. Y.) 475 (1831); 5 *Chamb., Ev.*, § 3423, n. 3.

78. *Lincoln v. Battelle*, *supra*; *Gunn v. Peakes*, 36 *Minn.* 177, 30 *N. W.* 466 (1886); *Spaulding v. Vincent*, *supra*; 5 *Chamb., Ev.*, § 3423, n. 4.

79. *Id.*; *Thompson v. Mason*, 4 *Ill. App.* 452 (1879); 5 *Chamb., Ev.*, § 3423, n. 5.

80. *Church v. Hubbard*, 2 *Cranch.* (U. S.) 187, 2 *L. ed.* 249 (1804). See *Buttrick v. Allen*, *supra*; 5 *Chamb., Ev.*, § 3423, n. 6.

81. *Wickersham v. Johnston*, *supra*; *Thompson v. Mason*, *supra*; *Capling v. Herman*, 17 *Mich.* 524 (1869); *Linton v. Baker*, 1 *Neb.* (Unoff.) 896, 96 *N. W.* 251 (1901); *Van Deventer v. Mortimer*, 56 *Misc.* 650, 107 *N. Y. Supp.* 564 (1907); 5 *Chamb., Ev.*, § 3423, n. 7.

CHAPTER LII.

PUBLIC DOCUMENTS; OFFICIAL REGISTERS; PAPERS AND WRITINGS.

Public documents; official registers, papers and writings, 1080.

certificates by public officers, 1081.

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same, 1083.

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§ 1080. **Public Documents; Official Registers, Papers and Writings.**¹—Records kept by public officers in the course of their official duty under a law which requires the keeping of such records or which are required by the nature of the office are ordinarily admissible² as *prima facie*³ though not conclusive evidence of the facts which they assert.⁴ The rule also applies to official documents or papers which an official is required to prepare in the performance of his duty,⁵ or to reports so made,⁶ even though the action is one between third parties.⁷ A record to be admissible as a public record should be intended as a mode of preserving the recollection of the facts.⁸ It is further required that it must have been made either by a superior officer or under his direction and be a record of occurrences or acts which either by statute or the duties of his office he was required to keep,⁹ though the fact that the record may contain some matter which should not appear thereon will not operate to exclude it as to those facts which are properly entered.¹⁰ A record not made in the performance of official duty will not be received.¹¹ The mere fact of the entry of some matter upon the record will not render it admissible as proof thereof; it must have been properly incorporated therein.¹² It is essential where such

1. 5 Chamberlayne, Evidence, §§ 3424–3428.

2. Chicago v. Fitzmaurice, 138 Ill. App. 239 (1907); Delaney v. Framingham Gas, etc., Co., 202 Mass. 359, 88 N. E. 773 (1909); State v. Baker, 35 Nev. 1, 126 Pac. 345 (1912); 5 Chamb., Ev., § 3424, n. 1.

3. Trentham v. Waldrop, 119 Ga. 152, 45 S. E. 988 (1903); Hayward v. Bath, 38 N. H. 179 (1859).

4. Enfield v. Ellington, 67 Conn. 459, 34 Atl. 318 (1896).

5. Bruce v. Holden, 21 Pick. (Mass.) 187 (1838); City of Dickinson v. White, 25 N. D. 523, 143 N. W. 754 (1913).

6. Illinois Cent. R. Co. v. Holt, 29 Ky. L. Rep. 135, 92 S. W. 540 (1906); Allegheny

v. Nelson, 25 Pa. 232 (1855); Seavey v. Seavey, 37 N. H. 125 (1858).

7. Enfield v. Ellington, *supra*.

8. Hegler v. Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 653 (1893).

9. Allen v. Kidd, 197 Mass. 256, 84 N. E. 122 (1908); Taylor v. Jackson, 151 Mich. 639, 115 N. W. 977 (1908); Carter v. Hornback, 139 Mo. 238, 40 S. W. 893 (1897); 5 Chamb., Ev., § 3425, n. 2.

10. Scott v. Williams, 74 Kan. 448, 87 Pac. 550 (1906).

11. Lloyd v. Simons, 90 Minn. 237, 95 N. W. 903 (1903).

12. Jackson v. Collins, 16 N. Y. Supp. 651 (1891). Entries should have been made promptly after the transaction which they

a book is offered, that there should be some proof of its official character.¹³ It is not necessary that such a book should be kept in pursuance of a mandate of a statute or that its keeping is indispensable to the nature of the office.¹⁴ A record may be kept by virtue of a statute or an ordinance for specific purposes only and not be a public record in the sense that it is competent evidence for all purposes.¹⁵ A record which is in favor of the official may be admissible, e.g., to prove the official's appointment¹⁶ or election to office; the performance of official acts by him;¹⁷ the rendition of services in an action to recover for their value,¹⁸ and the like. Where the entry is against the entrant's interest and he is deceased,¹⁹ it then becomes admissible also within the principle upon which entries and memoranda of persons, since deceased, are admitted.²⁰

§ 1081. Certificates by Public Officers.²¹—Certificates of public officials executed by them in the performance of their duties are regarded as documents of a public nature and are admissible,²² in many cases under express statutory enactment,²³ at least as *prima facie* evidence of the facts recited therein,²⁴ upon the principle that every one acting officially is presumed to have done his duty until the contrary appears.²⁵ They are only admissible, however, as evidence of those facts which the officer in the performance of his duty is authorized or required to certify to.²⁶ Where a certificate is given for a particular purpose, it will not ordinarily be received as evidence for any other purpose.²⁷ The official character of the one making a certificate should be

purport to record. *Birmingham v. Pettit*, 21 D. C. 209 (1888)

13. *Hall v. People*, 21 Mich. 456 (1870).

14. *County of La Salle v. Simmons*, 10 Ill. 513 (1849) (county commissioners' book); *Groesbeck v. Seeley*, 13 Mich. 329 (1865) (county treasurer's book of tax sales); *State v. Van Winkle*, 25 N. J. L. 73 (1855) (school trustees' minutes); *White v. U. S.*, 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365 (1896) (jailor's record book); 5 Chamb., Ev., § 3426, n. 2

15. *Butchers S & M. Assoc. v. Boston*, 214 Mass. 254, 101 N. E. 426 (1913) (register kept by a draw tender); *Buffalo Loan, etc., Co. v. Knights Templar*, 126 N. Y. 450, 27 N. E. 942 (1891) (board of health death record); *Kerr v. Metropolitan St. R. Co.*, 27 Misc. 190, 57 N. Y. Supp. 794 (1899) (police blotter); 5 Chamb., Ev., § 3427.

16. *Briggs v. Murdock*, 13 Pick. (Mass.) 305 (1832).

17. *Bissell v. Hamblin*, 6 Duer (N. Y.) 512 (1857).

18. *Bissell v. Hamlin*, 13 Abb. Pr. (N. Y.) 22 (1860).

19. *Field v. Boynton*, 33 Ga. 239 (1862); *Livingston v. Arnoux*, 56 N. Y. 507 (1874).

20. *Id.*; 5 Chamb. Ev., § 3428, nn. 6, 7, 8.

21. 5 Chamberlayne. Evidence, §§ 3432-3434.

22. *Whalen v. Gleeson*, 81 Conn. 638, 71 Atl. 908 (1903); *Black v. Chicago, B. & Q. R. Co.*, 237 Ill. 500, 86 N. E. 1065 (1909); *Lacy v. Kossuth County*, 106 Iowa 16, 75 N. W. 689 (1898); *Erickson v. Smith*, 2 Abb. Dec. (N. Y.) 64, 38 How. Pr. 454 (1860); 5 Chamb. Ev., § 3432, n. 1.

23. *Com. v. Waite*, 11 Allen (Mass.) 264, 87 Am. Dec. 711 (1865); *Davis v. Watkins*, 56 Neb. 288, 76 N. W. 575 (1898); *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771 (1910); 5 Chamb., Ev., § 3432, n. 2

24. *Jonesboro L. C. & E. R. Co. v. St. Francis Levee Dist.*, 80 Ark. 316, 97 S. W. 281 (1906).

25. *Whalen v. Gleeson*, *supra*. Such a certificate will be received in behalf of the officer making it. *McKnight v. Lewis*, 5 Barb. (N. Y.) 681 (1849).

26. *Wagner v. Allemania*, 71 Misc. 448, 128 N. Y. Supp. 629 (1911); *Marlow v. School Dist. No. 4*, 29 Okl. 304, 116 Pac. 797 (1911).

27. *Clark v. Detroit Locomotive Works*, 32 Mich. 348 (1875); *Erickson v. Smith*, *supra*.

shown to the satisfaction of the presiding judge,²⁸ and also that he executed the same in his official capacity²⁹ and in the line of his official duty or authority.³⁰ In so far as the matters certified to do not come within the official duty or cognizance of the officer the certificate will not be received as evidence of such statements.³¹ While a certificate executed by a deputy in the name of his principle has, in some cases been received where it appeared that the person so acting was in fact a deputy,³² as has also a certificate signed by a deputy as such,³³ yet in the absence of some provision of law expressly or impliedly authorizing the appointment of a deputy who can authenticate papers in the name of his principal, there would seem to be no sound reason to justify the admission of such a certificate in evidence.³⁴

§ 1082. Particular Documents.³⁵—*Appraisals* made by official custom house appraisers are in the nature of documents or public writings and while they are not conclusive as to the cost or value of the goods yet they may in connection with other evidence tend to establish those facts.³⁶

Birth, Death and Marriage Registers.—A register of births required by law to be kept or a duly authenticated copy thereof, is legal evidence of a birth which is entered thereon.³⁷ A death may be proved by a register in which the law requires entries of deaths to be made.³⁸ A record of marriages which is kept in pursuance of a statutory requirement, or an attested copy thereof, is of course legal evidence of a marriage there recorded.³⁹

Bond Registers.—Where the law provides for the keeping of a book in which the bonds issued by corporations shall be registered and it is shown to the satisfaction of the presiding judge that a register, offered in evidence, was kept as provided for by the act, it will be received.⁴⁰

Clerks of Courts; Records Kept By.—Records kept by clerks of courts either in pursuance of some requirement of a legislative enactment or of the express rules of court, or in the performance of their necessary duties, are

28. *Harbers v. Tribby*, 62 Ill. 56 (1871); *Prew v. Donahue*, 118 Mass. 438 (1875).

29. *Holtman v. Holtman* (Ky. 1900), 114 S. W. 1198.

30. *Sullivan v. State*, 66 Ill. 75 (1872); *Reed v. Inhabitants of Scituate*, 7 Allen (Mass.) 141 (1863); *Parr v. Greenbush*, 72 N. Y. 463 (1878); *McKinnon v. Fuller*, 33 S. D. 582, 146 N. W. 910 (1914); 5 Chamb., Ev., § 3433, n. 3.

31. *Cutter v. Waddingham*, 33 Mo. 269 (1862); *Tripler v. Mayor of New York*, 125 N. Y. 617, 26 N. E. 721 (1891); 5 Chamb., Ev., § 3433, n. 4.

32. *Byington v. Allen*, 11 Iowa 3 (1860); *Steinke v. Graves*, 16 Utah 293, 52 Pac. 386 (1898).

33. *Com. v. Hayden*, 163 Mass. 453, 40 N. E.

846 (1895); *Laffan v. U. S.*, 122 Fed. 333, 58 C. C. A. 495 (1903).

34. *Carter v. Territory*, 1 N. M. 317 (1859); 5 Chamb., Ev., § 3434.

35. 5 Chamberlayne, Evidence, §§ 3429-3431; 3435-3447.

36. *Buckley v. U. S.*, 4 How. (U. S.) 251, 11 L. ed. 961 (1846); 5 Chamb., Ev., § 3429.

37. *Murray v. Supreme Lodge N. E. O. P.*, 74 Conn. 715, 52 Atl. 722 (1902); *Howard v. Illinois Trust & Sav. Bank*, 189 Ill. 568, 59 N. E. 1106 (1901); 5 Chamb., Ev., § 3430.

38. *Id.*; 5 Chamb., Ev., § 3437.

39. *Id.*; *Nelson v. State*, 151 Ala. 2, 43 So. 966 (1907); *Com. v. Hayden*, *supra*; 5 Chamb., Ev., § 3444.

40. *Loving v. Warren County*, 14 Bush (Ky.) 316 (1878).

subject to the same general principles in respect to their admission. Thus a record kept by the clerk of a court has been received for the purpose of showing some fact in respect to the fees,⁴¹ the issuance and return of writs,⁴² the execution of a bond by the sheriff,⁴³ an attachment of real estate,⁴⁴ and other matters⁴⁵ thus entered of record by him.

County Records.—The nature and importance of duties performed by county boards, such as county commissioners,⁴⁶ are ordinarily of such a character that even though there is no statute requiring that a record be kept of their proceedings it is not only proper but necessary that such a record be kept by them,⁴⁷ and when so kept it will be received in evidence.⁴⁸ In like manner records kept by any one of the various county officials in the performance of his official duties, as for instance of a county treasurer⁴⁹ or of a county clerk,⁵⁰ have been admitted in evidence as proof of the facts which they assert.

Election Certificates, Registry Lists, Etc.—An official registry list of electors together with the check lists are admissible in evidence to prove the domicile of one whose name appears thereon,⁵¹ to show his qualifications to vote and to establish the fact that he voted.⁵² Similarly poll books and certificates of election officers of a township returned to the officials designated by law have been received as *prima facie* evidence of an election.⁵³

Federal Official Records.—Full faith is given to written instruments emanating from officers of the United States government in their official capacity. Thus the courts have admitted receipts,⁵⁴ pamphlets,⁵⁵ reports,⁵⁶ books of account,⁵⁷ and others of a like character issued by government officials as well as records kept by them in the performance of their official duties.⁵⁸

Inventories.—Inventories of estates of decedents made in pursuance of an order of the probate court issued under authority of a statute are admissible

41. *Cooper v. People*, 28 Colo. 87, 63 Pac. 514 (1900); *Lycett v. Wolff*, 45 Mo. App. 489 (1891); 5 Chamb., Ev., § 3435, n. 1.

42. *Browning v. Flanagan*, 22 N. J. L. 567 (1849).

43. *Bryan v. Glass' Securities*, 2 Humphr. (Tenn.) 390 (1841).

44. *Metcalf v. Munson*, 10 Allen (Mass.) 491 (1865).

45. *Lawrence County v. Dunkle*, 35 Mo. 395 (1865).

46. *Coler v. Rhoda School Tp.*, 6 S. D. 640, 63 N. W. 158 (1895).

47. *Johnson v. County of Wakulla*, 28 Fla. 720, 9 So. 690 (1891).

48. *Bader v. State*, 176 Ind. 268, 94 N. E. 1009 (1911); *Van Ness v. Hadsell*, 54 Mich. 560, 20 N. W. (1884); 5 Chamb., Ev., § 3436, n. 3.

49. *Sawyer v. Stilson*, 146 Iowa 707, 125 N. W. 822 (1910).

50. *Board of County Com'rs v. Patrick*, 18 Wyo. 130, 104 Pac. 531, 107 Pac. 748 (1909).

51. *Enfield v. Ellington*, 67 Conn. 459, 34 Atl. 318 (1896).

52. *Id.*; *Langhammer v. Munter*, 80 Md. 518, 31 Atl. 300 (1895).

53. *Merritt v. Hinton*, 55 Ark. 12, 17 S. W. 270 (1891); *State v. Baker*, 35 Nev. 1, 126 Pac. 345 (1912); 5 Chamb., Ev., § 3438.

54. *Herriot v. Broussard*, 4 Mart. N. S. (La.) 260 (1826).

55. *Nichols v. Chicago & W. M. R. Co.*, 125 Mich. 304, 84 N. W. 470 (1900).

56. *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621 (1846).

57. *United States v. Kuhn*, 4 Cranch (U. S. C. C.) 401 (1833).

58. *Infra*, nn. 55-60.

for many purposes as to every person since they are made by those acting under authority of the law.⁵⁹

Land Records of Grants and Patents.— Ordinarily the records of a land office showing the issuance of a grant, deed or certificate have been regarded as within the operation of the rule permitting the reception in evidence of records kept by a public official⁶⁰ and the record of a patent has been received as of a grant of equal dignity with the patent itself, since it shows, like the patent that the grant has been issued.⁶¹ Its identity as the original record must be established.⁶² Documents of the United States Land Office have been admitted where a register of the local land office identified them as the originals.⁶³

Letters of an Official Character.— Letters from government officials are frequently to be considered official acts and as such come within the application of the general rule controlling official documents and records.⁶⁴ This also applies to letters received by such persons in their official capacity.⁶⁵

Military and Naval Records.— Records made by the adjutant-general of a State of the muster rolls of different regiments furnished by the State for military service of the Federal government and which have been recognized by the legislature of the State as public records of his office are competent evidence of the enlistment, mustering and discharge of members of such regiments.⁶⁶ Commissions and discharges may also be proved by a roster kept as required by the proper recording officers.⁶⁷ Similarly the enrollment of a company is the best evidence of whether a certain person has in fact been enrolled.⁶⁸ Likewise the presence or absence of a member of a military company may be shown by the company's records.⁶⁹ The same rule applies in the case of naval records.⁷⁰

Municipal Records.— Records which have been kept by city officials either in pursuance of a statutory requirement⁷¹ or as a necessary part of their official duty⁷² even in the absence of statutory mandate are, as in the case of other

59. *Seavey v. Seavey*, 37 N. H. 125 (1858); *Roger's Admx. v. Chandler's Admx.*, 3 Munf. (Va.) 65 (1811); 5 Chamb., Ev., § 3440.

60. *Sylvester v. State*, 46 Wash. 585, 91 Pac. 15 (1907); *William James' Sons Co. v. Crouch*, 72 W. Va. 794, 79 S. C. 815 (1913); 5 Chamb., Ev., § 3441, n. 2.

61. *Reno Brewing Co. v. Packard*, 31 Nev. 433, 103 Pac. 415, 104 Pac. 801 (1909); 5 Chamb., Ev., § 3441, n. 3.

62. *Stewart v. Lead Belt Land Co.*, 200 Mo. 281, 98 S. W. 767 (1906).

63. *Harmering v. Howland*, 25 N. D. 38, 141 N. W. 131 (1913); 5 Chamb., Ev., § 3442.

64. *Carpenter v. Bailey*, 56 N. H. 283 (1876); *American Banana Co. v. United Fruit Co.*, 160 Fed. 184 (1908); 5 Chamb., Ev., § 3443, n. 1.

65. *Hammatt v. Emerson*, 27 Me. 308, 46

Am. Dec. 598 (1847); 5 Chamb., Ev., § 3443.

66. *Board of Com'rs of Monroe County v. May*, 67 Ind. 562 (1879); *Allen v. Halsted*, 39 Tex. Civ. App. 324, 87 S. W. 754 (1905).

67. *Matthews v. Bowman*, 25 Me. 157 (1845).

68. *Gale v. Currier*, 4 N. H. 169 (1827). *Prima facie* evidence. See *Shattuck v. Gilson*, 19 N. H. 296 (1848).

69. *Robinson v. Folger*, 17 Me. 206 (1840). *Compare, Com. v. Pierce*, 15 Pick. (Mass.) 170 (1833).

70. *Wallace v. Cook*, 5 Esp. 117 (1804); 5 Chamb., Ev., § 3445.

71. *St. Charles v. O'Mailey*, 18 Ill. 407 (1857); *Grafton v. Reed*, 34 W. Va. 172, 12 S. E. 767 (1890).

72. *Fruin-Bambrick Constr. Co. v. Geist*, 37 Mo. App. 509 (1889).

official registers and records, admissible⁷³ as the best evidence of the acts of a municipality whenever those acts are to be proved.⁷⁴ Thus they have been received to show the passage of an ordinance,⁷⁵ the report of a board of public works to the common council and its action thereon;⁷⁶ a resolution of a board of health condemning buildings and ordering their destruction;⁷⁷ the location and alteration of streets,⁷⁸ a change of grade made pursuant to a legal vote of the authorities,⁷⁹ the amount due a gas company for gas supplied under a contract⁸⁰ and other similar matters. Such records will only be received as proof of such facts as are properly entered thereon by one in the performance of his official duties.⁸¹

Official Maps.—An official map made under the authority of a State or of the United States may also be considered as a record and subject to the same principles controlling the admission of the latter.⁸² Such map have been received to show the jurisdiction of the court;⁸³ an intent of the owners of land to dedicate and the extent of the dedication;⁸⁴ the line of a street;⁸⁵ an accident occurred within the limits of a certain town;⁸⁶ to identify the particular parcel involved in the controversy;⁸⁷ and to prove the identity and description of land conveyed by a patent.⁸⁸ Where the genuineness of a map is disputed some evidence may be required of its authenticity.⁸⁹

§ 1083. *Particular Documents, Continued.*⁹⁰—A *post-office record*, an official registry kept by a postmaster containing statements of various matters required by law and by the regulations of the postal department of the government to be entered therein, will be generally received in proof of any relevant fact which it recites.⁹¹ So where relevant the record of mails received and sent away may be admitted,⁹² as may also the record of registered letters.⁹³

73. *Edwards v. Cedar Rapids*, 138 Iowa 421, 116 N. W. 323 (1908); *State v. Heffernan*, 243 Mo. 442, 148 S. W. 90 (1912); *Tenement House Dept. v. Weil*, 134 N. Y. Supp. 1062 (1912); 5 Chamb., Ev., § 3446, n. 3.

74. *Denning v. Roome*, 6 Wend. (N. Y.) 651 (1831).

75. *Greeley v. Hamman*, 17 Colo. 30, 28 Pac. 460 (1891).

76. *Alderman v. New Haven*, 81 Conn. 137, 70 Atl. 626 (1908).

77. *Kwong Lee Yuen & Co. v. Alliance Assurance Co.*, 16 Hawaii 674 (1905).

78. *Barker v. Fogg*, 34 Me. 392 (1852).

79. *Cook v. Ansonia*, 66 Conn. 413, 34 Atl. 183 (1895).

80. *St. Louis Gas Light Co. v. St. Louis*, 86 Mo. 495 (1885).

81. *Fraser v. Charleston*, 8 S. C. 318 (1876).

82. *Colton Land & W. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878 (1893); *Henry v. Dulle*, 74

Mo. 443 (1881); *People v. Denison*, 17 Wend. (N. Y.) 312 (1837); *Stephenson v. Leeburgh*, 33 Ohio St. 475 (1878); 5 Chamb., Ev., § 3447, n. 1.

83. *United States v. Beebe*, 2 Dak. 202, 11 N. W. 505 (1880).

84. *Chicago, B. & Q. R. Co. v. Banker*, 44 Ill. 26 (1867).

85. *Pittsburg, etc., R. Co. v. Rose*, 74 Pa. 362 (1873). Compare, *Com. v. Switzer*, 134 Pa. 383, 19 Atl. 681 (1890).

86. *Chicago, etc., R. Co. v. McArthur*, 53 Fed. 464, 3 C. C. A. 594 (1892).

87. *Meikel v. Greene*, 94 Ind. 344 (1883).

88. *Surget v. Doe*, 24 Miss. 118 (1852).

89. *Wooten v. Solomon*, 139 Ga. 433, 77 S. E. 375 (1912); *Com. v. King*, 150 Mass. 221, 22 N. E. 905 (1889).

90. 5 Chamberlayne, Evidence, §§ 3448–3457.

91. *Gurney v. Howe*, 9 Gray (Mass.) 404, 69 Am. Dec. 299 (1857); *Haddock v. Kelsey*,

Prison Records.—Records kept by the official in charge of a jail or prison are admissible to show the date of the commitment and discharge of a prisoner,⁴ though no statute provides for such a book.⁵

School Records.—Records kept by the officials of a school district as required by statute are admissible⁶ and have been received to show the election of a member of the school committee;⁷ as evidence of a regular notice for a school district meeting,⁸ and to show the amount of the district's indebtedness,⁹ or the indebtedness of a school official to it in an action against him and his sureties.¹ So a record which the law requires to be kept by school authorities concerning the age of school children and the like will be received as evidence of any fact required to be there entered, though it is not conclusive in regard thereto.²

Sheriff's Books and Records.—Records kept by a sheriff concerning his official acts,³ such as entries on a docket kept by him⁴ or in his execution book,⁵ have been received as proof of facts stated therein. Where he is deceased, they have also been received as declarations against his interest.⁶

State Officials' Records.—Records and documents kept by and in the custody of State officers, frequently if not generally in pursuance of some express legislation, will be received when relevant.⁷ Thus a bank pass-book regularly and accurately kept by a State treasurer, in connection with the discharge of his duties, has been received as a part of his official transactions in an action on his bond.⁸

Surveyors' Records.—Reports made by an official surveyor or records kept by him in the performance of his official duties are applicable to the same general rules relating to the admission in evidence of public records and documents,⁹ as are also those of a deputy surveyor.¹⁰ A survey need not recite

3 Barb. (N. Y.) 100 (1848); 5 Chamb., Ev., § 3448, n. 1.

92. Miller v. Boykin, 70 Ala. 469 (1881); Merriam v. Mitchell, 13 Me. 439, 29 Am. Dec. 514 (1836).

93. Gurney v. Howe. *supra*.

94. White v. U. S., 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365 (1896).

95. Id.: 5 Chamb., Ev., § 3449.

96. Board of Education v. Moore, 17 Minn. 412 (1871); 5 Chamb., Ev., § 3450, n. 1.

97. Peck v. Smith, 41 Conn. 442 (1874).

98. Sanborn v. School Dist. No. 10, 12 Minn. 17 (1866).

99. Wormley v. District Tp. of Carroll, 45 Iowa 666 (1877).

1. Independent School Dist. of Sioux City v. Hubbard, 110 Iowa 58, 81 N. W. 241 (1899).

2. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275 (1906). See also, Swift v. Rennard, 119 Ill. App. 173 (1905).

3. Albrecht v. State, 62 Miss. 516 (1885); Brewster v. Vail, 20 N. J. L. 56, 38 Am. Dec. 547 (1842); 5 Chamb., Ev., § 3451, n. 1.

4. Fleming v. Williams, 53 Ga. 556 (1875).

5. Secrist v. Twitty, 1 McMull. (S. C.) 255 (1840).

6. Field v. Boynton, Adm'r., 33 Ga. 289 (1862).

7. Parrish v. Com., 136 Ky. 77, 123 S. W. 339 (1909); Harper v. Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044 (1903).

8. Com. v. Tate, 89 Ky. 587, 13 S. W. 113 (1890). It is admissible if written in pencil. Franklin v. Tiernan, 56 Tex. 618 (1882). But see Meserve v. Hicks, 24 N. H. 295 (1851); 5 Chamb., Ev., § 3452, n. 3.

9 Sherrard v. Cudney, 134 Mich. 200, 96 N. W. 15 (1903); Clark v. Williams, 29 Neb. 691, 46 N. W. 82 (1890); Conkling v. Westbrook, 81 Pa. 81 (1872); 5 Chamb., Ev., § 3453, n. 1.

10. Russell v. Werntz, 24 Pa. 337 (1855).

statute to the contrary. In some cases, however, records of deeds and other writings seem to have been received without reference to any statute authorizing their admission in evidence.⁴⁵ The question as to the admissibility of the record of a deed or other private written instrument required by law to be recorded is, with possibly few exceptions, controlled by legislative enactments. The tendency of such legislation has been to make the record of the writing admissible,⁴⁶ without further proof,⁴⁷ in many cases it being made of equal force and effect as the original.⁴⁸ Under a statute of this nature a record purporting to be transcripts of deeds from other records has been received,⁴⁹ as has also a book into which records have been transcribed from a temporary book which is shown to have been lost or destroyed.⁵⁰ Some of the statutes merely provide that the record may be received as secondary evidence of the writing, upon satisfactory proof of loss of or inability to produce the original.⁵¹ Regardless of such statutes, however, it would seem that not the record but the original instrument should be produced where the question involved is whether such instrument has been forged.⁵²

To render a record admissible under a statute the requirements of the enactment must be complied with in regard to proving the same,⁵³ and the foundation prescribed thereby for its admission must be laid⁵⁴ to the satisfaction of the presiding judge. If notice to the adverse party is required it must be given.⁵⁵ Also it is said that the record must have been made in compliance with the law relating to the recording of instruments⁵⁶ and the instrument itself must be executed in compliance with the provisions of the statute.⁵⁷ It must be an instrument which the law authorizes or directs to be recorded.⁵⁸

Bradley v. Silsbee, 33 Mich. 328 (1876); 5 Chamb., Ev., § 3458, nn. 1, 2.

45. Trammell v. Thurmond, 17 Ark. 203 (1856); Robinson v. Pitzer, 3 W. Va. 335 (1869); 5 Chamb., Ev., § 3458, nn. 3, 4.

46. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712 (1904); Swank v. Phillips, 113 Pa. 482, 6 Atl. 450 (1886); 5 Chamb., Ev., § 3459, n. 1.

47. Embree v. Emerson, 37 Ind. App. 16, 74 N. E. 44, 1110 (1905); Wendell v. Heim, 87 Kan. 136, 123 Pac. 869 (1912); Clark v. Clark, 47 N. Y. 664 (1872); Blaha v. Borgman, 142 Wis. 43, 124 N. W. 1047 (1910); 5 Chamb., Ev., § 3459, n. 2.

48. Delaney v. Errickson, 10 Neb. 492, 6 N. W. 600 (1880); Serles v. Serles, 35 Or. 289, 57 Pac. 634 (1899); 5 Chamb., Ev., § 3459, n. 3.

49. Weisbrod v. Chicago & N. W. R. Co., 21 Wis. 602 (1867).

50. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735 (1881).

51. McBride v. Lowe, 175 Ala. 408, 57 So. 832 (1912); Patton v. Fox, 179 Mo. 525, 78

S. W. 804 (1903); Delaney v. Errickson, *supra*: 5 Chamb., Ev., § 3459, n. 6.

52. People v. Swetland, 77 Mich. 53, 43 N. W. 779 (1889).

53. Sullivan v. Hense, 2 Colo. 424 (1874).

54. Stow v. People, 25 Ill. 81 (1860); Peck v. Clark, 18 Tex. 239 (1857).

55. Lasher v. State, 30 Tex. App. 387, 17 S. W. 1064 (1891).

56. Einstein v. Holladay-Klotz Land & L. Co., 132 Mo. App. 82, 111 S. W. 859 (1908); 5 Chamb., Ev., § 3460, n. 4.

57. Trowbridge v. Addoms, 23 Colo. 518, 48 Pac. 535 (1897); Strain v. Fitzgerald, 128 N. C. 396, 38 S. E. 929 (1901); Davis v. Seybold, 195 Fed. 402 (1912); 5 Chamb., Ev., § 3460, n. 5. If not so executed it is not entitled to be recorded. Meskimen v. Day, 35 Kan. 46, 10 Pac. 14 (1886). The act of the official in recording it must be considered an unofficial act. Stone breaker v. Short, 8 Pa. 153 (1848).

58. Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401

The failure, however, of the register to sign the record, especially where the statute does not require it,⁵⁹ the failure to affix the revenue stamp required by the laws of the United States,⁶⁰ or generally mere clerical errors,⁶¹ do not affect the question of admissibility.

(1891); *State v. Cole*, 156 N. C. 618, 72 S. E. 221 (1911); *Midland Gas Co. v. Jefferson County Gas Co.*, 237 Pa. 602, 85 Atl. 853 (1912); 5 *Chamb., Ev.*, § 3460, n. 8.
59. *Wilt v. Cutler*, 38 Mich. 189 (1878).

60. *Trowbridge v. Addoms*, *supra*; *Collins v. Vallean*, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904 (1889).
61. *People v. Lyons*, 168 Ill. App. 396 (1912).

CHAPTER LIII.

COPIES AND TRANSCRIPTS; OFFICIAL REGISTERS, PAPERS AND WRITINGS.

Copies and transcripts; official registers, papers and writings, 1085.

mode of proof; certified copies, 1086.

land office records, 1087.

ordinances, 1088.

records of private writings, 1089.

records of other states, 1090.

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§ 1085. Copies and Transcripts; Official Registers, Papers and Writings.¹—

The method of proving the contents of records by use of the originals is seldom used, proof by the use of copies or transcripts which have been duly and properly authenticated² being from an early date regarded with favor.³ The copy or transcript which is offered in place of the original must be shown to the satisfaction of the court to be a copy or transcript of a record made by one in the performance of an official duty.⁴ In so far as it may include any matter which is not of this character and does not properly belong upon the record it will be rejected.⁵ It will also be required that it should be complete in respect to the particular transaction which it purports to record⁶ and not consist merely of a copy of excerpts from the record;⁷ and that it be shown that the record of which it purports to be a copy was in the custody of the officer certifying to it.⁸ The certificate should show that it is a copy of the original, and not of a copy or transcript of it.⁹ So a certified copy of a writ of error which contains a recital of the record of an inferior court is not evidence of such record.¹⁰ But where a cause has been removed or sent to one court from another and a transcript of the latter court has become a part of the record of the former, a certified copy thereof has been received.¹¹ And a copy of an officially certified copy has been received where the original has been destroyed.¹²

1. 5 Chamberlayne, Evidence, §§ 3461–3465.

2. Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598 (1847); American Life Ins. & T. Co. v. Rosenagle, 77 Pa. 507 (1875); 5 Chamb., Ev., § 3461, n. 1.

3. Gray v. Davis, 27 Conn. 447 (1858); State v. Voight, 90 N. C. 741 (1884).

4. State v. Dorris, 40 Conn. 145 (1873).

5. Hardiman v. Mayor of New York, 21 App. Div. 614, 47 N. Y. Supp. 786 (1897); 5 Chamb., Ev., § 3462, n. 2.

6. *Supra*, § 261; 1 Chamb., Ev., § 506.

7. Letcher v. Bank, 134 Ky. 24, 119 S. W. 236 (1909).

8. Woods v. Banks, 14 N. H. 101 (1843).

9. Drumm v. Cessnum, 58 Kan. 331, 49 Pac. 78 (1897); Handly v. Greene, 15 Barb. (N. Y.) 601 (1853); 5 Chamb., Ev., § 3463, nn. 1, 2.

10. Betts v. New Hartford, 25 Conn. 180 (1856).

11. State v. Rayburn, 31 Mo. App. 385 (1888).

12. Nash v. Williams, 20 Wall. (U. S.) 226, 22 L. ed. 254 (1873).

Mode of Proof; Statutory Provisions.— The question as to the mode of proof of the contents of public documents is, in a great majority of American jurisdictions, controlled by statutes of a general character providing for the reception of duly certified or attested copies, covering to a great extent if not entirely all cases in which proof of a public document or writing may be desired.¹³ This general statement applies also to the authentication of copies of records, documents and papers in the various departments and public offices of the national government which a party may desire to offer in evidence.¹⁴ These statutes are not exclusionary of other modes of proof unless such an intention is clearly apparent in the enactment.¹⁵ Therefore an examined copy is properly received, though a statute provides for the use of certified copies unless the enactment is exclusionary of the former mode.¹⁶ Similarly the original writing is not excluded by reason of such a statute.¹⁷

§ 1086. [Copies]; Mode of Proof; Certified Copies.¹⁸— A doctrine which early received the sanction of the English courts and later of some in the United States,¹⁹ was that certified copies were not admissible except where their reception was enjoined or permitted by statute. This principle, however, was as a general rule departed from in this country the United States Supreme Court, in one of the earlier decisions, holding that “on general principles of law a copy given by a public officer whose duty it is to keep the original ought to be given in evidence.”²⁰ At the present time this may be said to be the established rule in the courts of the United States,²¹ properly certified copies or transcripts of records being received in evidence when given by public officers who have been intrusted with the official custody of the records,²² upon the principle as variously expressed that when a public officer is bound to record

13. *Hall v. Treadaway*, 12 Ga. App. 492, 77 S. E. 878 (1913); *Ramsay v. People*, 197 Ill. 594, 64 N. E. 555 (1902); *Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846 (1895); *Hoffman v. Metropolitan Life Ins. Co.*, 135 App. Div. 739, 119 N. Y. Supp. 978 (1909); *Emmitt v. Lee*, 50 Ohio St. 662, 35 N. E. 794 (1898); 5 Chamb., Ev., § 3464, n. 1.

14. *Tapley v. Martin*, 116 Mass. 275 (1874); *Shelton v. St. Louis & S. F. R. Co.*, 131 Mo. App. 560, 110 S. W. 627 (1908); *Oakes v. U. S.*, 174 U. S. 778, 19 S. Ct. 864, 43 L. ed. 1169 (1899); 5 Chamb., Ev., § 3464, n. 2. Such statutes must be understood and interpreted by the same rules that govern at common law. *Block v. U. S.*, 7 Ct. Cl. (U. S.) 406 (1871).

15. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144 (1901); *supra*, §§ 1051, 1059; 5 Chamb., Ev., §§ 3357, 3370.

16. *Smithers v. Lowrance*, 35 Tex. Civ. App. 25, 79 S. W. 1088 (1904).

17. *Harmening v. Howland*, 25 N. D. 38, 141 N. W. 131 (1913); 5 Chamb., Ev., § 3465, n. 3.

18. 5 Chamberlayne, Evidence, §§ 3464–3474.

19. *Francis v. Newark*, 58 N. J. 522, 33 Atl. 853 (1896); *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844 (1903); 5 Chamb., Ev., § 3466, n. 1.

20. *United States v. Percheman*, 7 Pet. (U. S.) 51, 8 L. ed. 604 (1833).

21. *Cannon v. Gorham*, 136 Ga. 167, 71 S. E. 142 (1911); *Gage v. Chicago*, 225 Ill. 218, 80 N. E. 127 (1907); *Knotts v. Zeigler*, 58 Ind. App. 503, 106 N. E. 393 (1914); *State v. Austin*, 113 Mo. 538, 21 S. W. 31 (1892); *Cortlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561 (1828); *Hibbard v. Craycraft*, 32 Okl. 160, 121 Pac. 198 (1912); *U. S. v. Brelin*, 166 Fed. 104, 92 C. C. A. 88 (1908); 5 Chamb., Ev., § 3466, n. 3.

22. *Moore v. Gaus & Sons Mfg. Co.*, 113 Mo.

a fact, a copy of the record of it duly authenticated is competent evidence;²³ that the record cannot or should not be taken from his custody,²⁴ and the inconvenience attending removal.²⁵ Where the statute in respect to the record is unconstitutional, it follows that the record is not an official one and therefore a certified copy is not competent evidence of anything,²⁶ even though it may have been authenticated according to statute.

Who May Certify.—The certificate must be certified by one having authority to so act,²⁷ ordinarily the legal custodian of the record,²⁸ the certificate of one who is unauthorized being of no avail.²⁹ Therefore in the absence of any showing upon the face of the certificate that it is certified by one having authority to so act it will be rejected.³⁰ The certificate may specify the particular record from which the transcript is taken.³¹ A certificate signed by an official is sufficient where it identifies him as the one who acts in the required capacity and as such has custody of the official records, a copy from which is offered,³² or where the certificate contains a recital of such custody and is signed with the proper official designation.³³ And where a copy is authenticated by the signature and seal of the official purporting to make it no further verification is necessary as it could give no greater weight to copies so attested.³⁴ In the absence of any mode being prescribed a certification by signature which is irregular has been admitted.³⁵

Limitations on Power.—Unless it is permitted by statute,³⁶ the authority of an official to certify to a copy of a record carries with it no power to state his opinion or conclusion as to what is disclosed by the record or what its legal import or effect is.³⁷ That is a matter for the determination of the court from

98, 20 S. W. 975 (1892); *People v. Gray*, 25 Wend. (N. Y.) 465 (1841); 5 Chamb., Ev., § 3466, n. 4

23. *Herendeen v. DeWitt*, 49 Hun 53, 1 N. Y. Supp. 467 (1888).

24. *People v. Williams*, 64 Cal. 87, 27 Pac. 939 (1883); *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868 (1889).

25. *Simmons v. Spratt*, 20 Fla. 495 (1884); *Peck v. Farrington*, 9 Wend. (N. Y.) 44 (1832). The certification of copies may in some cases be compelled by mandamus. *State v. Circuit Court*, 20 S. D. 122, 104 N. W. 1048 (1905).

26. *State v. Winbauer*, 21 N. D. 70, 128 N. W. 679 (1910); 5 Chamb., Ev., § 3467.

27. *McAfee v. Flanders*, 138 Ga. 403, 75 S. E. 319 (1912); *Rich v. Lancaster R. Co.*, 114 Mass. 514 (1874); *St. Louis v. Blast Furnace Co.*, 235 Mo. 1, 138 S. W. 641 (1911); 5 Chamb., Ev., § 3468, n. 1.

28. *Tift v. Greene*, 211 Ill. 389, 71 N. E. 1030 (1904); *Bergman v. Bullitt*, 43 Kan.

709, 23 Pac. 938 (1890); *Woods v. Banks*, 14 N. H. 101 (1843); 5 Chamb., Ev., § 3468, n. 2.

29. *Northern Pac. Terminal Co. v. Portland*, 14 Or. 24, 13 Pac. 705 (1886).

30. *Citizens' State Bank v. Bonnes*, 76 Minn. 45, 78 N. W. 875 (1899).

31. *Mansfield v. Johnson*, 51 Fla. 239, 40 So. 196 (1906).

32. *Anderson v. Blair*, 121 Ga. 120, 48 S. E. 951 (1904).

33. *Galvin v. Palmer*, 113 Cal. 46, 45 Pac. 172 (1896); *Bixby v. Carskaddon*, 55 Iowa 533, 8 N. W. 354 (1881); 5 Chamb., Ev., § 3469, n. 2.

34. *Surget v. Newman*, 43 La. Ann. 873, 9 So. 561 (1891); *Com. v. Chase*, 6 Cush. (Mass.) 248 (1850).

35. *Cooper v. Nelson*, 38 Iowa 440 (1874).

36. *Doe v. Rowe*, 16 Ga. 521 (1854); *People v. Willi*, 147 Ill. App. 207 (1909).

37. *McMillan v. Savannah Guano Co.*, 133 Ga. 760, 66 S. E. 943 (1909); *People v. Lee*, 112 Ill. 113 (1885); *Com. v. Richardson*, 142

an inspection either of the record itself or of a true copy thereof,³⁸ and the presiding judge may insist that such official shall confine himself to an exercise of the authority conferred, viz.: the making of a copy of that which the record contains.³⁹ Similarly a certificate by a public official of the non-existence of a fact upon the record has been rejected.⁴⁰ An official certifying to a copy of a record is limited in his powers to the certification of matters which properly appear of record and can not certify as to an entry which does not belong there,⁴¹ nor as to any matters which are not properly upon the record.⁴² Similarly, unless the writing or record is one authorized by law to be made either expressly or as an act in the performance of the necessary duties of the office, it does not come within the principle relating to official records and therefore a certified copy is no evidence in regard thereto.⁴³ It will only be received where the original, if produced, is competent evidence.⁴⁴

Mode and Sufficiency of Authentication.—The court will require that a copy of a record shall be duly and properly authenticated⁴⁵ before it will be received in evidence. It will be required, independent of any statute, in all cases that the paper offered as a copy is in fact that which it purports to be. The words "true copy" or "correct copy" are frequently used. The official

Mass. 71, 7 N. E. 26 (1886); Wood v. Knapp, 100 N. Y. 109, 2 N. E. 632 (1885); State v. Gottlieb, 21 N. D. 179, 129 N. W. 460 (1910); 5 Chamb., Ev., § 3470, n. 2.

38. French v. Ladd, 57 Miss. 678 (1880); McGuire v. Sayward, 22 Me. 230 (1842).

39. Greer v. Ferguson, 104 Ga. 552, 30 S. E. 943 (1898); Chicago v. English, 80 Ill. App. 163 (1898).

Instances.—The courts have rejected certificates of a compliance with the provisions of the law in respect to becoming a corporation, Boyle v. Trustees, etc., of M. E. Church, 46 Md. 359 (1876); of the issuance of a certificate of incorporation, Wall v. Bridget Mines, 130 Cal. 27, 62 Pac. 386 (1900); that a grant from the state was genuine, Walker v. Logan, 75 Ga. 759 (1885); of the death of a prisoner, Gill v. Phillips, 6 Mart. N. S. (La.) 298 (1827); of the granting of a decree of divorce, Jay v. East Livermore, 58 Me. 107 (1868); of the issuance of a patent, Davis v. Gray, 17 Ohio St. 331 (1867); of the filing of proofs of heirship and certificate in the adjutant-general's office, Bvers Bros. v. Wallace, 87 Tex. 503, 29 S. W. 760 (1895); of the amount of taxable property in a county and the amount of poll and county taxes for a year, Tinsley v. Rusk County, 42 Tex. 40 (1875); of the assessment or non-assessment of a person or his property in the assessor's book, Bartlett v. Patton, 33 W. Va. 71, 10

S. E. 21 (1889); that land was regularly listed for taxation, Dunn v. Games, 1 McLean (U. S.) 321 (1838), aff'd 14 Pet. 322, 10 L. ed. 476 (1840); and of the appointment of a certain person as receiver, Hudkins v. Bush, 69 W. Va. 194, 71 S. E. 106 (1911); 5 Chamb., Ev., § 3471.

40. Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199 (1902); Chicago, etc., R. Co. v. Vance, 64 Kan. 684, 68 Pac. 606 (1902); Pontier v. State, 107 Md. 384, 68 Atl. 1059 (1908); 5 Chamb., Ev., § 3470, n. 5.

41. Daggett v. Bonewitz, 107 Ind. 276, 7 N. E. 900 (1886).

42. Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361 (1866).

43. Com. v. O'Bryan, 153 Ky. 406, 155 S. W. 1126 (1913); Southwestern Surety Ins. Co. v. Anderson (Tex. 1913), 155 S. W. 1176; Cruse v. McCauley, 96 Fed. 369 (1899); 5 Chamb., Ev., § 3472, n. 3.

44. Donohue v. Whitney, 133 N. Y. 178, 30 N. E. 848 (1892); State v. Wells Adm'r., 11 Ohio 261 (1842); 5 Chamb., Ev., § 3472, nn. 5, 6, 7.

45. Weaver v. Tuten, 138 Ga. 101, 74 S. E. 835 (1912); Brecker v. Fillingham, 209 Mo. 578, 108 S. W. 41 (1907); Lee v. Sterling Silk Mfg. Co., 134 App. Div. 123, 118 N. Y. Supp. 852 (1909); 5 Chamb., Ev., § 3473, n. 1.

certifies to the transcript as a copy of the record and this necessarily implies that it is correct, else it cannot be a copy.⁴⁶ In case there is a statute controlling, which prescribes a mode of authenticating such copies, the certificate should show a compliance therewith,⁴⁷ as where it is required that a seal shall be affixed,⁴⁸ otherwise the presiding judge will refuse to admit it. If it contains, however, in substance what the law requires it is sufficient and will be received.⁴⁹ Where it is provided that the certificate of a public officer shall be evidence, a paper produced with his name has been received as evidence, *prima facie*⁵⁰ unless the name is proved not to have been signed by him.⁵¹ In some cases it is required by statute that the certificate shall state that the copy has been compared, by the person making it, with the original and that it is a correct transcript thereof.⁵² Compliance with such a provision is essential. A mere statement that it "has been compared," without stating by whom is not sufficient.⁵³ "As compared by me" has, however, been held to be a compliance with the law.⁵⁴

§ 1087. [Copies]; Land Office Records.⁵⁵— Ordinarily the rule prevails that independent of statute, which in some cases expressly authorizes the admission in evidence of authenticated copies of land office records,⁵⁶ including patents and grants,⁵⁷ courts will receive in evidence properly authenticated copies of such records,⁵⁸ including those of grants and other instruments of a like character, issued by the State to the individual⁵⁹ without requiring the

46. *Com. v. Quigley*, 170 Mass. 14, 48 N. E. 782 (1897); *Robinson v. Lowe*, 50 W. Va. 75, 40 S. E. 454 (1901).

47. *Knotts v. Zeigler*, 58 Ind. App. 503, 106 N. E. 393 (1914); *Redford v. Snow*, 46 Hun 370, 12 N. Y. St. Rep. 323 (1887); *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844 (1903); 5 Chamb., Ev., § 3474, n. 1.

48. *Chambers v. Jones*, 17 Mont. 156, 42 Pac. 758 (1895); *New York v. Vanderveer*, 91 App. Div. 303, 86 N. Y. Supp. 659 (1904); *State v. Railroad*, 141 N. C. 846, 54 S. E. 294 (1906); 5 Chamb., Ev., § 3474, n. 2.

49. *Turner v. Davis*, 186 Ala. 77, 64 So. 958 (1914); *Wright v. Glos*, 264 Ill. 261, 106 N. E. 200 (1914); *People v. Tobey*, 153 N. Y. 381, 47 N. E. 800 (1897); 5 Chamb., Ev., § 3474, n. 3.

50. *Willard v. Pike*, 59 Vt. 202, 9 Atl. 907 (1886); *Usher's Heirs v. Pride*, 15 Gratt. (Va.) 190 (1858).

51. *Prather v. Johnson*, 3 Harr. & J. (Md.) 487 (1814).

52. *Redford v. Snow*, 46 Hun (N. Y.) 370 (1887).

53. *Stevens v. Sup'rs of Clark County*, 43 Wis. 63 (1877).

54. *Huntoon v. O'Brien*, 79 Mich. 227, 44 N. W. 601 (1890).

55. 5 Chamberlayne, Evidence, §§ 3475-3477.

56. *Stinson v. Geer*, 42 Kan. 520, 22 Pac. 586 (1889); *Stephens v. Macey*, 49 Mont. 230, 141 Pac. 649 (1914); *Richards v. Ritter Lumber Co.*, 158 N. C. 54, 73 S. E. 485 (1911); 5 Chamb., Ev., § 3475, n. 2.

57. *Beasley v. Clarke*, 102 Ala. 254, 14 So. 744 (1893); *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647 (1891); *Nitche v. Earle*, 117 Ind. 270, 19 N. E. 749 (1888); 5 Chamb., Ev. § 3475, n. 3.

58. *Chilton v. Nickey*, 261 Mo. 232, 169 S. W. 978 (1914); *Anderson v. Keim*, 10 Watts (Pa.) 251 (1840); *Kirby v. Hayden*, 44 Tex. Civ. App. 207, 99 S. W. 746 (1906); 5 Chamb., Ev., § 3475, n. 4.

59. *Reppard v. Warren*, 103 Ga. 198, 29 S. E. 817 (1897); *Lane v. Bommelmann*, 17 Ill. 95 (1855); *New York Cent. & H. R. Co. v. Brockway Brick Co.*, 10 App. Div. 387, 41 N. Y. Supp. 762 (1896); 5 Chamb., Ev., § 3475, n. 5.

proponent to account for the original,⁶⁰ they being received upon the general principles of evidence relating to proof of public records at common law,⁶¹ though in some cases it is held that they are not admissible without accounting for the non-production of the originals.⁶² In much the same way properly authenticated copies of maps and surveys have been received in some cases under the express provisions of a statute,⁶³ and in others independent thereof.⁶⁴ Similarly a certified copy of the assignment of a land office certificate or other similar instrument when recorded will be received.⁶⁵

Official Letters.— Certified copies of letters on file at the general land office constitute a part of the record where they relate to the business of the office and ordinarily under express statutory provisions will be received in evidence, including both letters sent to the commissioner⁶⁶ and those mailed from the office,⁶⁷ the latter having been preserved in the usual way as by taking an imprint.⁶⁸

Administrative Requirements.— A copy of a land office record must be properly and sufficiently authenticated,⁶⁹ otherwise it will be rejected.⁷⁰ Private or other papers not required or authorized to be filed in a land office are not susceptible of proof by a certified copy from that office;⁷¹ the certificate, so far as copies of papers are concerned, must be as to those properly on file there.⁷² The certificate must state the facts as they appear upon the record and not the conclusion of the official certifying as to what the record contains or as to its legal effect or import.⁷³ A copy of extracts from the record has been received where it is complete in so far as it applies to the particular matter in litigation,⁷⁴ such authentication also being according to the practice of the department.⁷⁵

60. *Beasley v. Clarke*, *supra*; *Bernstein v. Smith*, 10 Kan. 60 (1872); *Avery v. Adams*, 69 Mo. 603 (1879); 5 Chamb., Ev., § 3475, n. 6.

61. *Wyman v. City of Chicago*, 254 Ill. 202, 98 N. E. 266 (1912); *New York Cent. & H. R. Co. v. Brockway Brick Co.*, *supra*; *McGarrahan v. Mining Co.*, 96 U. S. 316, 24 L. ed. 630 (1877); 5 Chamb., Ev., § 3475, n. 7.

62. *Hensley v. Tarpey*, 7 Cal. 288 (1857); *Covington v. Berry*, 76 Ark. 460, 88 S. W. 1005 (1905); 5 Chamb., Ev., § 3475, n. 8.

63. *Wood v. Nortman*, 85 Mo. 298 (1884); *Sullivan v. Solis*, 52 Tex. Civ. App. 464, 114 S. W. 456 (1908); 5 Chamb., Ev., § 3475, n. 9.

64. *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705 (1888); *Dewey v. Campau*, 4 Mich. 565 (1857); 5 Chamb., Ev., § 3475, n. 10.

65. *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868 (1889); *Clark v. Hall*, 19 Mich. 356 (1869).

66. *Darcy v. McCarthy*, 35 Kan. 722, 12

Pac. 104 (1886); *Hibbard v. Craycraft*, 32 Okl. 160, 121 Pac. 198 (1912).

67. *Holmes v. State*, 108 Ala. 24, 18 So. 259 (1895); *Trimble v. Burroughs*, 41 Tex. Civ. App. 554, 95 S. W. 614 (1906); 5 Chamb., Ev., § 3476, n. 2.

68. *McKee v. West*, 55 Tex. Civ. App. 460, 118 S. W. 1135 (1909).

69. *Beasley v. Clarke*, *supra*; *Wilson v. Hoffman*, 54 Mich. 246, 20 N. W. 37 (1884); 5 Chamb., Ev., § 3477, n. 1.

70. *Huls v. Buntin*, 47 Ill. 396 (1868); 5 Chamb., Ev., § 3477, n. 2.

71. *Rogers v. Pettus*, 80 Tex. 425, 15 S. W. 1093 (1891); 5 Chamb., Ev., § 3477, n. 3.

72. *Hatchett v. Conner*, 30 Tex. 104 (1867).

73. *Byers v. Wallace*, 87 Tex. 503 (1895).

74. *Strickland v. Draughan*, 88 N. C. 315 (1883); *Jennings v. McDowell*, 25 Pa. 387 (1855); 5 Chamb., Ev., § 3477, n. 7.

75. *Tillotson v. Webber*, 96 Mich. 144, 55 N. W. 837 (1893).

§ 1088. [Copies]; Ordinances.⁷⁶—The principle that public records may, independent of statute, be proved by copies thereof certified by the officer having such records in charge,⁷⁷ applies in the case of municipal ordinances.⁷⁸ By statute also provision of this character is frequently made, such as that a copy may be admissible when certified by the city or village clerk⁷⁹ or the recorder of the town,⁸⁰ register⁸¹ or other designated official. In some cases also the corporate seal is required.⁸² The non-existence of any fact of record can not, however, be established by such a certificate.⁸³

§ 1089. [Copies]; Records of Private Writings.⁸⁴—There is, apparently, considerable authority for the rule that, independent of statute, the copy of the record of a private writing will be received in evidence.⁸⁵ It would seem that the qualification should at least be imposed that the enrollment of the original upon the record is a necessary requirement.⁸⁶ A certified copy of the record of such a writing is also admissible on proof that the original has been lost or destroyed,⁸⁷ or upon proof that it is outside of the jurisdiction of the court and beyond process to produce,⁸⁸ or that the other party to the suit is in possession of the instrument and refuses to produce it.⁸⁹

Early Established Rules in New England States.—In some jurisdictions the rule requiring the production of the original is regarded as applying only to a case where it is necessary to prove a conveyance directly to the party in the suit, and which may reasonably be supposed to be in his possession, and not to include prior deeds in a chain of title.⁹⁰ In Connecticut and Massachusetts the rule seems to have been early established that duly certified copies of deeds from the records in the line of title, made and recorded by strangers to the suit, are admissible without other evidence of their execution and delivery or of any excuse for the non-production of the original deed.⁹¹ The relaxation of

76. 5 Chamberlayne, Evidence, § 3478.

77. *Supra*, § 1086; 5 Chamb., Ev., § 3468.

78. Florida Cent., etc., Ry. Co. v. Seymour, 44 Fla. 557, 33 So. 424 (1902).

79. Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199 (1902); Com. v. Chase, 6 Cush. (Mass.) 248 (1850); 5 Chamb., Ev., § 3478, n. 3.

80. Bayard v. Baker, 76 Iowa 220, 40 N. W. 818 (1888).

81. St. Louis v. Foster, 52 Mo. 513 (1873).

82. Georgia Cent. R. Co. v. Bond, 111 Ga. 13, 36 S. E. 299 (1900); Logue v. Gillick, 1 E. D. Smith (N. Y.) 398 (1852).

83. Boyd v. Chicago, etc., R. Co., *supra*.

84. 5 Chamberlayne, Evidence, §§ 3479–3485.

85. Jones v. Marks, 47 Cal. 242 (1874); Ricker v. Joy, 72 Me. 106 (1881); 5 Chamb., Ev., § 3479, n. 1.

86. Kelsey v. Hanmer, 18 Conn. 311 (1847); Warner v. Hardy, 6 Md. 525 (1854); Van Riper v. Morton, 61 Mo. App. 440 (1895); 5 Chamb., Ev., § 3479, n. 2.

87. Hayden v. Mitchell, 103 Ga. 431, 30 S. E. 287 (1897); Lancaster v. Lee, 71 S. C. 280, 51 S. E. 139 (1904); 5 Chamb., Ev., § 3479, n. 3.

88. Halsey v. Fanning, 2 Root (Conn.) 101 (1794).

89. Sally v. Gunter, 13 Rich. (S. C.) 72 (1860).

90. Kelsey v. Hanmer, *supra*; Holman v. Lewis, 107 Me. 28, 76 Atl. 956 (1910); Egan v. Horrigan, 96 Me. 46, 51 Atl. 246 (1901).

91. Colchester Sav. Bank v. Brown, 75 Conn. 69, 52 Atl. 316 (1902); Frazee v. Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391 (1901); 5 Chamb., Ev., § 3480, n. 2.

the common law rule in England was, however, held to be subject to the limitation that the instrument must be one which was required by law to be recorded in order to render a copy admissible.⁹² In Maine it was also early provided by rule of court that office copies of deeds pertinent to the issue, might be read in evidence without proof of the execution of the deeds "in all actions touching the realty" by one not a party to the deed, nor claiming as heir, nor justifying as servant of the grantee or of his heirs.⁹³ This subsequently was enacted, in substantially the same form, into statute.⁹⁴ The rule referred to in these jurisdictions does not permit of the introduction of a copy of the record where the original deed is presumed to be in the possession of the adverse party. In such a case a copy will be excluded in the absence of evidence of notice to such party to produce the original.⁹⁵

Statutory Regulation.—The question as to the admissibility of copies of records of private writings is now almost, if not entirely, controlled by legislative enactments. By statute in some states it is provided that a certified copy of a paper filed or recorded pursuant to law in a public office of the State may be received in evidence the same as the original.⁹⁶ More especially has this legislation been directed towards records of writings conveying or affecting some interest in real property such as deeds,⁹⁷ mortgages,⁹⁸ and the like,⁹⁹ though in some jurisdictions the statutes are inclusive of copies of private writings such as bills of sale,¹ chattel mortgages,² written consent of husband that wife may act as *feme sole* trader,³ liquor dealers' bond⁴ and of bond filed with the State insurance commissioner.⁵ Under the statute in many jurisdictions a copy of the record of a private writing will be received when the original has been lost or is not within the custody or control of the proponent or within his power to produce,⁶ as where he is unable to produce it because of the

92. *Kelsey v. Hanmer*, *supra*.

93. *Hutchinson v. Chadbourne*, 35 Me. 189 (1853).

94. *Holman v. Lewis*, 107 Me. 28, 76 Atl. 956 (1910); 5 Chamb., Ev., § 3480, n. 5. The rule first referred to is based upon the system in these jurisdictions relating to conveyancing as modified by the local registry laws. *Com. v. Emery*, 2 Gray (Mass.) 80 (1854).

95. *Draper v. Hatfield*, 124 Mass. 53 (1878); *Homer v. Cilley*, 14 N. H. 85 (1843); 5 Chamb., Ev., § 3480, nn. 8, 9.

96. *Polykranas v. Krausz*, 73 App. Div. 583, 77 N. Y. Supp. 46 (1902).

97. *Brown v. White*, 153 Ky. 452, 156 S. W. 96 (1913); *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532 (1888); *Livingston v. McDonald*, 9 Ohio 168 (1839); *Pardee v. Johnston*, 70 W. Va. 347, 74 S. E. 721 (1912); 5 Chamb., Ev., § 3481, n. 2.

98. *Chase v. Caryl*, 57 N. J. L. 545, 31 Atl. 1024 (1895); *Bruce v. Wanzer*, 20 S. D. 277, 105 N. W. 282 (1905).

99. *Kramer v. Settle*, 1 Ida. 485 (1873); *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58 (1887).

1. *Merchants' Nav. Co. v. Amsden*, 25 Ill. App. 307 (1888); *Polykranas v. Krausz*, *supra*.

2. *Van Dervort v. Vye*, 85 Minn. 35, 88 N. W. 2 (1901); *Van Hassell v. Borden*, 1 Hilt. (N. Y.) 128 (1856); 5 Chamb., Ev., 3481, n. 6.

3. *Schwartz v. Baird*, 100 Ala. 154, 13 So. 947 (1893).

4. *Bulger v. Prenica*, 93 Neb. 697, 142 N. W. 117 (1913).

5. *Southwestern Surety Ins. Co. v. Anderson* (Tex. Civ. App. 1913), 152 S. W. 816.

6. *Sims v. Scheussler*, 2 Ga. App. 466, 58 S. E. 693 (1907); *Eby v. Winters*, 51 Kan.

refusal of the one in possession to surrender it after notice,⁷ in which case he must establish, to the satisfaction of the presiding judge,⁸ the existence of such facts as will authorize the admission of a copy.⁹ In some cases the statute requires that it must be satisfactorily shown both that the party not only has not possession of the original, but also has not control of it.¹⁰

Administrative Requirements.—It is, as a general rule, essential that the original must have been one the recording of which the law required or authorized;¹¹ otherwise, neither the record nor a copy thereof will be received as evidence.¹² It must also have been recorded by an officer having authority for that purpose.¹³ But where the original is shown to have been lost a copy of the record may properly be received.¹⁴ It is also essential that it be recorded within the time prescribed by law.¹⁵ But where a deed or other instrument required to be recorded has been lost, a copy of the record has been received in evidence,¹⁶ likewise a certified copy of the deed as it is shown by the record.¹⁷ “It is a well established proposition of law that the record must be made upon the evidence of execution required by the statute to entitle a certified copy to be used as evidence in lieu of the original.”¹⁸ Thus in the case of a deed,¹⁹ if it is not properly executed, proved or acknowledged, as required, it does not become effective so as to render the record of it admissible in evidence. Similarly in the case of a mortgage²⁰ and other private writings,²¹ or in case of a

777, 33 Pac. 471 (1893); *Cazier v. Hinchey*, 143 Mo. 203, 44 S. W. 1052 (1897); 5 Chamb., Ev., § 3481, n. 10.

7. *Foxworth v. Brown*, 120 Ala. 59, 24 So. 1 (1897).

8. *Hayden v. Mitchell*, *supra*; *Freeman v. Wm. M. Rice Institute* (Tex. Civ. App. 1910), 128 S. W. 629.

9. *Cox v. McDonald*, 118 Ga. 414, 45 S. E. 401 (1903); *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595 (1891); *Williamson v. Work* (Tex. Civ. App. 1903), 77 S. W. 266; 5 Chamb., Ev., § 3481, n. 13.

10. *Hammond v. Blue*, 132 Ala. 337, 31 So. 357 (1901); *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868 (1889).

11. *Flint River Lumber Co. v. Smith*, 134 Ga. 627, 68 S. E. 436 (1910); *Com v. Merrill*, 215 Mass. 204, 102 N. E. 446 (1913); *Hoskinson v. Adkins*, 77 Mo. 537 (1883); *Goodman v. Greenberg*, 103 N. Y. Supp. 779, 53 Misc. 583 (1907); *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 503, 53 S. E. 987 (1905); 5 Chamb., Ev., § 3482, n. 1.

12. *Board of Com'rs of Lake County v. Keene Five-Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A. 464 (1901).

13. *Smith v. Bannan*, 13 Cal. 107 (1859); *Simpson v. Loving*, 3 Bush. (Ky.) 458, 96

Am. Dec. 252 (1867); *Olcott v. Bynum*, 17 Wall. (U. S.) 44, 21 L. ed. 570 (1872).

14. *Webster v. Harris*, 16 Ohio 490 (1847).

15. *Keller v. Moore*, 51 Ala. 340 (1874); *Jones v. Crowley*, 57 N. J. L. 222, 30 Atl. 871 (1894). Compare *Reorganized Church of Jesus Christ of L. D. S. v. Church of Christ*, 60 Fed. 937 (1894); *Hall v. Rea*, 85 Kan. 675, 118 Pac. 693 (1911).

16. *Lancaster v. Lee*, 71 S. C. 280, 51 S. E. 139 (1904).

17. *Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641 (1882).

18. *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871 (1889).

19. *Turner v. Neisler*, 141 Ga. 27, 80 S. E. 461 (1914); *Musick v. Barney*, 49 Mo. 458 (1872); *Blackman v. Riley*, 63 Hun 521, 18 N. Y. Supp. 476 (1892); *Johnston's Lessee v. Haines*, 2 Ohio 55, 15 Am. Dec. 533 (1825); 5 Chamb., Ev., § 3483, n. 2.

20. *Foxworth v. Brown*, 114 Ala. 299, 21 So. 413 (1896); *Starnes v. Allen*, 151 Ind. 108, 45 N. E. 330, 51 N. E. 78 (1898).

21. *Hunt v. Selleck*, 118 Mo. 588, 24 S. W. 213 (1893) (title bond); *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384 (1908) (contract); 5 Chamb., Ev., § 3483, n. 4.

will.²² In some jurisdictions, however, the rule prevails that after a lapse of a certain number of years it will be presumed that a deed recorded in the proper office was legally proved or acknowledged and that a certified copy of the record will in such a case be received.²³

Where a deed purports to be signed and sealed by the grantor a certified copy thereof has been received, though there was no representation of a seal thereof.²⁴ And though no written scroll or seal is copied into the record, yet where the record copy offered in evidence contains the statement of the official by whom the acknowledgment was taken that he has affixed his seal thereto, it will be presumed that it was attached.²⁵ Similarly, though the official seal of the officer taking the acknowledgment does not appear on the copy, yet the latter has been admitted where an inspection thereof shows that it was affixed to the original instrument as where the official certifies to the fact that it was acknowledged before a notary public who affixed his seal thereto.²⁶

In order to render a copy of the record of an instrument admissible it must have been recorded at a place designated or authorized by law for the recording of such writings.²⁷ In case of a deed, mortgage or other writing affecting realty, the instrument should be recorded in the registry district, ordinarily the county, in which the land is located.²⁸ In some jurisdictions, though there is authority to the contrary,²⁹ where a deed conveying land situated in two counties is recorded in only one of them, a copy of the record thereof has been received in the courts of the other;³⁰ in some States its admission being limited to those cases where loss of the original has been established.³¹

§ 1090. [Copies]; Records of Other States.³²—It is provided by the Constitution of the United States that “Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof.”³³ In conformity with this provision, it was provided by an act of Congress, passed in 1804, that “All records and exemplifications of books which may be kept in any public office of any State or territory or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved

²². Hood v. Mathers, 2 A. K. Marsh. (Ky.) 553 (1820).

²³. White v. Hutchings, 40 Ala. 253, 88 Am. Dec. 766 (1866); Robidoux v. Cassilegi, 10 Mo. App. 516 (1881).

²⁴. McCoy v. Cassidy, 96 Mo. 429, 9 S. W. 926 (1888); Williams v. Bass, 22 Vt. 352 (1850); 5 Chamb., Ev., § 3484, n. 1.

²⁵. Addis v. Graham, 88 Mo. 197 (1885).

²⁶. Davis v. Seybold, 195 Fed. 402 (1912). See also Hubbard v. Dry Goods Co., 209 Mo. 495, 108 S. W. 15 (1907).

²⁷. Townsen v. Wilson, 9 Pa. 270 (1848).

²⁸. Pepper v. James, 7 Ga. App. 518, 67 S.

E. 218 (1909); Cole v. Ward, 79 S. C. 573, 61 S. E. 108 (1907); 5 Chamb., Ev., § 3485, n. 2.

²⁹. Garbutt Lumber Co. v. Grass Lumber Co., 111 Ga. 821, 35 S. E. 686 (1900).

³⁰. Wheeler v. Winn, 53 Pa. 122, 91 Am. Dec. 186 (1866).

³¹. Jackson v. Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683 (1829); 5 Chamb., Ev., § 3485, n. 6.

³². 5 Chamberlayne, Evidence, §§ 3486-3488.

³³. § 1, Art. 4.

or admitted in any court of office in any other State or territory or in any such country by the attestation of the keeper of said records or books and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the Governor or Secretary of State, the chancellor or keeper of the great seal of the State or territory or county that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified, or if given by such Governor, Secretary, chancellor or keeper of the great seal, it shall be under the great seal of the State, territory or country aforesaid in which it is made.”³⁴ In the absence of any legislation by the State relating to proof of records of another State by a copy, this enactment is said to be binding upon its courts, at least to the extent of defining the evidentiary value of a copy as proof;³⁵ and a party who seeks to prove a record in the mode thus provided should comply with the terms of the statute.³⁶ Under this act the force and affect of the record is limited to that which it had in the State where made and if not admissible in that State a certified copy thereof will not be received in the courts of another State.³⁷ The record must have been authorized under the laws of the State where made to render a copy admissible.³⁸ The certificate of the Secretary of State that the attestation is in due form and by the proper officer is sufficient, it not being necessary under the act that the certificate of a presiding justice should also be affixed.³⁹ The federal act is not exclusive of legislation by the State, a statute of which providing for a mode of authenticating such documents may be followed.⁴⁰ So a certified copy will be received though it is not in all cases conclusive.⁴¹ It is essential that the proponent should establish the fact of the relevancy of a copy of such a record as a prerequisite to admission.⁴² On the other hand it is only essential that such part of the record or document should be certified to as is relevant.⁴³

34. U. S. Comp. Stats. 1901, p. 677, § 905.

35. Witt v. State, 5 Ala. App. 137, 59 So. 715 (1912); New York, etc., Ry. Co. v. Lind, 180 Ind. 38, 102 N. E. 449 (1913); 5 Chamb., Ev., § 3486, n. 3.

36. Taylor v. McKee, 118 Ga. 874, 45 S. E. 672 (1903); State v. Allen, 113 La. 705, 37 So. 614 (1904); State v. Kniffen, 44 Wash. 485, 87 Pac. 837 (1906); 5 Chamb., Ev., § 3486, n. 4.

37. Munkers v. McCaskill, 64 Kan. 516, 60 Pac. 42 (1902); Clardy v. Richardson, 24 Mo. 295 (1857); Quay v. Eagle Fire Ins. Co., Anth. N. P. (N. Y.) 237 (1816); 5 Chamb., Ev., § 3486, n. 5.

38. Dixon v. Thatcher, 14 Ark. 141 (1853); Florscheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023 (1904); 5 Chamb., Ev., § 3486, n. 6.

39. Reid v. State, 168 Ala. 118, 53 So. 254 (1910).

40. Harmening v. Howland, 25 N. D. 38, 141 N. W. 131 (1913); Slaughter v. Bernards, 88 Wis. 111, 59 N. W. 576 (1894); 5 Chamb., Ev., § 3486, n. 8.

41. Ins. Co. v. Baker (Tex. 1895), 31 S. W. 1072.

42. Ordway v. Couroe, 4 Wis. 45 (1855).

43. Grant v. Henry Clay Coal Co., 80 Pa. 208 (1876); 5 Chamb., Ev., § 3487, n. 2.

Records of Private Writings.—The words in the act, “all records and exemplifications of books which may be kept in any public office,” are inclusive of records of conveyances of real or personal property,⁴⁴ mortgages,⁴⁵ assignments,⁴⁶ powers of attorney⁴⁷ and in fact all instruments in writing which are required to be recorded.⁴⁸ A copy of a recorded conveyance so authenticated is said to have the same effect in the State in which it is offered in evidence as it would be entitled to by the laws of the State where the instrument is recorded.⁴⁹ A conveyance of land, however, is regulated by the law of the *situs* and a record in one State of a conveyance of land situated in another is no evidence; consequently a copy thereof is not admissible.⁵⁰ Records of such writings may also be proved by copies certified by the officer having the lawful custody of them.⁵¹

§ 1091. [Copies]; Foreign Records.⁵²—Proof of the records of a foreign country is ordinarily made by a properly authenticated copy owing to the difficulty of procuring the original,⁵³ though of course the latter is admissible, being spoken of as the best evidence.⁵⁴ Thus for the purpose of proving the contents of records of the British army, it was held competent to show by the deposition of an officer having the custody of such records, that they were not allowed to be removed from the country; this being shown copies of the records sworn to by the officer to have been true and correct were admitted.⁵⁵ So records of births, marriages and deaths kept by ecclesiastical authorities in pursuance of a requirement of the law, as is the case in England, have been received when properly authenticated,⁵⁶ though as a prerequisite to their admission the fact that they were so kept must appear.⁵⁷ An examined copy duly made and sworn to by a competent witness has also been received.⁵⁸ In some jurisdictions provision is made by statute for the mode of proving for-

44. *Schweigel v. Shakman Co.*, 78 Minn. 142, 80 N. W. 871, 81 N. W. 529 (1899); *Trinity County Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015 (1893); 5 *Chamb., Ev.*, § 3488, n. 1

45. *Chase v. Caryl*, 57 N. J. L. 545, 31 Atl. 1024 (1895).

46. *Horn v. Bayard*, 11 Rob. (La.) 259 (1845).

47. *Rochester v. Toler*, 4 Bibb. (Ky.) 106 (1815).

48. *Smith v. McWaters*, 7 La. Ann. 145 (1852).

49. *Whaun v. Atkinson*, 84 Ala. 592, 4 So. 681 (1887).

50. *Donaldson v. Phillips*, 18 Pa. 170, 55 Am. Dec. 614 (1851); 5 *Chamb., Ev.*, § 3488, n. 7.

51. *Woods v. Banks*, 14 N. H. 101 (1843).

52. 5 *Chamberlayne, Evidence*, § 3489.

53. *State v. McDonald*, 55 Or. 419, 103

Pac. 512, 10. Pac. 967, 106 Pac. 444 (1910); 5 *Chamb., Ev.*, § 3489, n. 1.

54. *Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778 (1887).

55. *In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681 (1906).

56. *Hancock v. Supreme Council*, 67 N. J. L. 614, 52 Atl. 301 (1902); *Jacobs v. Order of Germania*, 73 Hun 602, 26 N. Y. Supp. 318 (1893); *Sandberg v. State*, 113 Wis. 578, 89 N. W. 504 (1902); 5 *Chamb., Ev.*, § 3489, n. 4.

57. *Royal Neighbors of America v. Hayes*, 150 Ky. 626, 150 S. W. 845 (1912); *Stanglein v. State*, 17 Ohio St. 453 (1867); *Guerra v. San Antonio Sewer Pipe Co.* (Tex. Civ. App. 1914), 163 S. W. 669; 5 *Chamb., Ev.*, § 3489, n. 5.

58. *American Life Ins., etc., Co. v. Rose-nagle*, 77 Pa. 507 (1875).

eign documents or records.⁵⁹ Where there is no provision by statute as to the mode of authenticating copies of foreign documents, the question whether they are properly authenticated is to be determined by the courts as occasion may require by the rules of common law or the usages of nations; and by the usages of nations it is said that such facts as are there recorded may be proved by the certificates of public officers under their official seals, when these seals are such that the court takes judicial notice of them.⁶⁰ The seal of a notary public is regarded as one of this description whenever it is used to attest a document which by the usages of nations may be so attested.⁶¹ In view of the fact that courts of this country take judicial notice of the seals of State of other nations a copy of a foreign document authenticated by such a seal will be received.⁶² The courts of the United States also take judicial notice of the seals of United States consuls in authenticating copies of foreign documents.⁶³

59. *In re Kennedy*, 82 Misc. 214, 143 N. Y. Supp. 404 (1913); *State v. Hassing*, 60 Or. 81, 118 Pac. 195 (1911); *Sandberg v. State*, *supra*; 5 Chamb., Ev., § 3489, n. 7.

60. *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758 (1901).

61. *Id.*; *Bowman v. Sanborn*, 25 N. H. 87 (1852).

62. *State v. McDonald*, *supra*; 5 Chamb., Ev., § 3489, n. 10.

63. *Barber v. International Co. of Mexico*, *supra*.

CHAPTER LIV.

PRIVATE DOCUMENTS AND WRITINGS.

Private documents and writings; corporation records; photographs, 1092.

commercial agencies' records, 1093.

ecclesiastical records, 1094.

nautical records, 1095.

secret society records, 1096.

compelling adversary to produce, 1097.

§ 1092. Private Documents and Writings; Corporation Records; Photographs.¹

— The records or the books of a private corporation may be treated, in the first place, in their assertive capacity — as proof of what they assert. So regarded they are merely hearsay and so far as admissible without the testimony of their maker are to be received either as admissions² or as primary evidence by virtue of the relevancy or automatism of regularity.³ In the second place, however, the memoranda may be relevant or probative by virtue of their truth or falsity — independently relevant as it has seemed expedient to call them.⁴ Thus the organization of a corporation may be sufficiently established by the production of its books for the inspection of the court and jury.⁵ The acts, and doings of the corporation may also be shown in the same way, so far as the memoranda are independently relevant.⁶ Documents purporting to be the records and by-laws of a corporation must be properly identified.⁷ The sole test is as to what is reasonable in view of the facts.⁸

1. 5 Chamberlayne, Evidence, § 3490.

2. Brown v. First Nat. Bank, 49 Colo. 393, 113 Pac. 483 (1911); Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247 (1904); Clarke v. Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887 (1879); Lederer v. Morrow, 132 Mo. App. 438, 111 S. W. 902 (1908); Leonard v. Faber, 52 App. Div. 495, 65 N. Y. Supp. 391 (1900); Stillwater Turnpike Co. v. Coover, 25 Ohio St. 558 (1874); Smith v. Moore, 199 Fed. 689, 118 C. C. A. 127 (1912); 5 Chamb., Ev., § 3491, n. 1. See Admissions: extra-judicial, 2 Chamb., Ev., Chap. 18.

3. See Relevancy of Regularity, 4 Chamb., Ev., Chap. 45.

4. Wilson v. U. S., 190 Fed. 427, 111 C. C. A. 231 (1911).

5. First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778, (1906); Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046

(1891); 5 Chamb., Ev., § 3491, n. 4. Corporation books as documents. See note, Bender, ed., 126 N. Y. 122.

6. Star Loan Assoc. v. Moore, 4 Pennw. (Del.) 308, 55 Atl. 946 (1903); Rudd v. Robinson, *supra*; Matter of Mandlebaum, 80 Misc. 475, 141 N. Y. Supp. 319 (1913); 5 Chamb., Ev., § 3491, n. 5. Irrelevant matters contained on corporation books may be rejected. Trainor v. German-American Sav., etc., Assoc., 204 Ill. 616, 68 N. E. 650 (1913); 5 Chamb., Ev., § 3491, n. 6.

7. Wright v. Farmers' Mut. Live-Stock Ins. Assoc., 96 Iowa 360, 65 N. W. 308 (1895).

8. Parkerson v. Burke, 59 Ga. 100 (1877); Barton v. Wilson, 9 Rich. (S. C.) 273 (1856); 5 Chamb., Ev., § 3492, nn. 2, 3. A different rule may be prescribed by statute. White v. Mastin, 38 Ala. 147 (1861).

In What Proceedings Admissible.—The evidence being intrinsically relevant, it is not material that the memoranda are offered in evidence by the corporation itself,⁹ or by one not a member of the corporation against one of its members,¹⁰ or on a criminal prosecution of one of its members,¹¹ or in proceedings between the corporation and its members.¹² The general rule is to the effect that a statute alone can authorize a member of a corporation or the corporation itself, to use the corporate records as evidence against a third person or stranger,¹³ in the absence of proof that he knew and assented thereto.¹⁴ Such records have, however, been admitted in certain cases.¹⁵

How Proof May Be Made.—The most obvious method of proving the existence of a given corporation record is by production of the original book containing it and authenticating the same as such to the tribunal by the testimony of a clerk, secretary¹⁶ or other person acquainted with the facts.¹⁷ The authentication of the custodian or other witness¹⁸ who saw the entry made¹⁹ will be sufficient for admissibility although the entry is not in the handwriting of the proper officer of the company.²⁰ Nor need authentication be under the seal of the corporation.²¹ It must, however, as a general rule, be shown that the books have been kept by the proper officer of the company or by some one for him in his absence.²² It is not necessary that the record of the stockholders' meetings should have been at once entered upon the book of original perma-

9. *Buncombe Turnpike Co. v. McCarson*, 18 N. C. 308 (1835).

10. *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894 (1890).

11. *Wilson v. U. S.*, *supra*.

12. *Meridian Oil Co. v. Dunham*, 5 Cal. App. 367, 90 Pac. 469 (1907); *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161 (1900); *Union Pac. Lodge v. Bankers Surety Co.*, 79 Neb. 801, 113 N. W. 263 (1907); *Poppenhusen v. Poppenhusen*, 68 Misc. 548, 125 N. Y. Supp. 269 (1910); *Smith v. Moore*, *supra*; 5 Chamb., Ev., § 3493, n. 4.

13. *Dolan v. Wilkerson*, 57 Kan. 758, 48 Pac. 23 (1897); *Old South Soc. v. Wainwright*, 156 Mass. 115, 30 N. E. 476 (1892); *Fleming v. Reed*, 77 N. J. L. 563, 72 Atl. 299 (1908); *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. Supp. 1064 (1910); *Railroad Co. v. Cunningham*, 39 Ohio St. 327 (1883); 5 Chamb., Ev., § 3193, n. 5.

14. *Oregon & C. R. Co. v. Grubissich*, 206 Fed. 577, 124 C. C. A. 375 (1913).

15. *Norman Printers Supply Co. v. Ford*, 77 Conn. 461, 59 Atl. 499 (1904); *Kitman v. Chicago, B. & Q. R. Co.*, 113 Minn. 350, 129 N. W. 844 (1911); *Rudd v. Robinson*, *supra*; 5 Chamb., Ev., § 3493, n. 7.

16. *Fraternal Relief Assoc. v. Edwards*, 9

Ga. App. 43, 70 S. E. 265 (1910); *Morgan v. Lehigh Valley Coal Co.*, 215 Pa. 443, 64 Atl. 633 (1906).

17. *Le Master v. People*, 54 Colo. 416, 131 Pac. 269 (1913); *Church of St. Stanislaus v. Allgemeine Verein*, 164 N. Y. 606, 59 N. E. 1086 (1900); *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187 (1907); 5 Chamb., Ev., § 3494, n. 2. That the clerk or secretary is interested in the litigation will not justify its exclusion. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27 (1852).

18. *Hurwitz v. Gross*, 5 Cal. App. 614, 91 Pac. 109 (1907); *Syuchar v. Workingmen's Co-operative Assoc.*, 14 Misc. 10, 35 N. Y. Supp. 124 (1895).

19. *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilt. (N. Y.) 430 (1857).

20. *United Growers Co. v. Eisner*, 22 App. Div. 1, 47 N. Y. Supp. 906 (1897).

21. *Fleming v. Wallace*, 2 Yeates (Pa.) 120 (1796).

22. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565 (1875); *State v. Trimble*, 104 Md. 317, 64 Atl. 1026 (1906); *Highland Turnpike v. McKean*, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324 (1813); 5 Chamb., Ev., § 3494, n. 8. See *Leonard v. Faber*, 52 App. Div. 495, 65 N. Y. Supp. 291 (1900).

ment entries where good faith can be assumed. The contemporaneous memoranda constitute the record until it has been duly placed in permanent form.²³ By statutory provisions in several states corporate records may be proved by the use of a certified copy,²⁴ or by one verified as true by the oath of a witness, i.e., a sworn copy.²⁵ Independent of statutory provisions, a copy of a corporation record will be received by a presiding judge upon satisfactory authentication of the correctness of the copy,²⁶ as by the official attestation or certification by the signature of the secretary²⁷ appended to a copy of a record of an act of the stockholders or directors further authenticated by the seal of the company.²⁸ The certification of a copy of a corporation's record made by one not officially connected with the company has no administrative value.²⁹ It is not imperative that the copy should be a complete one of the entire record. It will be regarded as sufficient that it should be reliable as to the point involved in the inquiry.³⁰ The secretary or other officer of a corporation may make and authenticate by his certificate copies of the records themselves, but there is no relevancy of regularity where he undertakes to make up statements of fact, the legal or other effects of the records appearing upon his books, or the like. Such statements are accordingly rejected as mere hearsay.³¹

*Photographs*³² or X-Ray pictures³³ may be put in evidence when relevant and when shown to have been taken under proper circumstances.³⁴

²³ *Vawter v. Franklin College*, 53 Ind. 88 (1876); *Waters v. Gilbert*, 2 Cush. (Mass.) 27 (1848); 5 Chamb., Ev., § 3495, nn. 1, 2.

²⁴ *Maynard v. Interstate Bldg. & L. Assoc.*, 112 Ga. 443, 37 S. E. 741 (1900); *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 76 N. E. 489 (1905); 5 Chamb., Ev., § 3496, n. 1.

²⁵ *Cantwell v. Welch*, 187 Ill. 275, 58 N. E. 414 (1900); *Ide v. Pierce*, 134 Mass. 260 (1883); 5 Chamb., Ev., § 3496, n. 2.

²⁶ *Interstate Trust & B. Co. v. Powell Bros. & S. Co.*, 126 La. 22, 52 So. 179 (1910).

²⁷ *Hallowell & Augusta Bank v. Hamlin*, 14 Mass. 181 (1817); *Herman v. Supreme Lodge, K. of P.*, 66 N. J. L. 77, 48 Atl. 1000 (1901); 5 Chamb., Ev., § 3496, n. 5.

²⁸ *Purser v. Eagle Lake Land & I. Co.*, 111 Cal. 139, 43 Pac. 523 (1896); 5 Chamb., Ev., § 3496, n. 6.

²⁹ *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371 (1903).

³⁰ *Palmer v. Ruland*, 28 Colo. 65, 62 Pac. 841 (1900).

³¹ *Oakes v. Hill*, 14 Pick. (Mass.) 442 (1833). See also, *Tessmann v. Supreme Commandery of U. P.*, 103 Mich. 185, 61 N. W. 261 (1894); 5 Chamb., Ev., § 3497.

³² A photograph is not evidence of dis-

tances especially where the two points in question are not in the same line of vision. *Southern R. Co. v. Vaughan*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916 E 1222 (1916).

³³ X-Ray pictures are admissible when taken by an expert with a good machine under proper circumstances to make an accurate picture. *Griffith v. American Coal Co.*, 75 W. Va. 686, 84 S. E. 621, L. R. A. 1915 F 803 (1915). An X-ray photograph may be put in evidence only when its accuracy is established, so one should be excluded where the doctor who took it merely states that he took it but does not state that they correctly represent what he saw or how they were taken or that he had ever taken one before or knew how they ought to be taken. *Ligon v. Allen*, 157 Ky. 101, 162, 51 L. R. A. (N. S.) 842 (1914).

³⁴ Photographs are competent evidence when faithful reproductions of the place or subject as it existed at the time involved in the controversy but photographs intended to illustrate a hypothetical situation and to explain the theory of one side showing persons and objects in certain assumed positions are not admissible. *Colonial Refining Co. v. Lathrop* (Okla. 1917), 166 Pac. 747, L. R. A. 1917 F 890. Admissibility of photo-

§ 1093. **Commercial Agencies' Records.**³⁵—The reports of commercial agencies do not come within the scope of the relevancy of regularity.³⁶ The reason for this is that they are confessedly not founded upon the personal knowledge of the entrants, but, on the contrary, are based upon information received from others, mere hearsay.³⁷ Circumstances might, however, arise, justifying their admission.³⁸

§ 1094. **Ecclesiastical Records.**³⁹—The relevancy of regularity which makes hearsay primary evidence of the facts asserted under certain sets of facts creating what may be called an automatism or routine,⁴⁰ clearly attaches in case of official church registers kept by clergymen and other ecclesiastical officers. Original church records of births, deaths or marriages will, therefore, as an administrative matter, i.e., apart from any rule of law, statutory or otherwise, be received in evidence.⁴¹ The fact and date of baptism may be established by the original entries in a book used for the purpose of recording the conferring of the sacrament by the proper ecclesiastical authority.⁴² But collateral or incidental facts as to which the entrant can have, as a rule, no personal knowledge and which are not part of his duty either to know or enter on the record cannot be established in this way. Thus, a clergyman who baptizes a person cannot add to his record the date of this person's *birth*,⁴³ or that a child was baptized as the legitimate child of his parents.⁴⁴

§ 1095. **Nautical Records.**⁴⁵—By act of Congress a log book regularly and properly kept, in full compliance with the terms of the statute,⁴⁶ is made *prima facie* evidence of observations noted therein.⁴⁷ The statement must be, so far as practicable, one of *fact*.⁴⁸ The entry must also have been made on the very day of the occurrence of the event which it records.⁴⁹ Apart from the statute,

graphs. See note, Bender, ed., 106 N. Y. 589. Photographs as evidence of places. See note, Bender, ed., 149 N. Y. 570.

35. 5 Chamberlayne, Evidence, § 3490.

36. Richardson v. Stringfellow, 100 Ala. 416, 14 So. 283 (1893); Marx v. Hardy, 25 Ky. L. Rep. 1770, 78 S. W. 864, 1105 (1909); Cook v. Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568 (1880); 5 Chamb., Ev., § 3490, n. 1.

37. Van Deman & Lewis Co. v. Demas, 64 Fla. 533, 60 So. 342 (1912).

38. Blake v. Meadows, 225 Mo. 1, 33, 123 S. W. 868 (1909).

39. 5 Chamberlayne, Evidence, § 1094.

40. See 4 Chamberlayne, Evidence, Chap. 43.

41. Maxwell v. Chapman, 8 Barb. (N. Y.) 579 (1850); Meconce v. Mower, 37 Kan. 293, 15 Pac. 155 (1887).

42. Kennedy v. Doyle, 10 Allen (Mass.) 161

(1865); Collins v. German-American Mut. L. Assoc., 112 Mo. App. 209, 86 S. W. 891 (1905); Kabok v. Phoenix Mut. L. I. Co., 4 N. Y. Supp. 718, 51 Hun 639 (1889); 5 Chamb., Ev., § 3498, n. 3.

43. Whitcher v. McLaughlin, 115 Mass. 167 (1874); Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541 (1892); Jacobi v. Germania Order, 73 Hun 602, 26 N. Y. Supp. 318 (1893); 5 Chamb., Ev., § 3499, n. 1.

44. Blackburn v. Crawfords, 3 Wall. (U. S.) 175, 18 L. ed. 186 (1865).

45. 5 Chamberlayne, Evidence, §§ 3500, 3501.

46. Worth v. Mumford, 1 Hilt. (N. Y.) 1 (1855); 5 Chamb., Ev., § 3500, n. 1.

47. Jones v. The Phoenix, 13 Fed. Cas. No. 7,489, 1 Pet. Adm. 201 (1800).

48. Worth v. Mumford, *supra*.

49. Brink v. Lyons, 18 Fed. 605 (1883); 5 Chamb., Ev., § 3500, n. 4.

the log book has been held inadmissible as proof of the facts asserted in it;⁵⁰ especially when self-serving and offered by the entrant.⁵¹ For example, the marine protest of a master mariner will not, in the absence of special authorization, be received as evidence of the facts asserted in favor of himself or his owners.⁵² If, however, it were called for by the opponent of the entrant a different situation would be presented,⁵³ though it is said to be doubtful if a mere inspection of a log book by the party against whom it is sought to be used renders it evidence in favor of the party who made it.⁵⁴ Under the general rules relating to written admissions,⁵⁵ an entry in a log book is perfectly competent against those who made, authorized or directed the making of any entry in it.⁵⁶

§ 1096. Secret Society Records.— The record of a secret or fraternal organization, when properly authenticated, may be admissible as to facts which it was the duty of the officer to record and of which he had personal knowledge.⁵⁷ No relevancy of regularity can, however, admit it as proof of collateral facts asserted, such as the age⁵⁸ of a member which it is no part of the duty of the entrant to record.

§ 1097. Compelling Adversary to Produce.⁵⁹— The right of a party to call upon his opponent to produce some writing within his power or control for the inspection of the former, is to a great extent, controlled by legislative enactment, providing a mode of relief in addition to the equitable method by bill of discovery.⁶⁰ Among the earliest statutes were the act of Congress by which the court was authorized to impose a penalty of nonsuit or default upon a party for the non-production of papers which he was ordered to produce,⁶¹ and the New York act which permitted the court in case of disobedience of such an order to strike out a pleading and order judgment for the opposite party.⁶² Other statutes subsequently passed in the various States are along much the same lines,⁶³ their object generally being to relieve the situation at common

50. *Worth v. Mumford*, *supra*; *The Kentucky*, 148 Fed. 500 (1906); 5 Chamb., Ev., § 3500, n. 5.

51. *U. S. v. Gilbert*, 25 Fed. Cas. No. 15,204, 2 Sumn. (U. S.) 19 (1834), the log book will not be received as proof of the date of the vessel's sailing.

52. *Peck v. Gale*, 3 La. 320 (1832); *Cudworth v. South Carolina Ins. Co.*, 4 Rich. (S. C.) 416, 55 Am. Dec. 692 (1851); 5 Chamb., Ev., § 3500, n. 8.

53. *The Kentucky*, *supra*.

54. *Worrall v. Davis Coal & C. Co.*, 113 Fed. 549 (1902).

55. *Supra*, §§ 546 *et seq.*; 2 Chamb., Ev., § 1356 *et seq.*

56. *U. S. v. Gilbert*, *supra*; *Atkins v. El-*

well, 45 N. Y. 753 (1871); 5 Chamb., Ev., § 3501.

57. *Leach v. Dodson*, 64 Tex. 185 (1885); *Wiener v. Zweib* (Tex. Civ. App. 1910), 128 S. W. 699; 5 Chamb., Ev., § 3502, n. 1.

58. *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (1876).

59. 5 Chamberlayne. Evidence, § 3503.

60. *Geyger v. Geyger*, 10 Fed. Cas. No. 5,375, 2 Dall. 232 (1795).

61. *Iasigi v. Brown*, 1 Curtis C. C. (U. S.) 401 (1853).

62. *Gould v. McCarty*, 11 N. Y. 575 (1854).

63. *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976 (1902); *Marshall v. McNeal*, 114 Ga. 622, 40 S. E. 796 (1901); *Meeth v. Rankin Brick Co.*, 48 Ill. App. 602 (1892); *Hoyt*

law, which, except in a few cases,⁶⁴ afforded practically no relief. The only benefit obtained was that after notice and refusal the door was then opened for the admission of secondary evidence of the contents of the papers asked for.⁶⁵

v. American Exch. Bank, 1 Duer (N. Y.) 652
8 How. Pr. 89 (1853); Johns v. Johns, 6 Ohio
272 (1834); 5 Chamb., Ev., § 3503. n. 4.

64. People v. Circuit Judge, 41 Mich. 258,
49 N. W. 921 (1879); Utica Bank v. Hillard,
6 Cow. (N. Y.) 62 (1826); Com. v. Meads, 11

Pa. Dist. R. 10 (1902); 5 Chamb., Ev., § 3503,
n. 5.

65. Golden v. Conner, 89 Ala. 598, 8 So. 148
(1889); Hoagland v. Great Western Tel. Co.,
30 Ill. App. 304 (1888); 5 Chamb., Ev., §
3503, n. 6.

CHAPTER LV.

PRIVATE DOCUMENTS AND WRITINGS; MEMORANDA.

Private documents and writings; memoranda, 1098.

§ 1098. **Private Documents and Writings; Memoranda.**¹—Memoranda, like other forms of hearsay, not affected by some special relevancy, such as that of spontaneity² or regularity,³ which confers admissibility as primary evidence, or of some “exception” to the hearsay rule as secondary, are inadmissible, regardless of the forensic necessity of the proponent. This is precisely the striking, practically the only, anomaly of the English law of evidence.⁴

As Primary Evidence; Admissions.—In any case where a memorandum is relevant as primary evidence, as in case where such a document constitutes an admission,⁵ the statement will be received.⁶ A memorandum may, under appropriate circumstances, constitute an admission more nearly analogous to those by *conduct*; which, as is elsewhere said,⁷ are in reality circumstantial or probative facts. Thus, where a memorandum was read by one of the parties to a transaction to the other, or by a third person to both of two contracting parties and received without dissent as expressive of the terms of an agreement, the memorandum is admissible.⁸

To Refresh Memory; Present Memory.—If a memorandum refreshes the memory of the witness so that he is able to state from recollection the particulars recorded, the memorandum will not be received.⁹ In such a case it is

1. See *infra*. § 1173; 5 Chamberlayne, Evidence, §§ 3504–3511.

2. See Chap. 44, *supra*; 4 Chamb., Ev., Chap. 42.

3. See Chap. 45, *supra*; 4 Chamb., Ev., Chap. 43.

4. See §§ 837 *et seq.*; 4 Chamb., Ev., §§ 2574 *et seq.* Thus, for example, the maker of a self-serving memorandum may be dead, yet the declaration may be probatively relevant as to the truth of the facts asserted, which may be provable in no other way. The memorandum is, nevertheless, rejected. *Davie v. Lloyd*, 38 Colo. 250, 88 Pac. 446 (1906); *Sherman v. Whiteside*, 93 Ill. App. 572, *aff'd* 190 Ill. 576, 60 N. E. 838 (1900); *Mair v. Bassett*, 117 Mass. 356 (1875); *Vaughn v. Strong*, 4 N. Y. Supp. 686 (1889); 5 Chamb., Ev., § 3504, n. 4. Death has occasionally been treated in statutory enact-

ments as a sufficient reason for receiving hearsay memoranda. *Rowland v. Philadelphia & B. R. Co.*, 63 Conn. 415, 28 Atl. 102 (1893); 5 Chamb., Ev., § 3504, n. 5.

5. *Nagle v. Fulmer*, 98 Iowa 585, 67 N. W. 369 (1896); *House Wrecking Co. v. Senken*, 152 Mo. App. 458, 133 S. W. 355 (1911); 5 Chamb., Ev., § 3505, n. 1.

6. *Meyer v. Reichart*, 112 Mass. 108 (1873).

7. *Supra*, §§ 582 *et seq.*; 2 Chamb., Ev., §§ 1292 *et seq.*

8. *Athens Mfg. Co. v. Malcolm*, 134 Ga. 600, 68 S. E. 329 (1910); *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401 (1890); *Dickinson v. Robbins*, 12 Pick. (Mass.) 74 (1831); *Lathrop v. Bramhall*, 64 N. Y. 365 (1876); 5 Chamb., Ev., § 3505, n. 4.

9. *People v. Lanterman*, 9 Cal. App. 674, 100 Pac. 720 (1909); *Hawken v. Daley*, 85 Conn. 16, 81 Atl. 1053 (1911); *Koehler v.*

not regarded as essential that the memorandum should have been made by the witness provided the circumstances under which it was made were such that he may be considered as having knowledge of its correctness.¹⁰ The use of a copy in place of the original has also in some cases been allowed,¹¹ though it is said that this means is attended with suspicion.¹² In any case, however, the genuine nature and authenticity of the memorandum itself will be scrutinized with the utmost care by the presiding judge.¹³

Admissibility Independent of.—Should the production of the contemporaneous memoranda fail to refresh the memory of the maker to such an extent as to enable him to testify to the existence of the facts asserted as a matter of present knowledge, the memoranda themselves may be admitted in evidence, as constituting proof of the facts asserted; ¹⁴ *provided* the maker of the memorandum is able to testify, not only that he made it under proper conditions of contemporaneousness and the like, but also that he knows now that at the time he made the memorandum he knew the facts and that the memorandum states them correctly.¹⁵ It is also essential that the original should be used in such a case and not a copy.¹⁶

Probative Relevancy.—The probative relevancy of such documents might with propriety be regarded either as that of spontaneity¹⁷ or of regularity,¹⁸ according to whether it was or was not the business or official duty of the person in question to make the memorandum. Also, the memory is actually, if not completely refreshed,¹⁹ to the extent at least of recognition of the memorandum as that of the witness, and ability to assert its having been made from a personal knowledge at that time adequate. Apart from such refreshing of memory, and the personal recognition and authentication which it renders possible, the memoranda made by a person viewed as evidence of the facts asserted.

Abey, 168 Mich. 113, 133 N. W. 923 (1911); Mattison v. Mattison, 203 N. Y. 79, 96 N. E. 359 (1911); 5 Chamb., Ev., § 3507, n. 1. Administrative necessity for the use of memoranda. See 5 Chamb., Ev., § 3506.

10. Com v. Ford, 130 Mass. 64 (1881); Douglass v. Leighton, 57 Minn. 81, 58 N. W. 827 (1894); Huff v. Bennett, 6 N. Y. 337 (1852); Hill v. State, 17 Wis. 675 (1864); Molzahn v. Christensen, 152 Wis. 520, 139 N. W. 429 (1913); 5 Chamb., Ev., § 3507, n. 2.

11. Finch v. Barclay, 87 Ga. 393, 13 S. E. 566 (1891); Bouvet v. Glattfeldt, 120 Ill. 186, 11 N. E. 250 (1887); Com v. Ford, *supra*; 5 Chamb., Ev., § 3507, n. 3.

12. Folsom v. Apple River Log-Driving Co., 41 Wis. 602 (1877).

13. Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67 (1900).

14. Hawken v. Daley, *supra*; Davis Bros.

v. Vandalia R. Co., 168 Ill. App. 621 (1912); Koehler v. Abey, *supra*; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017 (1896); 5 Chamb., Ev., § 3508, n. 1.

15. Atlanta & B. A. L. Ry. Co. v. Brown, 158 Ala. 607, 48 So. 73; Briggs v. Rafferty, 14 Gray (Mass.) 525 (1860); Titus v. Gunn, 69 N. J. L. 410, 55 Atl. 735 (1903); Josias v. Nivois, 50 Misc. 557, 107 N. Y. Supp. 15 (1907); 5 Chamb., Ev., § 3508, n. 2.

16. Green v. Caulk, 16 Md. 556, 575 (1860); Charleston Nat. Bank Assoc. v. Zorn, 14 S. C. 444 (1880).

17. *Supra*. Chap. 46; 4 Chamb., Ev., Chap. 44.

18. *Supra*, Chap. 47; 4 Chamb., Ev., Chap. 45.

19. Costello v. Crowell, 133 Mass. 352 (1882); McCabe v. Swift & Co., 143 Ill. App. 404 (1908).

indicated or intended would be hearsay and rejected under that rule.²⁰ For this reason a report of the results of inspecting railroad cars, locomotives, vessels or the like, would not be admissible in evidence.²¹ The entries of a nurse, physician or surgeon upon a hospital register as to the details of a case are pure hearsay and also to be excluded if offered without the testimony of the writer,²² unless it is shown that the entrant is dead or cannot be produced.²³

Time of Making.—The courts frequently use the expressions “contemporaneous with,” “at or near the time,” “at or about the time,” and others of a like nature,²⁴ in defining the required nearness of the making of the memorandum to the occurrence or event there recorded. Expressions of this character are of course vague and indefinite, and it is said that no precise rule can be stated.²⁵ In all cases the question is whether the writing may be considered as sufficiently near to justify the inference that the matter to be recorded was fresh enough in the mind of the writer to enable him to make a memorandum correctly stating the fact as it actually occurred. If so then it may be used; if not then of necessity its use should not be allowed.²⁶

Independent Relevancy; Res Gestae.—Memoranda may be admissible in evidence not only in their assertive capacity, i.e., as hearsay evidence of the facts asserted; they may be independently relevant,²⁷ i.e., by reason of their mere existence, irrespective of the truth or falsity of the contained statement itself, as where a memorandum constitutes a fact in the *res gestae*.²⁸ The *res gestae*, in fact, may in a sense result in the creation of what may be called a constituent memorandum as well as of a constituent document. It is not material whether such a memorandum has been made by one of the parties

20. *Lowe v. Donnelly*, 36 Colo. 292, 85 Pac. 318 (1906); *People v. McKeoun*, 171 Ill. App. 146 (1912); *Gray v. Boston Elev. Ry. Co.*, 215 Mass. 143 102 N. E. 71 (1913); *Donner v. State*, 72 Neb. 263, 100 N. W. 305 (1904); *Goldfarb v. Goldman*, 141 N. Y. Supp. 479 (1907); *Osborne v. Grand Trunk Ry. Co.*, 87 Vt. 104, 88 Atl. 512 (1913); *Molzahn v. Christensen*, *supra*; 5 Chamb., Ev., § 3509, n. 5.

21. *Baltimore, etc., Ry. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833 (1898); *Perkins v. Augusta Ins. & B. Co.*, 10 Gray (Mass.) 312, 71 Am. Dec. 654 (1858); 5 Chamb., Ev., § 3509, n. 6.

22. *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058 (1912); *Griebel v. Brooklyn Heights R. Co.*, 95 App. Div. 214, 88 N. Y. Supp. 767 (1904); Chamb., Ev., § 3509, n. 7.

23. *Cashin v. New York, etc., R. Co.*, 185 Mass. 543, 70 N. E. 930 (1904).

24. *Morrison v. Chapin*, 97 Mass. 72 (1867); *Atchison v. Lawler*, 40 Neb. 356, 58

N. W. 968 (1894); *Howard v. McDonough*, 77 N. Y. 592 (1879); *Jones v. State*, 54 Ohio St. 1, 42 N. E. 699 (1896); 5 Chamb., Ev., § 3510, n. 1.

25. *Lawson v. Glass*, 5 Colo. 134 (1881); *Bates v. Preble*, 151 U. S. 140, 38 L. ed. 106, 14 S. Ct. 277 (1893).

26. In any event it is a matter for the presiding judge to determine in the sound exercise of his powers of administration. *Lawson v. Glass*, *supra*; *Chamberlin v. Ossipee*, 60 N. H. 212 (1880); 5 Chamb., Ev., § 3510.

27. *Supra*, §§ 838 *et seq.*; 4 Chamb., Ev., 2581 *et seq.*

28. *Parkinson Co. v. Tullgren*, 177 Ill. App. 295 (1913); *Federal Union Surety Co. v. Indiana Lumber & Mtg. Co.*, 176 Ind. 328, 95 N. E. 1104 (1911); *Milne v. Chicago, etc., R. Co.*, 155 Mo. App. 465, 135 S. W. 85 (1911); *National Ulster County Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633 (1851); 5 Chamb., Ev., § 3511, n. 2.

for both, or that it should have been made partly by one of the parties and party by the other.²⁹ Evidently no such constituent memorandum is created except where both parties agree to it or assent to, or otherwise ratify it, or where it is prepared under the assent of both.³⁰

²⁹. *Bigelow v. Hall*, 91 N. Y. 145 (1883). (1877); *Smith v. Dreyer*, 228 Pa. 438, 77 Atl.

³⁰. *Boone v. Rickard*, 125 Ill. App. 438 628 (1910); 5 *Chamb., Ev.*, § 3511, nn. 4, 5. (1906); *Flood v. Mitchell*, 38 N. Y. 507

CHAPTER LVI.

PRIVATE DOCUMENTS AND WRITINGS; PROOF OF ORIGINAL.

Private documents and writings; proof of original, 1099.

attested writings; general rule, 1100.

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§ 1099. **Private Documents and Writings; Proof of Original.**¹—In the absence of any statute which may be controlling of the subject,² the general rule has been applied to private documents, such as assignments,³ bills of lading,⁴ bills of sale,⁵ bonds,⁶ certificates of stock,⁷ circulars purporting to give market prices,⁸ or issued for the purpose of procuring investments or securing the patronage of others,⁹ commercial paper, such as checks, notes and the like,¹⁰ contracts of various kinds,¹¹ deeds and conveyances of real property,¹² leases,¹³ letters,¹⁴ mortgages of real or personal property,¹⁵ newspaper advertisements,¹⁶

1. 5 Chamberlayne, Evidence, §§ 3512-3514.

2. Charles v. Valdosta Foundry & M. Co., 4 Ga. App. 733, 62 S. E. 493 (1908); Boseker v. Chamberlain, 160 Ind. 114, 66 N. E. 448 (1902); London & N. W. Amer. Mortg. Co. v. St. Paul Park Imp. Co., 84 Minn. 144, 86 N. W. 872 (1901); Matter of Pirie, 133 App. Div. 431, 117 N. Y. Supp. 753 (1909); 5 Chamb., Ev., § 3512, n. 1.

3. Pennsylvania Min. Co. v. Owens, 15 Cal. 135 (1860); Hagins v. Arnett, 23 Ky. L. Rep. 809, 64 S. W. 430 (1901).

4. Hill v. Adams Exp. Co., 74 N. J. L. 338, 68 Atl. 94 (1907). Compare Beach v. Schroeder, 47 Colo. 312, 107 Pac. 271 (1910); 5 Chamb., Ev., § 3512, n. 3.

5. State v. Pirkey, 22 S. D. 550, 118 N. W. 1042 (1908); Jaquith Co. v. Shumway's Estate, 80 Vt. 556, 69 Atl. 157 (1908); 5 Chamb., Ev., § 3512, n. 4.

6. Equitable Mfg. Co. v. Davis, 130 Ga. 67, 60 S. E. 262 (1908); Craw v. Abrams, 68 Neb. 546, 94 N. W. 639, 97 N. W. 296 (1903); 5 Chamb., Ev., § 3512, n. 5.

7. Whitaker v. State, 11 Ga. App. 208, 75 S. E. 258 (1912).

8. Willard v. Mellor, 19 Colo. 534, 36 Pac. 148 (1894).

9. Atchison, etc., R. Co. v. Cruzen, 31 Kan. 718, 3 Pac. 520 (1884).

10. Denver Omnibus & Cab Co. v. Gast, 54 Colo. 17, 129 Pac. 233 (1912); Thompson v. Wilkinson, 9 Ga. App. 367, 71 S. E. 678 (1911); Hugumin v. Hinds, 97 Mo. App. 346, 71 S. W. 479 (1902); Matter of Pirie, 198 N. Y. 209, 91 N. E. 587 (1910); 5 Chamb., Ev., § 3512, n. 9.

11. Outcault Advertising Co. v. American Furniture Co., 10 Ga. App. 211, 73 S. E. 20 (1911); Ruckman v. Stone Milling Co., 139 Mo. App. 256, 123 S. W. 69 (1909); 5 Chamb., Ev., § 3512, n. 10.

12. Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S. E. 252 (1906); Jackson v. Pratt, 10 Johns. (N. Y.) 381 (1813); Harden v. Hays, 14 Pa. 91 (1850); 5 Chamb., Ev., § 3512, n. 11.

13. Smith v. Guarantee Dental Co., 114 N. Y. Supp. 867 (1909).

14. Butterworth v. Cathcart, 168 Ala. 262, 52 So. 896 (1910); Lovett v. Gibb, 128 N. Y. Supp. 1047, (1911); 5 Chamb., Ev., § 3512, n. 13.

15. Lewis v. Glass (Ala.), 39 So. 771 (1905); Cooke v. Pennington, 7 S. C. 385 (1878); 5 Chamb., Ev., § 3512, n. 14.

and passenger lists published therein,¹⁷ policies of insurance,¹⁸ and applications therefor,¹⁹ powers of attorney,²⁰ receipts²¹ and wills,²² that where the original is offered in evidence it must be authenticated to the court as the act of the person against whom it is offered. In case he is said to have signed or otherwise executed it, the due and proper execution of the same by him must be shown to the satisfaction of the presiding judge.²³ Practically the same administrative rule will be applied in criminal as in civil cases.²⁴ Where an instrument executed by several is offered in evidence against one of the obligors, his execution of the writing only need be proved; no proof as to the other parties is required.²⁵ Where the writing is introduced to prove a collateral fact proof of execution has been dispensed with.²⁶

Mode of Proof; Evidence to Show Execution.—The due and proper execution of a private writing, to which there is no attesting witness, may be established by any competent evidence.²⁷ It need not necessarily be direct, circumstantial evidence being frequently equally satisfactory,²⁸ it being sufficient if it be necessarily inferable, from the facts and circumstances proved, that the writing was executed by the one whose name appears thereon as maker.²⁹ A frequent mode of proving the execution of a writing is by the testimony of a witness that he was present at the time it was executed³⁰ and saw the party affix his signature

16. Mann v. Russell, 11 Ill. 586 (1850).

17. Johnson v. Johnson, 25 Or. 496, 30 Pac. 161 (1894); 5 Chamb., Ev., § 3512, n. 16.

18. Crutchfield v. Dailey, 98 Ga. 462, 25 S. E. 526 (1896); American Underwriters' Assoc. v. George, 97 Pa. 238 (1881).

19. Brown v. Rape, 136 Ga. 584, 71 S. E. 802 (1911); Eminent Household of Columbian Woodmen v. Prater, 37 Okl. 568, 133 Pac. 48 (1913).

20. Scotland County Nat Bank v. Hohn, 146 Mo. App. 699, 125 S. W. 539 (1910); Jackson v. Hopkins, 8 Johns. (N. Y.) 487 (1821).

21. Empire Ranch & Cattle Co. v. Lanning, 53 Colo. 151, 124 Pac. 579 (1912); Bell Bros. v. Western & A. R. Co., 125 Ga. 510, 54 S. E. 532 (1906); 5 Chamb., Ev., § 3512, n. 20.

22. Hicks v. Deemer, 187 Ill. 164, 58 N. E. 252 (1900).

23. Kidd v. Huff, 105 Ga. 209, 31 S. E. 430 (1898); Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596 (1848); Bidwell v. Overton, 13 N. Y. Supp. 274, 26 Abb. N. Cas. 402 (1891); Archer v. U. S., 9 Okl. 569, 60 Pac. 268 (1900); Bomgardner v. Schwartz, 26 Pa. Super. Ct. 263 (1904); Apache County v. Barth, 177 U. S. 538, 20 S. Ct. 718, 44 L. ed. 878 (1900); 5 Chamb., Ev., § 3512, n. 22.

24. State v. Oeder, 80 Iowa 72, 45 N. W. 543 (1890); People v. Corey, 148 N. Y. 476, 42 N. E. 1066 (1896); Montieth v. State, 114 Wis. 165, 89 N. W. 828 (1902); 5 Chamb., Ev., § 3512, n. 23.

25. Conard v. Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 862 (1828). See Kolb v. Jones, 62 S. C. 193, 40 S. E. 168 (1901); 5 Chamb., Ev., § 3512, n. 24.

26. State v. Waldrop, 73 S. C. 60, 52 S. E. 793 (1905). See Western Cottage Piano & Organ Co. v. Anderson, 45 Tex. Civ. App. 513, 101 S. W. 1061 (1907).

27. Dundy v. Chambers, 23 Ill. 369 (1860); Oldham v. Oldham (R. I.), 83 Atl. 265 (1912); 5 Chamb., Ev., § 3513, n. 1.

28. Garland v. Gaines, 13 Conn. 662, 49 Atl. (1901); Alpena v. Mainville, 163 Mich. 732, 117 N. W. 338 (1908); Ashlock v. Com., 108 Va. 877, 61 S. E. 752 (1908); 5 Chamb., Ev., § 3513, n. 2.

29. Garland v. Gaines, *supra*, the execution of a lease may be established by evidence showing that it was sent to a non-resident lessee, came back with his name signed to it and that he subsequently occupied the premises. Fergerson v. Smith, 104 Ind. 246, 3 N. E. 866 (1885).

30. Mosely v. Gordon, 16 Ga. 384 (1854).

thereto.³¹ *Another mode* which is often employed is to prove the handwriting of the maker of the instrument³² either by a comparison of the disputed handwriting with other writings proved or admitted to be genuine,³³ or by the identification of the maker's signature by a witness who is familiar with his handwriting.³⁴ The execution of the writing by the one by whom it purports to be made may be established by his admissions, either judicial or extra-judicial,³⁵ or by evidence of particular acts of his amounting to an acknowledgment of execution of the instrument by him.³⁶ The evidence must, in all cases, be sufficiently certain to satisfy the presiding judge that the paper to which it refers is identical with the one it is attempted to establish.³⁷

Identification Otherwise than by Proof of Execution.—Where a paper is independently relevant, it may be admissible, if sufficiently connected with the person to be affected by it as to be probative to the effect desired.³⁸ The execution need not be proved before the writing is received in evidence.³⁹ The writing may be admitted *de bene* upon the assurance that formal proof will be offered later, and at a later stage of the trial stricken out if the proof is not produced.⁴⁰ So, any inadequacy in proof may be supplied at a subsequent time in the trial.⁴¹ Where other writings, plans, diagrams or the like are incorporated in a principal document by references contained in it, identification satisfactory to the court is sufficient.⁴² Full proof of the execution of these collateral documents or other incorporated matters has, however, been required.⁴³

31. *Malchow v. State*, 5 Ala. App. 99, 59 So. 342 (1912); *Dunby v. Chambers*, *supra*; *Stoddard v. Hill*, 38 S. C. 385, 17 S. E. 138 (1892).

32. *Pullen v. Hutchinson*, 25 Me. 249 (1845); *Rogers v. New York & Brooklyn Bridge*, 11 App. Div. 141, 42 N. Y. Supp. 1046 (1896), *aff'd* 159 N. Y. 556, 54 N. E. 1094 (1899); 5 Chamb., Ev., § 3513, n. 7.

33. *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145 (1910).

34. *Rutherford v. Dyer*, 146 Ala. 665, 40 So. 974 (1906); *Bauer v. State*, 144 Cal. 740, 78 Pac. 280 (1904); *Hinchman v. Keener*, 5 Colo. App. 300, 38 Pac. 611 (1894); 5 Chamb., Ev., § 3513, n. 9.

35. *White v. Solomon*, 164 Mass. 516, 42 N. E. 104 (1895); *Matoushek v. Dutcher*, 67 Neb. 627, 93 N. W. 1049 (1903); *Stewart v. Gleason*, 25 Pa. Super. Ct. 325 (1903); *Smith v. Gale*, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521 (1892); 5 Chamb., Ev., § 3513, n. 11.

36. *Houston & Texas C. R. Co. v. Chandler*, 51 Tex. 416 (1879).

37. *Burgen v. Com.*, 8 Ky. L. Rep. 613 (1887); *Thatcher v. Goff*, 11 La. 94 (1837); 5 Chamb., Ev., § 3513, n. 13.

38. Thus, if the object be to show that A knew the contents of a paper, proof of its production from a place to which he alone had access, e.g., his pocketbook, may sufficiently connect him with it for the purposes of the case. *Whaley v. State*, 11 Ga. 123 (1852).

39. *Allen v. State*, 61 Ind. 268, 28 Am. Rep. 673 (1878); 5 Chamb., Ev., § 3514, n. 3.

40. *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417 (1885).

41. *Houck v. Linn*, 48 Neb. 227, 66 N. W. 1103 (1896).

42. *Neuval v. Cowell*, 36 Cal. 648 (1869); *Smith v. New York Cent. R. Co.*, 4 Keyes (N. Y.) 180, 4 Abb. Dec. 262 (1868); 5 Chamb., Ev., § 3514, n. 6.

43. *Lee v. Payne*, 4 Mich. 106 (1856); *Jackson v. Sackett*, 7 Wend. (N. Y.) 94 (1831). Wills as evidence of title. See note, *Bender*, ed., 121 N. Y. 95. A bill indorsed may be given although copy did not show indorsement. See note, *Bender*, ed., 7 N. Y. 283. Conclusiveness of certificate of deposit. See note, *Bender*, ed., 48 N. Y. 487. Letters in evidence. See note, *Bender*, ed., 126 N. Y. 419. Recitals in instruments as evidence. See note, *Bender*, ed., 24 N. Y. 346.

§ 1100. **Attested Writings; General Rule.**⁴⁴— The testimony of an attesting witness will be required to prove the execution of a private writing⁴⁵ to which he has affixed his signature in that capacity, at the request or with the consent of the party or parties executing it,⁴⁶ providing of course that he can be produced.⁴⁷ This rule is regarded by the courts as one of the most stringent and inflexible and, consequently, is rigidly adhered to.⁴⁸ This mode of proof has been applied alike to private writings without regard as to whether they were executed under seal or not,⁴⁹ subject of course to statutory provisions regulatory thereof.⁵⁰ Where the evidence furnished arises merely incidentally or collaterally, proof by an attesting witness of its execution may not be necessary.⁵¹

Subscribing Witness; Defined.— A subscribing or attesting witness may be defined as one who was present at the time of the execution of an instrument, and who at the request or with the consent of the party or parties, subscribed his name thereto as a witness of the fact of the execution.⁵² It is not necessary, however, that he should actually see the writing executed,⁵³ or be present at the precise moment of the act of the party or parties in executing it, it being sufficient if his signature was affixed immediately thereafter,⁵⁴ upon the request or assent of such party or parties, which latter element is regarded as essential.⁵⁵ One's character as a witness will not be affected, in the absence of

44. 5 Chamberlayne, Evidence, §§ 3515-3519.

45. Kelsey v. Hanmer, 18 Conn. 311 (1847); Thompson v. Wilkinson, 9 Ga. App. 367, 71 S. E. 678 (1911); Boyle v. Knauss, 81 N. J. L. 330, 79 Atl. 1025 (1911); Read v. Metropolitan Life Ins. Co., 17 Misc. 307, 40 N. Y. Supp. 374 (1896); Warner v. Baltimore & O. R. Co., 31 Ohio St. 265 (1877); North Penn Iron Co. v. International Lithoid Co., 217 Pa. 538, 66 Atl. 860 (1907); 5 Chamb., Ev., § 3515, n. 1.

46. Sherwood v. Pratt, 63 Barb. (N. Y.) 137 (1808).

47. Ellis v. Doe, 10 Ga. 253 (1851); Sampson v. Grimes, 7 Blackf. (Ind.) 176 (1844); Gelott v. Goodspeed, 8 Cush. (Mass.) 411 (1851); 5 Chamb., Ev., § 3515, n. 3.

48. Ellis v. Doe, *supra*; 5 Chamb., Ev., § 3515, n. 4. The theory is that when parties to a transaction have called in a third person as a witness thereto, they preappoint him as the one by whom their act is to be proved in case of the use of the instrument as the basis of an action or proceeding between them. He is presumed to have a knowledge of the circumstances attending the transaction superior to that possessed by others. Labarthe v. Gerbeau, 1 Mart. N. S.

(La.) 486 (1823); Handy v. State, 7 Harr & J. (Md.) 42 (1826); *supra*, §§ 120, 243; 1 Chamb., Ev., §§ 269c, 487; 5 Chamb., Ev., § 3515, n. 7.

49. Henry v. Bishop, 2 Wend. (N. Y.) 575 (1829); International & G. N. R. Co. v. McRae, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926 (1891); 5 Chamb., Ev., 3515, n. 8.

50. McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711 (1890), *aff'g* 50 Hun 383, 3 N. Y. Supp. 352 (1888); 5 Chamb., Ev., § 3515, n. 9.

51. Smith v. Soper, 12 Colo. App. 264, 55 Pac. 195 (1898); Goza v. Browning, 96 Ga. 421 (1895); Ayers v. Hewett, 19 Me 281 (1841); Skinner v. Brigham, 126 Mass. 132 (1879); 5 Chamb., Ev., § 3515, n. 10.

52. Hollenback v. Fleming, 6 Hill (N. Y.) 303 (1844). For other definitions to the same effect see: Matter of Clute, 37 Misc. 586, 75 N. Y. Supp. 1059 (1902); Luper v. Werts, 19 Or. 122, 23 Pac. 850 (1890); 5 Chamb., Ev., § 3516, n. 1.

53. Hale v. Stone, 14 Ala. 803 (1848); Pequawkett Bridge v. Mathes, 7 N. H. 230, 26 Am. Dec. 737 (1834).

54. Hollenback v. Fleming, *supra*.

55. Matter of Clute, *supra*; Schomaker v.

statute, by the fact of his youth at the time he subscribed his name or that he was not proficient in the art of reading and writing;⁵⁶ even his absolute inability to read or write will not affect the admissibility of his testimony, and signing by mark may be disregarded,⁵⁷ though it has been said that it may affect the weight to be accorded.⁵⁸

Number Required.—Where two or more persons have subscribed their names to a writing as witnesses, the proof in all cases must be such as to satisfy the court of the due and proper execution of the document offered in evidence.⁵⁹ This result is ordinarily accomplished by calling one witness only.⁶⁰ If the presiding judge is not satisfied, from the testimony of one witness, with the proof of execution, he may insist that one or all of the remaining witnesses be called.⁶¹

Effect of Admissions.—It is the general rule that an admission by the party executing the writing, whether in the pleadings, or in any other form,⁶² will not be received to prove the execution of an instrument, if an attesting witness thereto can be produced. Similarly, in the case of testimony by one or both parties, the presiding judge will likewise insist upon proof by the attesting witness where his testimony is available.⁶³ Nor does the statute making parties competent witnesses abrogate the rule requiring the calling of such a witness.⁶⁴

Sufficiency of Proof.—A party is entitled to supplement the testimony of a subscribing witness by other evidence for the purpose of establishing by satisfactory evidence the execution of the writing in question;⁶⁵ he may even go further, if the witness should deny his signature or the execution of the instrument, and contradict his testimony by evidence showing the signature to be

Dean, 201 Pa. 439, 50 Atl. 923 (1902); 5 Chamb., Ev., § 3516, n. 4.

56. Wyche v. Wyche, 10 Mart. (La.) 408 (1821).

57. Watts v. Kilburn, 7 Ga. 356 (1849); Kinney v. Flynn, 2 R. I. 319 (1852).

58. Allred v. Elliott, 71 Ala. 224 (1881).

59. Jackson v. Letrange, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237 (1822); Martin v. Bowie, 37 S. C. 102, 15 S. E. 736 (1892).

60. Cooper v. O'Brien, 98 Ga. 773, 26 S. E. 470 (1896); White v. Wood, 8 Cush. (Mass.) 413 (1851); Jackson v. Vandyke, 1 N. J. L. 28 (1890); Jackson v. Le Grange, *supra*; 5 Chamb., Ev., § 3517, n. 2.

61. Burke v. Miller, 7 Cush. (Mass.) 547 (1851); Tarrant v. Ware, 25 N. Y. 425 (1862); Clarke v. Dunnavant, 10 Leigh (Va.) 13 (1839).

62. Ellis v. Doe, 10 Ga. 253 (1851); Kinney v. Flynn, *supra*; 5 Chamb., Ev., § 3518, n. 2.

63. *Id.*; Fox v. Reil, 3 Johns. (N. Y.) 477 (1808); Zerby v. Wilson, 3 Ohio 42, 17 Am. Dec. 577 (1827); 5 Chamb., Ev., § 3518, n. 3. But see, Jones v. Henry, 84 N. C. 320, 37 Am. Rep. 624 (1881); Hodges v. Eastman, 12 Vt. 358 (1839).

64. Barry v. Ryan, 4 Gray (Mass.) 523 (1855); Kayser v. Sichel, 34 Barb. (N. Y.) 84 (1861); Gaines v. Scott, 7 Ohio Cir. Ct. 447, 4 Ohio Cir. Dec. 673 (1892); 5 Chamb., Ev., § 3518, n. 4.

65. Brigham v. Palmer, 3 Allen (Mass.) 450 (1862); Hodnett v. Smith, 2 Sweeny (N. Y.) 401, 41 How. Pr. 190, 10 Alb. Pr. N. S. 86 (1870); 5 Chamb., Ev., § 3518, n. 5. Compare Bowling v. Hax, 55 Mo. 446 (1874); Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321 (1895).

67. Thompson v. Wilkinson, 9 Ga. App. 367; 71 S. E. 678 (1911); Whitaker v. Salisbury, 15 Pick. (Mass.) 534 (1834); 5 Chamb., Ev., § 3519, n. 1.

genuine.⁶⁸ It will, ordinarily, be sufficient, to warrant the admission of the writing in evidence, if the witness testifies that he saw it executed and subscribed his name as witness.⁶⁹ The identification by the witness of the signature as his, coupled with further testimony to the effect that, being genuine, it would not be there unless it had been placed there by him under the proper conditions, will satisfy the requirements imposed.⁷⁰ Whether the evidence is sufficient to authorize the admission of the document is a matter of administration for the presiding judge.⁷¹

§ 1101. **Instruments Executed Under a Power.**⁷²— If a person claims to act, in the execution of an instrument, under some authority as the representative of another, it may very properly be required that some satisfactory proof tending to show that authority should be given.⁷³ Where a deed purports to be executed by one as administrator or executor⁷⁴ or as guardian,⁷⁵ it must be shown, to the satisfaction of the presiding judge, that the person by whom the writing is thus executed possessed the requisite authority to so act, otherwise it will be rejected.

Corporation Deeds and Writings.— In the case of a deed executed by one

68. *Buchanan v. Simpson Grocery Co.*, 105 Ga. 393, 21 S. E. 105 (1898); *Duckwall v. Weaver*, 2 Ohio 13 (1825); *Northrop v. Columbian Lumber Co.*, 186 Fed. 770, 108 C. C. A. 640 (1911); 5 Chamb., Ev., § 3519, n. 2.

69. *Holtzclaw v. Miley*, 172 Ala. 15, 55 So. 150 (1911); *Dawson v. Callaway* 18 Ga. 573 (1855); 5 Chamb., Ev., § 3519, n. 4.

70. *Robinson v. Brennan*, 115 Mass. 582 (1874); *Cheston v. Wilson*, 2 Neb. (Unoff.) 674, 89 N. W. 764 (1902); *Hall v. Luther*, 13 Wend. (N. Y.) 491 (1835); 5 Chamb., Ev., § 3519, n. 5. Where an attesting witness to a will cannot remember all the circumstances of attestation they may be proved by circumstantial evidence. So evidence is sufficient that the testator came into the room where the witnesses were with a pen and ink and sat down to a table and then went out to show that the testator signed in their presence and before they did. *Re Carey*, 56 Colo. 77, 136 Pac. 1175, 51 L. R. A. (N. S.) 927 (1913). Where an attesting witness to a will has lost his eye-sight so he cannot identify his signature it is sufficient if he testifies that the will was signed and the other witnesses identify the signatures and all three testify to the execution of the will in due form. *Reynolds v. Sevier*, 165 Ky. 58, 176 S. W. 961, L. R. A. 1915 E 593 (1915).

Absence of witnesses.— The statutory rule requiring that a will must be proved by all

the attesting witnesses is of necessity dispensed with when the production of all is impossible because one or more may be beyond the jurisdiction of the court or are dead or insane or otherwise incompetent. In that case the handwriting of the absent ones may be proved. *Wells v. Thompson*, 140 Ga. 119, 78 S. E. 823, 47 L. R. A. (N. S.) 722 (1913).

71. *Carruth v. Bayley*, 14 Allen (Mass.) 532 (1867).

72. 5 Chamberlayne, Evidence, §§ 3520-3526.

73. *La Plante v. Lee*, 83 Ind. 155 (1882). *Campbell v. Alkahest Lyceum System*, 10 Ga. App. 839, 74 S. E. 443 (1912); *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761 (1854); *Chaffee v. Blaisdell*, 142 Mass. 538, 8 N. E. 435 (1886); 5 Chamb., Ev., § 3520, n. 1. Such power may be presumed after a lapse of thirty years. *Tucker v. Murphy*, 66 Tex. 356, 1 S. W. 76 (1886). But not in the absence of all proof of the existence of the power and its loss or destruction. *House v. Brent*, 69 Tex. 27, 7 S. W. 65 (1895).

74. *La Plante v. Lee*, 83 Ind. 155 (1882); *Chapman v. Crooks*, 41 Mich. 595, 2 N. W. 924 (1879); *Riley v. Pool*, 5 Tex. Civ. App. 346, 24 S. W. 85 (1893); 5 Chamb., Ev., § 3521, n. 1.

75. *House v. Brent*, *supra*; 5 Chamb., Ev., § 3523, n. 1.

as president,⁷⁶ or agent,⁷⁷ or by the officers⁷⁸ of a corporation, if the corporate seal is attached, a presumption arises that the proper authority to execute it existed,⁷⁹ it not being necessary that, in the first instance, evidence of authority should be shown.⁸⁰ Likewise, in the case of a bill of sale executed by the vice-president,⁸¹ or of any instrument executed by the corporate officers.⁸² A similar rule has also been applied in the case of a deed executed by a mayor *pro tempore*, under the corporate seal of a municipal corporation.⁸³ In the absence, however, of a corporate seal to an instrument, purporting to bind the corporation, authority to execute the writing must be shown.⁸⁴ The recital, in the deed, of authority will not be considered as any evidence of its existence.⁸⁵

Official Sale Under Authority of Decree and Execution.—A sheriff's⁸⁶ authority in executing a deed, in pursuance of an alleged decree of court, should be shown, in order to render the writing admissible, unless by statute this is not required.⁸⁷ A similar rule prevails in case of deeds executed by other officers under the same asserted power,⁸⁸ as, for instance in the case of a deed given by a public official to a purchaser at a tax sale,⁸⁹ or of a deed given by a receiver.⁹⁰ If the object of offering the deed is to establish some collateral fact, proof of the authority of the official to execute it will not be required.⁹¹

76. *Almand v. Equitable Mortg. Co.*, 113 Ga. 983, 39 S. E. 421 (1901).

77. *Flint v. Clinton Company*, 12 N. H. 430 (1841).

78. *Campbell v. Alkahest Lyceum System*, *supra*; *Quackenboss v. Globe & Rutgers Fire Ins. Co.*, 77 App. Div. 168, 78 N. Y. Supp. 1019 (1902); 5 Chamb., Ev., § 3522, n. 3.

79. *Trustees Canandaigua Academy v. McKechie*, 90 N. Y. 618 (1882).

80. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607 (1867); *Springer v. Bigford*, 160 Ill. 495, 43 N. E. 751 (1896).

81. *Springer v. Bigford*, *supra*.

82. *Blackshire v. Iowa Homestead Co.*, 39 Iowa 624 (1874); *National Bank of Commerce v. Atkinson*, 8 Kan. App. 30, 54 Pac. 8 (1898); *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297 (1903); 5 Chamb., Ev., § 3522, n. 7.

83. *Middletown Sav. Bank v. Dubuque*, 19 Iowa 467 (1865). See *Holder v. Yonkers*, 25 Misc. 250, 55 N. Y. Supp. 254 (1898).

84. *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812 (1908); *Smith v. Guarantee Dental Co.*, 114 N. Y. Supp. 867 (1909); 5 Chamb., Ev., § 3522, n. 9.

85. *Gashwiler v. Willis*, *supra*.

86. *Carr v. Georgia L. & T. Co.*, 108 Ga. 757, 33 S. E. 190 (1899); *Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47 (1845); *Bowen v.*

Bell, 20 Johns. (N. Y.) 338, 11 Am. Dec. 286 (1823); *Weyand v. Tipton*, 5 Serg. & R. (Pa.) 332 (1819); 5 Chamb., Ev., § 3524, n. 1.

87. *Bliss v. Waterbury*, 27 S. D. 429, 131 N. W. 731 (1911).

88. *Peterson v. Weissbein*, 75 Cal. 174, 16 Pac. 769 (1888); *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878 (1895); 5 Chamb., Ev., § 3524, n. 3. An order or decree of court directing the execution of a deed by one in whom title is vested need not be shown where the deed expresses a valuable consideration. *Rockwell v. Brown*, 58 N. Y. 210 (1873); 5 Chamb., Ev., § 3524, n. 3.

89. *Anderson v. McCormick*, 129 Ill. 308, 21 N. E. 803 (1889); *Lessee of Carlisle v. Longworth*, 5 Ohio 368 (1832); *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347 (1895); 5 Chamb., Ev., § 3524, n. 4.

90. *Winn v. Coggins*, 53 Fla. 327, 42 So. 897 (1907); *Hutchinson v. Patterson*, 226 Mo. 174, 126 S. W. 403 (1909); 5 Chamb., Ev., § 3524, n. 5.

91. *Doe v. Roe*, 32 Ga. 448 (1861); *Bolles v. Beach*, 22 N. J. L. 680, 53 Am. Dec. 263 (1850); 5 Chamb., Ev., § 3524, nn. 8, 9. For other instances of relaxation of the rule, see 5 Chamb., Ev., § 3524, nn. 10, 11.

Under Power of Attorney.—A power of attorney to perform some act such as the execution of a deed,⁹² contract,⁹³ or other writing,⁹⁴ must be shown where the act is asserted to have been done in pursuance of such an authority, unless by statute such proof is dispensed with,⁹⁵ or unless in the case of a deed it is not offered as evidence of title.⁹⁶

By Trustee.—Where trustees execute a deed of corporate property, as for instance town or city trustees⁹⁷ or a board of a corporation,⁹⁸ their authority to so act should be shown upon proper objection by the party against whom they are offered. The recital of authority in the deed to so act is not of itself sufficient.⁹⁹

§ 1102. Exceptions to Rule.¹—If, without any fault of his own, a party is unable to prove the execution of a writing by the testimony of an attesting witness, the court will, upon satisfactory proof of such fact, permit of the use of secondary evidence for the purpose of establishing the genuineness of the document.² Thus if the witness is dead,³ or may be so presumed,⁴ or after diligent search or inquiry cannot be found,⁵ or is beyond the seas or otherwise out of the jurisdiction of the court,⁶ or has become incompetent from interest, insanity or otherwise,⁷ an exception is created justifying the admission of secondary evidence to establish the execution of the proffered document.⁸ Where the disqualifying interest was acquired by the voluntary act of the witness or by operation of law,⁹ resort may be had to proof of handwriting. Where, how-

92. Hughes v. Holliday, 3 Greene (Iowa) 30 (1851); Lamberton v. Windom, 18 Minn. 506 (1872); 5 Chamb., Ev., § 3525, n. 1.

93. Chaffee v. Blaisdell, 142 Mass. 538, 8 N. E. 435 (1886).

94. Gray v. Gillilan, 15 Ill. 453, 60 Am. Dec. 761 (1854).

95. Austin v. Townes, 10 Tex. 24 (1853).

96. Waco Bridge Co. v. Waco, 85 Tex. 320, 20 S. W. 137 (1892).

97. Green v. Barker, 47 Neb. 934, 66 N. W. 1032 (1896); 5 Chamb., Ev., § 3526, n. 1.

98. Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607 (1867). Where corporate seal is attached, see § 1101, *supra*; 5 Chamb., Ev., § 3522.

99. Gashwiler v. Willis, *supra*; Hancock v. Whybark, 66 Mo. 672 (1877).

1. 5 Chamberlayne, Evidence, §§ 3527–3532.

2. Job v. Tebbetts, 10 Ill. 376 (1848); Jewell v. Chamberlain, 41 Neb. 254, 59 N. W. 784 (1894).

3. McVicker v. Conkle, 96 Ga. 584, 24 S. E. 23 (1895); Gallagher v. Delargy, 57 Mo. 29 (1874); Borst v. Empire, 5 N. Y. 33 (1851); 5 Chamb., Ev., § 3527, n. 2.

4. Gaither v. Martin, 3 Md. 146 (1852); Jackson v. Chamberlain, 8 Wend. (N. Y.) 620 (1832); 5 Chamb., Ev., § 3527, n. 3.

5. Turner v. Cates, 90 Ga. 731, 16 S. E. 971 (1892); Willson v. Betts, 4 Den. (N. Y.) 201 (1847); Gallagher v. London Assur. Corp., 149 Pa. 25, 24 Atl. 115 (1892); 5 Chamb., Ev., § 3527, n. 4.

6. Mobile, etc., R. Co. v. Hawkins, 163 Ala. 565, 51 So. 37 (1909); Trustees of Smith Charities v. Connolly, 157 Mass. 272, 31 N. E. 1058 (1892); New Jersey Zinc & Iron Co. v. Lehigh Zinc & Iron Co., 59 N. J. L. 189, 35 Atl. 915 (1896); Richards v. Skiff, 8 Ohio St. 586 (1858); 5 Chamb., Ev., § 3527, n. 5.

7. Haynes v. Rutter, 24 Pick. (Mass.) 242 (1842); Edwards v. Perry, 21 Barb. (N. Y.) 600 (1855); Kinney v. Flynn, 2 R. I. 319 (1852); 5 Chamb., Ev., § 3527, n. 6.

8. Bowser v. Warren, 4 Blackf. (Ind.) 522 (1838); Brynjolfson v. Northwestern Elevator Co., 6 N. D. 450, 71 N. W. 555, 66 Am. St. Rep. 612 (1897); 5 Chamb., Ev., § 3527, n. 7.

9. Saunders v. Ferrell, 23 N. C. 97 (1840).

ever, the incompetency of the witness has been caused by the act of the party offering the document in evidence, it seems that evidence of handwriting will not be received.¹⁰ *Where a writing is executed out of the State*, it will be presumed that the witnesses are non-residents and evidence will be admitted to establish the genuineness of their signatures.¹¹ *Where the witness is beyond the jurisdiction of the court* in which the instrument is offered in evidence, the courts will, as a general rule, require proof tending to show something more than a mere casual or temporary absence, before the introduction of secondary evidence will be permitted.¹² The fact that the witness is so located is the material factor, which makes the particular case an exception to the general rule and authorizes the admission of secondary evidence.¹³ The rule will not apply in case it appears that there was any fraud or collusion on the part of the proponent in procuring the absence of the witness,¹⁴ or if the exercise of the required degree of diligence in endeavoring to locate a witness is not satisfactorily shown.¹⁵

Mode of Proof.—Where the testimony of the attesting witness or witnesses is unavailable, the usual mode which has been adopted by the courts is to admit evidence to establish the genuineness of the signatures of the person or persons so signing.¹⁶ Where there are several subscribing witnesses, the fact must be satisfactorily established that the testimony of all of them is unavailable;¹⁷ otherwise secondary evidence will not be admitted. If it should appear that the witness, at the time of subscribing his name and at the time of the trial, was, by reason of interest, incompetent, the genuineness of the instrument may be established by proof of the handwriting of the obligor.¹⁸ Ordinarily, it will be sufficient to prove the handwriting of one witness¹⁹ where, in case there are other signatures, the absence of all the signers is explained to the satisfaction

10. *Edwards v. Perry, supra.*

11. *Mobile, etc., R. Co. v. Hawkins, supra; McMinn v. Whelan, 27 Cal. 300 (1865); Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715 (1839); Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661 (1907); 5 Chamb., Ev., § 3527, n. 10.*

12. *Gaither v. Martin, 3 Md. 146 (1852); Harrel v. Ward, 2 Sneed (Tenn.) 610 (1855); 5 Chamb., Ev., § 3527, n. 11.*

13. *Harris v. Cannon, 6 Ga. 382 (1849).* How far beyond the jurisdiction of the court he may be is immaterial. *Emery v. Twombly, 17 Me. 65 (1840).* Likewise the fact that the residence of the witness is known. *Dunbar v. Marden, 13 N. H. 311 (1842).*

14. *Clark v. Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368 (1810).*

15. *Grover v. Coffee, 19 Fla. 61 (1882); Silverman v. Blake, 17 Wis. 213 (1863).*

16. *Mobile, etc., R. Co. v. Hawkins, supra;*

Homer v. Wallis, 11 Mass. 308 (1814); Dunbar v. Marden, supra; Borst v. Empie, 5 N. Y. 33 (1851); Clark v. Boyd, 2 Ohio 56 (1825); Merck v. Merck, 89 S. C. 347, 71 S. E. 969 (1911); 5 Chamb., Ev., § 3528, n. 1.

17. *Kelsey v. Hammer, 18 Conn. 311 (1847); Gelott v. Goodspeed, 8 Cush. (Mass.) 411 (1851).*

18. *Packard v. Dunsmore, 11 Cush. (Mass.) 282 (1853); Mackrell v. Wolfe, 104 Pa. 421 (1883).* Incompetency of such a character arising subsequent to the date of execution will effect no change in the mode of proof. *Keefer v. Zimmerman, 22 Md. 274 (1864); Tinnin v. Price, 31 Miss. 422 (1856); 5 Chamb., Ev., § 3528, n. 4.*

19. *McVicker v. Conkle, supra; Gelott v. Goodspeed, supra; Borst v. Empie, supra; Clark v. Boyd, supra; Sanborn v. Cole, 63 Vt. 590, 22 Atl. 716 (1891); 5 Chamb., Ev., § 3529, n. 3.*

of the court. Upon the introduction of such proof the genuineness of the instrument is *prima facie* established.²⁰

Signature of Maker.— There is some authority for the view that proof of the signature of the party by whom the writing was executed will also be required,²¹ in addition to proof of the signature of the subscribing witness. This is not, however, the general rule, it ordinarily being sufficient to prove the signature of one witness.²² Should such testimony not be sufficiently satisfactory and the court require that some additional proof shall be adduced, it may be necessary to prove the handwriting of the party executing the instrument.²³ Such other proof, generally of the handwriting of the obligor, will also be required to establish the execution of the writing where there is no evidence to prove the signature of the attesting witness.²⁴

Where Attesting Witness Unavailable.— Upon the question of whether, where no attesting witness is available, resort may be had to proving the handwriting of the maker, without adducing any evidence tending to establish the signature of an attesting witness, there is much conflict.²⁵ In many jurisdictions the rule that proof must first be made of the handwriting of the witness is strictly adhered to and no evidence tending to establish that of the maker will be received, unless the genuineness of the witness's signature can not first be satisfactorily established.²⁶ This rule, however, has not received the universal approval of the courts and the reasons underlying it have been questioned, even in some jurisdictions which have felt bound by its inflexibility.²⁷ In other jurisdictions the rule has been departed from to allow proof of the maker's signature, where the witness has used a mark in signing, upon the theory that there is nothing distinctive about the signature, in such a case, to warrant proof

20. *Servis v. Nelson*, 14 N. J. Eq. 94 (1861).

21. *Harris v. Patten*, 2 La. Ann. 217 (1847); *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742 (1912). Proof of the signature of the obligor, in addition to that of the subscribing witness, has in many cases been received as satisfactory proof of execution. *Gelott v. Goodspeed*, *supra*; *Dunbar v. Marden*, *supra*; *Irwin v. Patchen*, 164 Pa. 51, 30 Atl. 436 (1894); *Adams v. Norris*, 25 How. (U. S.) 353, 16 L. ed. 539 (1859); 5 Chamb., Ev., § 3530, n. 1. In none of these cases, however, does it appear that the proof of the former's signature was required as a prerequisite to admission of the writing in evidence.

22. See note 14, *supra*.

23. *Newsom v. Luster*, 13 Ill. 175 (1851); *Boswell v. First Nat. Bank*, *supra*; 5 Chamb., Ev., § 3530, n. 3.

24. *McPherson v. Rathbone*, 11 Wend. (N. Y.) 96 (1833); *Miller v. Carothers*, 6 Serg.

& R. (Pa.) 215 (1820); 5 Chamb., Ev., § 3530, n. 4.

25. *Boswell v. First Nat. Bank*, 16 Wyo. 161 (1907); *Clark v. Sanderson*, 3 Binn. (Pa.) 192 (1810).

26. *Gould v. Kely*, 16 N. H. 551 (1845); *Jackson v. Waldron*, 13 Wend. (N. Y.) 178 (1834); *North Penn Iron Co. v. International Lithoid Co.*, 217 Pa. 538, 66 Atl. 860 (1907); 5 Chamb., Ev., § 3531, n. 2. This ruling is based upon the theory of the witness being a preappointed or preferred one, presumed to be conversant with the facts surrounding the execution of the instrument, and that his testimony is the highest and best evidence which it is possible to procure. When such witness is unavailable then proof of his signature becomes the best and resort must be had thereto. *Clark v. Boyd*, 2 Ohio 56 (1825).

27. *Newsom v. Luster*, 13 Ill. 175 (1851).

of handwriting.²⁸ Also some courts have permitted such proof where the instrument was one to which no attesting witness was required.²⁹ In still other jurisdictions the rule in this respect is openly repudiated and where the witness is unavailable proof is allowed, in the first instance, of the handwriting of the maker.³⁰

Ancient Documents.— An exception to the rule requiring that attested writings shall be proved by the testimony of the subscribing witness exists in the case of ancient documents, which, as stated elsewhere,³¹ are regarded as proving themselves, in so far as their execution is concerned, since the witnesses are presumed to be dead.

28. *Watts v. Kilburn*, 7 Ga. 356 (1849); *Carrier v. Hampton*, 33 N. C. 307 (1850); *Gilliam v. Perkinson*, 4 Rand. (Va.) 325 (1826).

29. *Sherman v. Champlain Transp. Co.*, 31 Vt. 162 (1858).

30. *McMinn v. Whelan*, 27 Cal. 300 (1865); *Jones v. Roberts*, 65 Me. 273 (1876); *Trustees of Smith Charities v. Connolly*, 157 Mass. 272, 31 N. E. 1058 (1892); *Chator v. Brunswick-Balke Collender Co.*, 71 Tex. 588, 10 S. W. 250 (1888); 5 Chamb., Ev., § 3531, n. 7. In these cases the conclusion is based upon the view that the signature of the maker is what gives the instrument its legal force,

that the object towards which the proof is directed is the genuineness of such signature and that, therefore, this being the primary inquiry, evidence tending to establish the handwriting of the maker is to be preferred to that tending to prove the signature of a witness. In the former case the evidence tends directly to establish the validity of the instrument by proving the genuineness of the signature of the maker, while, in the latter, this fact is established by inference only. *Dismukes v. Musgrove*, 7 Mart. N. S. (La.) 58 (1828).

31. See Chap. 57, *infra*.

CHAPTER LVII.

ANCIENT DOCUMENTS.

Ancient documents; admissible without proof of execution, 1103.

writings within rule; copies, 1104.

private writings, 1105.

deeds, 1106.

public documents, 1107.

§ 1103. **Ancient Documents; Admissible Without Proof of Execution.**¹— The rule that a writing must be authenticated as genuine, as being in fact that which it purports to be, does not apply in the case of ancient documents,² that is those which are thirty years of age or over. In this class of cases a presumption in favor of the genuineness of the writing arises where it is shown to have been in existence for the period designated, is free from suspicion by reason of alteration or otherwise and comes from the proper custody.³ The reasons underlying this rule are the difficulty, if not impossibility, after such a period, of procuring witnesses to documents which are of that age or of proving their handwriting and, in the case of deeds, that a possession, or an exercise of ownership thereunder, is calculated to give authenticity to them.⁴

1. 5 Chamberlayne, Evidence, §§ 3533–3538.

2. Brannan v. Henry, 175 Ala. 454, 57 So. 967 (1912); Stevens v. Smoker, 84 Conn. 569, 80 Atl. 788 (1911); Stalford v. Goldring, 197 Ill. 156, 64 N. E. 395 (1902); Whitman v. Shaw, 166 Mass. 451, 44 N. E. 333 (1896); Anderson v. Cole, 234 Mo. 1, 136 S. W. 395 (1910); National Commercial Bank v. Gray, 71 Hun 295, 24 N. Y. Supp. 997 (1893); Mineral R. & M. Co. v. Auten, 188 Pa. 568, 41 Atl. 327 (1898); Dickinson v. Smith, 134 Wis. 6, 114 N. W. 133 (1907); 5 Chamb., Ev., § 3533, n. 1.

3. Coleman v. Bruch, 132 App. Div. 716, 117 N. Y. Supp. 582 (1909). In some instances a document not even that old has been received. Allison v. Little, 85 Ala. 512, 5 So. 221 (1888); 5 Chamb., Ev., § 3534, n. 2. Where all the parties are dead a commissioners' deed may be received in evidence to prove the facts stated in it where the deed is over forty years old. McGinnis v. Caldwell, 71 W. Va. 375, 76 S. E. 834, 43 L. R. A. (N.

S.) 630 (1912). Where a deed is more than thirty years old and the possession of the locus has been consistent with its terms the deed proves itself on the theory that the witnesses are supposed to be dead. This principle applies to an executrix's deed and it will be presumed that the executrix had authority to sign the deed although the records to prove this are lost. Wilson v. Snow, 228 U. S. 217, 57 L. ed. 807, 33 Sup. Ct. Rep. 487, 50 L. R. A. (N. S.) 604 (1913).

In an ancient deed a recital of heirship is sometimes competent when followed by long possession and acquiescence, which shows a recognition of such heirship. But recitals in a deed are not ordinarily admitted against a stranger and so a recital of heirship in a modern deed is not to be admitted in a title suit between strangers. Dyer v. Marriott, 89 Kan. 515, 131 Pac. 1185, 45 L. R. A. (N. S.) 93 (1913).

4. Wilson v. Betts, 4 Den. (N. Y.) 201 (1847); Duncan v. Beard, 2 Nott & McC. (S. C.) 400 (1820). Such documents are, in con-

Administrative Requirements; Absence of Suspicion.—An instrument offered in evidence as an ancient document must be free from suspicion⁵ or, as it has been expressed, “on inspection, it must exhibit an honest face.”⁶ If it is apparent that the instrument is a forgery it will be rejected;⁷ the same result will also follow in the case of any material alteration,⁸ a most frequent instance of which is in respect to the date⁹ in order to bring it within the ancient document rule. The alteration alone is said to be a circumstance tending to show fraud.¹⁰

Proof of Age.—The existence of the document for the period of time necessary to make it an ancient document, within the meaning of the rule, must be established to the satisfaction of the presiding judge.¹¹ Direct evidence is not essential; circumstantial evidence may be equally satisfactory.¹² The date of the document although by no means controlling,¹³ is a factor of much weight to be considered as bearing upon that question.¹⁴ The date of an endorsement upon the instrument, or of a paper attached thereto, may also be considered in this connection.¹⁵

sequence thereof, regarded as proving their own execution, that is, to the extent of dispensing with proof of that fact, even though an attesting witness may be known to be alive at the time. *Shaw v. Pershing*, 57 Mo. 416 (1874); *Jackson v. Christman*, 4 Wend. (N. Y.) 277 (1830); 5 Chamb., Ev., § 3535, n. 2. In this class of cases the presumption arises that, after thirty years, the attesting witnesses are no longer alive, *McReynolds v. Longenberger*, 57 Pa. St. 13 (1868); *Lunn v. Scarborough*, 6 Tex. Civ. App. 15, 24 S. W. 846 (1894); such presumption being adopted as a rule of practical convenience. *Settle v. Allison*, 8 Ga. 201, 52 Am. Dec. 393 (1850); *Winn v. Patterson*, 9 Pet. (U. S.) 663, 9 L. ed. 266 (1835). The instrument offered must be relevant. *King v. Watkins*, 98 Fed. 913 (1899).

5. *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 So. 415 (1911); *West v. Houston Oil Co.*, 56 Tex. Civ. App. 341, 120 S. W. 228 (1909).

6. *Hill v. Nisbet*, 58 Ga. 586 (1877). If it does not fulfill this requirement, further evidence explaining and eliminating all suspicious circumstances will be required. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13 (1895); *Morgan v. Tutt*, 52 Tex. Civ. App. 301, 113 S. W. 958 (1908).

7. *Albright v. Jones*, 106 Ga. 302, 31 S. E. 761 (1898); *Chamberlain v. Torrance*, 14 Grant Ch. (U. C.) 181 (1868).

8. *McConnell v. Slappey* 134 Ga. 95, 67 S. E.

440 (1909); *Herrick v. Malin*, 22 Wend. (N. Y.) 388 (1839). See *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527 (1851); 5 Chamb., Ev., § 3536, n. 5.

9. *Wisdom v. Reeves*, *supra*.

10. *Hill v. Nisbet*, *supra*.

11. *Whitman v. Heneberry*, 73 Ill. 109 (1874); *Clark v. Owens*, 18 N. Y. 434 (1858); *Wright v. Hull*, 83 Ohio St. 385, 94 N. E. 813 (1911); *West v. Houston Oil Co.*, *supra*; 5 Chamb., Ev., § 3537, n. 1. The age at the time the writing is offered in evidence, computing from its date, determines its admissibility. *Gardner v. Granniss*, 57 Ga. 539 (1876); *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014 (1899); *Wright v. Hull*, *supra*; *Ardoin v. Cobb* (Tex. Civ. App. 1911), 136 S. W. 271. But see *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485 (1808).

12. *Bentley v. McCall*, 119 Ga. 530, 46 S. E. 645 (1903). Thus the old, worn and discolored appearance of the writing may be a circumstance tending to establish its age. *Enders v. Sternbergh*, 1 Keyss (N. Y.) 264, 33 How. Pr. 464 (1864).

13. *Whitman v. Heneberry*, *supra*; *Fairly v. Fairly*, 38 Miss. 280 (1859).

14. *Enders v. Sternbergh*, *supra*; *West v. Houston Oil Co.*, *supra*.

15. *Brigden v. Green*, 80 Ga. 737, 7 S. E. 97 (1888); *Fairly v. Fairly*, *supra*; *Holt v. Maverick*, 5 Tex. Civ. App. 650, 23 S. W. 751 (1893).

ficient to authorize the admission of the document in evidence, where, in other respects, it satisfies the requirements relating to ancient documents.⁴⁴ As against an adverse claimant, however, who has been and is in possession of land, an instrument offered as an ancient deed has been rejected.⁴⁵

Effect of Irregularities in Execution or Recording.—An irregularity in the execution of a writing will not, necessarily, be a sufficient ground for its rejection,⁴⁶ unless it should appear that it was of such a character as to defeat the legal effect and operation of the instrument,⁴⁷ in which case, it will of course be rejected, since the rule does not operate to give validity to a writing invalid on its face.⁴⁸ A similar conclusion has been reached where the writing is not properly entered of record,⁴⁹ or is not recorded as required.⁵⁰

§ 1106. [Ancient Writings]; Private Writings; Deeds.⁵¹—One of the most frequent instances in which the rule is applied is in the case of deeds⁵² and other instruments affecting title to or interest in real property.⁵³ Where a deed is shown to satisfy the requirements of the rule as to ancient documents, a recital therein may be received in evidence as proof of the fact stated,⁵⁴ even in a proceeding between strangers;⁵⁵ in the absence of some statute which may be controlling.⁵⁶

Executed Under a Power.—Where a deed, which has apparently been executed by one under a power, appears to have been executed thirty or more years prior to the time it is offered in evidence, it will be received as an ancient document, without proof of the authority under which it was executed; in such a case the existence of the power will be presumed.⁵⁷ Where, however, it ap-

44. *Stalford v. Goldring*, 197 Ill. 156, 64 N. E. 395 (1902).

45. *Davidson v. Morrison*, 86 Ky. 397, 9 Ky. L. Rep. 629, 5 S. W. 871, 9 Am. St. Rep. 295 (1887).

46. *McConnell Bros. v. Slappey*, 134 Ga. 95, 67 S. E. 440 (1909); *Bradley v. Lightcap*, 201 Ill. 511, 66 N. E. 546 (1903); *Hudson v. Webber*, 104 Me. 429, 72 Atl. 184 (1908); 5 Chamb., Ev., § 3544, n. 1.

47. *O'Neil v. Tennessee Coal, I. & R. Co.*, 140 Ala. 378, 37 So. 275 (1903).

48. *Id.*; *Meegan v. Boyle*, 19 How. (U. S.) 130, 15 L. ed. 577 (1856).

49. *Jordan v. Cameron*, 12 Ga. 267 (1852); *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283 (1803).

50. *Broussard v. Guidry*, 127 La. 708, 53 So. 946 (1911); *Mackey v. Armstrong*, 84 Tex. 159, 19 S. W. 436 (1892); 5 Chamb., Ev., § 3544, n. 5.

51. 5 Chamberlayne, Evidence, §§ 3545, 3546.

52. *Sloss-Sheffield Steel & I. Co. v. Lollar*, *supra*; *Stalford v. Goldring*, *supra*; *Buttrick*

Petitioner, *supra*; *Anderson v. Cole*, 234 Mo. 1, 136 S. W. 395 (1910); *Coleman v. Burch*, 132 App. Div. 716, 117 N. Y. Supp. 582 (1909); *Wilson v. Snow*, *supra*; 5 Chamb., Ev., § 3545, n. 1.

53. *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 So. 415 (1911); *Boston v. Richardson*, 105 Mass. 351 (1870); *Dodge v. Gallatin*, 130 N. Y. 117, 29 N. E. 107 (1891); 5 Chamb., Ev., 3545, n. 2.

54. *Hathaway v. Evans*, 113 Mass. 264 (1873); *Russell v. Jackson*, 22 Wend. (N. Y.) 277 (1839); *Jackson v. Gunton*, 26 Pa. Super. Ct. 203 (1904); 5 Chamb., Ev., § 3545, n. 3.

55. *Deery v. Cray*, 5 Wall. (U. S.) 795, 18 L. ed. 653 (1866).

56. *Gwin v. Calegaris*, 139 Cal. 384, 73 Pac. 851 (1903). Deeds, however, from those who are found to have neither title nor possession are not entitled to serious consideration in support of a claim of ownership. *McMahon v. Stratford*, 83 Conn. 386, 76 Atl. 983 (1910).

57. *Reuter v. Stuckart*, 181 Ill. 529 (1899);

pears that the power was exercised in pursuance of a decree of court,⁵⁸ or that the writing conferring the power was one which was entered of record,⁵⁹ the rule then seems to be that some evidence showing the existence of the power will be required. But where it appears that the record has been lost or destroyed and proof thereof cannot be made, the existence of the power may then be presumed.⁶⁰ And in case of mere formalities, preliminary to a sale by one acting under authority of law, it is presumed that the things necessary to be done were in fact done.⁶¹

§ 1107. [Ancient Documents]; Public Documents.⁶²— The rule permitting the introduction of ancient documents has, in some cases, been applied to public documents and writings.⁶³ The general principle, however, controlling the admission of such instruments, regardless of their date, is as stated elsewhere, that they are made by accredited public officials, in the performance of their public duties, and that they are produced from the proper official custody.

Goodhue v. Cameron, 142 App. Div. 470, 127 N. Y. Supp. 120 (1911); *Wilson v. Snow*, 228 U. S. 217, 33 S. Ct. 217, 52 L. ed. 807 (1913); 5 Chamb., Ev., § 3546, n. 1.

58. *Fell v. Young*, 63 Ill. 106 (1872); *Green v. Blake*, 10 Me. 16 (1833).

59. *Tolman v. Emerson*, 4 Pick. (Mass.) 156 (1827).

60. *Giddings v. Day*, 84 Tex. 605, 19 S. W. 682 (1892).

61. *Winkley v. Kaime*, 32 N. H. 268

(1855); *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002 (1898); 5 Chamb., Ev., § 3546, n. 5.

62. 5 Chamberlayne, Evidence, § 3547.

63. *Enfield v. Ellington*, 67 Conn. 459, 34 Atl. 818 (1896); *Pells v. Webquish*, 129 Mass. 469 (1880); *Sanger v. Merritt*, 120 N. Y. 109, 24 N. E. 386 (1890); *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679 (1887); 5 Chamb., Ev., § 3547, n. 1.

CHAPTER LVIII.

PAROL EVIDENCE RULE.

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unauthorized signing, 1119.

public records, 1120.

§ 1108. **Parol Evidence Rule; General Statement of.**¹—Parol evidence is inadmissible to vary, alter, control or contradict the terms of a written instrument, in an action founded upon such writing, between the parties or privies thereto.² This is what is known as the parol evidence rule, long recognized and applied at common law, and one which has proved to be full of many difficulties in its application by the courts. Whether it is a rule of evidence or one of the substantive law has been the subject of some discussion. Whatever may have been the intention of the parties, the substantive law forbids, subject

1. 5 Chamberlayne, Evidence, §§ 3548, 3549.

2. Bryan v. Idaho Quartz Min. Co., 73 Cal. 249, 14 Pa. 859 (1887); Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485 (1900); Chambers v. Prewitt, 172 Ill. 615, 50 N. E. 145 (1898); Wentworth v. Manhattan Market Co., 216 Mass. 374, 103 N. E. 1105 (1914); Hapke v. Davidson, 180 Mich. 138, 146 N. W. 624 (1914); Outcult Advertising Co. v. Barnes, 176 Mo. App. 307, 162 S. W. 631 (1914); Finck v. Bauer, 40 Misc. 218, 81 N. Y. Supp. 625 (1903); Tuttle v. Burgett, 53 Ohio St. 498, 42 N. E. 427 (1895); Gamble v. Riley, 39 Okl. 363, 135 Pac. 390 (1913); Fuller v. Law, 207 Pa. 101, 56 Atl. 333

(1903); Sigafus v. Porter, 84 Fed. 430, 28 C. C. A. 443 (1898); Van Winkle v. Crowell, 146 U. S. 42, 36 L. ed. 880, 13 S. Ct. 18 (1892); Buty v. Murray, 24 Can. S. C. 77 (1894); 5 Chamb., Ev., § 3548, n. 1. Parol qualifications of written contracts. See note. Bender, ed., 153 N. Y. 528.

Notice is incidental matter not covered by the rule.—Parol evidence of the mailing and contents of a notice sent is not excluded by the parol evidence rule where the notice is a mere collateral matter and not the subject matter of the litigation. Holloman v. Southern R. Co. 172 N. C. 372, 90 S. E. 292, L. R. A. 1917 C 416 (1916).

to certain exceptions hereinafter considered, that resort may be had to any extrinsic evidence, in order to ascertain it. The instrument is regarded as expressive of the actual agreement or intention of the parties and as controlling, when the question of their intention is raised.³ This general rule of exclusion has been applied by the courts to assignments,⁴ bills of sale,⁵ bonds,⁶ compromises,⁷ contracts,⁸ contracts of sale,⁹ deeds,¹⁰ leases,¹¹ letters constituting

3. *Barney v. Indiana R. Co.*, 157 Ind. 228, 61 N. E. 194 (1901); *Congower v. Equitable Mut. L. & Endow. Ass'n*, 94 Iowa 499, 72 N. W. 416 (1895); *Citizens Bank v. Brigham*, 61 Kan. 727, 60 Pac. 754 (1900); *McCabe v. Swap*, 14 Allen (Mass.) 188 (1867); *American Surety Co. v. Thurber*, 121 N. Y. 655, 23 N. E. 1129 (1890); 5 Chamb., Ev., § 3548, n. 2.

4. *Hardwick v. McClurg*, 16 Colo. App. 354, 65 Pac. 405 (1901); *Enright v. Franklin Pub. Co.*, 24 Misc. 180, 52 N. Y. Supp. 704 (1898); *Turner v. Utah Title Ins. & Trust Co.*, 10 Utah 61, 37 Pac. 91 (1894); 5 Chamb., Ev., § 3548, n. 1.

5. *Geiser Mfg. Co. v. Davis*, 110 Ark. 449, 162 S. W. 59 (1914); *Wheaton Roller Mill Co. v. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854 (1896); *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491 (1890); *Kinney v. McBride*, 88 App. Div. 92, 84 N. Y. Supp. 958 (1903); *McQuaid v. Ross*, 77 Wis. 470, 46 N. W. 892 (1890); 5 Chamb., Ev., § 3548, n. 1.

6. *Vann v. Lunsford*, 91 Ala. 576, 8 So. 719 (1890); *Whitney v. Slayton*, 40 Me. 224 (1855); *Worthington v. Bullitt*, 6 Md. 172 (1854); *Speirs Fish Co. v. Robbins*, 182 Mass. 128, 65 N. E. 25 (1902); *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 20 Mont. 394, 51 Pac. 824 (1898); *American Surety Co. v. Thurber*, *supra*; *Frey v. Heydt*, 116 Pa. 601, 11 Atl. 535 (1887); 5 Chamb., Ev., § 3548, n. 1.

7. *Calhoun v. Lane*, 39 La. Ann. 594, 2 So. 219 (1887); *McTague v. Finnegan*, 54 N. J. Eq. 454, 35 Atl. 542 (1896); *Parker v. Morrill*, 98 N. C. 232, 3 S. E. 511 (1887); *Bonsack Mach. Co. v. Woodrum*, 88 Va. 512, 13 S. E. 994 (1891); 5 Chamb., Ev., § 3548, n. 1.

8. *Diamond v. Tay*, 23 Cal. App. 506, 138 Pac. 933 (1914); *Hildreth v. Hartford M. & R. Tramway Co.*, 73 Conn. 631, 48 Atl. 963 (1901); *Bank of Lavonia v. Bush*, 140 Ga. 594, 79 S. E. 459 (1913); *Zickert v. Times Square Automobile Co.*, 181 Ill. App. 676 (1914); *Corbin v. Milward*, 158 Ky. 308, 164 S. W. 974 (1914); *Williams v. New York Life*

Ins. Co., 122 Md. 141, 89 Atl. 97 (1914); *Ennis v. Wright*, 217 Mass. 40, 104 N. E. 430 (1914); *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418 (1914); *Allen v. Oneida*, 210 N. Y. 496, 104 N. E. 920 (1914); *Miller Bros. v. McCall Co.*, 37 Okl. 634, 133 Pac. 183 (1913); *Pollock v. Cohen*, 32 Ohio St. 514 (1877); 5 Chamb., Ev., § 3548, n. 1.

9. *Neal v. Flint*, 88 Me. 72, 33 Atl. 669 (1895); *Dean v. Washburn & Morn Mfg. Co.*, 177 Mass. 137, 58 N. E. 162 (1900); *Wellman v. O'Connor-Martin Co.*, 178 Mich. 682, 146 N. W. 289 (1914); *Coats v. Bacon*, 77 Miss. 320, 27 So. 621 (1899); *Lillis v. Mertz*, 89 App. Div. 289, 85 N. Y. Supp. 800 (1903); *Monnett v. Monnett*, 46 Ohio 30, 17 N. E. 659 (1888); *Coman v. Wunderlich*, 122 Wis. 138, 99 N. W. 612 (1904); *Stickney v. Hughes*, 12 Wyo. 397, 75 Pac. 945 (1903); 5 Chamb., Ev., § 3548, n. 1.

10. *Poage v. Rollins & Sons*, 24 Colo. App. 537, 135 Pac. 990 (1913); *Gam v. Cordrey*, 4 Pennw. (Del.) 143, 53 Atl. 334 (1902); *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666 (1903); *Pascal v. Slavin*, 144 N. Y. Supp. 354 (1913); *Patterson v. Lamson*, 45 Ohio St. 77, 12 N. E. 531 (1887); *Miller v. Miller*, 17 Or. 423, 21 Pac. 938 (1889); *Clark v. Gregory*, 87 Tex. 189, 27 S. W. 56 (1894); *In re Perkins Estate*, 65 Vt. 313, 26 Atl. 637 (1893); *Martmyer v. Everly*, 73 W. Va. 88, 79 S. E. 1093 (1913); 5 Chamb., Ev., § 3548, n. 1.

11. *Tietjen v. Snead*, 3 Ariz. 195, 24 Pac. 324 (1890); *University Club v. Deakin*, 182 Ill. App. 484 (1914); *Walker Ice Co. v. American Steel & Wire Co.*, 185 Mass. 463, 70 N. E. 937 (1904); *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59 Atl. 382 (1904); *Equitable Life Assur. Soc. of U. S. v. Schum*, 40 Misc. 657, 83 N. Y. Supp. 161 (1903); *Howard v. Thomas*, 12 Ohio St. 201 (1861); *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329 (1895); *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650 (1905); 5 Chamb., Ev., § 3548, n. 1.

a contract,¹² mortgages,¹³ partnership agreements,¹⁴ releases,¹⁵ subscriptions for corporate stock,¹⁶ suretyship, etc.¹⁷ It has been construed by the United States Supreme Court as being in force in Porto Rico and has been held to apply to a mortgage executed there in 1885.¹⁸

§ 1109. *Private Documents.*¹⁹—It is upon the theory of a merger in the writing of all previous negotiations and that the parties have embodied therein their final and complete agreement, that the rule is founded.²⁰ The writing, subject to certain exceptions hereinafter considered, becomes conclusive upon them. To permit the reception of parol evidence would, in the intendment of law, defeat the very object to be accomplished by reducing the agreement to a written form.²¹

Not Conclusive Against Strangers.—If an agreement contains something not intended, or omits some terms which should have been inserted, the parties thereto and their privies are, nevertheless, bound thereby. The rule, however, does not extend further in its operation so as to include strangers to the agree-

12. *Davis v. Fidelity Fire Co.*, 208 Ill. 375, 70 N. E. 359 (1904); *Cook v. Shearman*, 103 Mass. 21 (1869); *Northwestern Fuel Co. v. Bruns*, 1 N. D. 137, 45 N. W. 699 (1890); 5 Chamb., Ev., § 3548, n. 1.

13. *Patterson v. Taylor*, 15 Fla. 336 (1875); *Southwick v. Hapgood*, 10 Cush. (Mass.) 119 (1852); *Gage v. Phillips*, 21 Nev. 150, 26 Pac. 60, 37 Am. St. Rep. 494 (1891); *Bowery Bank v. Hart*, 77 App. Div. 121, 79 N. Y. Supp. 46 (1902); *In re Schihl*, 179 Pa. 308, 36 Atl. 181 (1897); *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. 762 (1897); 5 Chamb., Ev., § 3548, n. 1.

14. *Michigan Sav. Bank v. Butler*, 98 Mich. 381, 57 N. W. 253 (1893); *Spingarn v. Rosenfeld*, 4 Misc. 523, 24 N. Y. Supp. 733 (1893); *Gearing v. Carroll*, 151 Pa. 79, 24 Atl. 1045 (1892); 5 Chamb., Ev., § 3548, n. 1.

15. *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099 (1900); *Radigan v. Johnson*, 174 Mass. 68, 54 N. E. 358 (1899); *Moore v. Missouri, etc., R. Co.*, 30 Tex. Civ. App. 266, 69 S. W. 997 (1902); 5 Chamb., Ev., § 3548, n. 1.

16. *Atchison, etc., R. Co. v. Truskett*, 67 Kan. 26, 72 Pac. 562 (1903); *Hanrahan v. National Bldg., etc., Ass'n*, 66 N. J. L. 80, 48 Atl. 517 (1901); *Davis v. Shafer*, 50 Fed. 764 (1892); 5 Chamb., Ev., § 3548, n. 1.

17. *Indiana Bicycle Co. v. Tuttle*, 74 Conn. 489, 51 Atl. 538 (1902); *McKee v. Needles*, 123 Iowa 195, 99 N. W. 618 (1904); *Burns v. Limerick*, 178 Mo. App. 145, 185 S. W. 1166 (1914); *Sherman v. Pedrick*, 35 App. Div. 15, 54 N. Y. Supp. 467 (1898); *Deming v. Board*

of Trustees, etc., 31 Ohio St. 41 (1876); *Di Iorio v. Di Brasio*, 21 R. I. 203, 42 Atl. 1144 (1899); *Traders Nat. Bank v. Washington Water Power Co.*, 22 Wash. 467, 61 Pac. 152 (1900); 5 Chamb., Ev., § 3548, n. 1.

18. *Veve v. Sacher*, 226 U. S. 234, 33 S. Ct. 36, 59 L. ed. 673 (1912).

19. 5 Chamberlayne, Evidence, §§ 3549-3552.

20. *Channel Commercial Co. v. Hourihan*, 20 Cal. App. 647, 129 Pac. 947 (1913); *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319 (1904); *Tjams v. Provident Sav. L. Assur. Soc.*, 185 Mo. 466, 84 S. W. 51 (1904); *Bradley & Co. v. Basta*, 71 Neb. 169, 98 N. W. 697 (1904); *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233 (1880); *King v. Hudson River Realty Co.*, 210 N. Y. 467, 104 N. E. 926 (1914); *Ripy & Son v. Art Wall Paper Mills*, 41 Okl. 20, 136 Pac. 1080; *Cressy v. International Harvester Co.*, 206 Fed. 29, 124 C. C. A. 163 (1913); 5 Chamb., Ev., § 3549, n. 1.

21. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 113 Ga. 1142, 39 S. E. 471 (1901); *Henry School Tp. v. Meredith*, 32 Ind. App. 607, 70 N. E. 393 (1903); *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409 (1902); *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147 (1898); *Uihlein v. Matthews*, 172 N. Y. 154, 64 N. E. 792 (1902); *Tuttle v. Burgett*, 53 Ohio St. 498, 42 N. E. 427 (1895); *Harris v. Sharpless*, 15 Pa. Super. Ct. 643 (1901); *Vogt v. Shienbeck*, 122 Wis. 491, 100 N. W. 820 (1904); 5 Chamb., Ev., § 3549, n. 2.

ment.²² In their case the parol evidence rule does not apply, but they will be permitted to go outside of the writing and show the exact transaction.

Consideration; When Evidence Admissible to Show.— Parties are not ordinarily concluded by the consideration stated in a written instrument but will be permitted to show what in fact was the true consideration.²³ It frequently occurs, more often in assignments, contracts of sale and deeds, that the actual consideration is not given, but the instrument recites merely the payment of some nominal sum. In such case a recital of payment is regarded as merely in the nature of a receipt which, like other receipts, is not subject to the operation of the parol evidence rule. In all such cases the actual consideration may be shown. Where, however, the statement of the consideration does not consist of a mere recital of something paid or to be paid, but sets forth mutual obligations in detail, which in fact constitute the terms of a contract, the exclusion of extrinsic evidence tending to vary or contradict it is justified.²⁴

Receipts.— A receipt, in so far as it does not amount to a contract and is not an embodiment of any agreement between the parties, but is simply an acknowledgment of payment, is regarded as merely a *prima facie* admission and as not within the meaning of the parol evidence rule.²⁵ Nor is the situa-

22. Knudson v. Wacker & Birk Brewing & Malting Co., 182 Ill. App. 296 (1914); Williams v. National Cash Register Co., 157 Ky. 836, 164 S. W. 112 (1914); Walker Ice Co. v. American Steel & Wire Co., *supra*; Pfeifer v. National Live Stove Ins. Co., 62 Minn. 536, 64 N. W. 1018 (1895); Barro v. Saitta, 145 N. Y. Supp. 849 (1914); Folinsbee v. Sawyer, 157 N. Y. 196, 51 N. E. 994 (1898); Clapp v. Banking Co., 50 Ohio St. 528, 35 N. E. 308 (1893); Selser's Estate, 141 Pa. 529, 21 Atl. 777 (1891); Watson v. Hecla Min. Co., 79 Wash. 383, 140 Pac. 317 (1914); 5 Chamb., Ev., § 3550, n. 1.

Rule not applicable to third parties.— Parol evidence may be used to show that a bill of sale was given to the vendee simply to hold as agent where the property is attached by a third party on a claim against the apparent vendee. The parol evidence rule does not apply to third parties. Ransom v. Wickstrom, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916 A 588 and note (1915).

23. Seacord v. Seacord, 160 Ill. App. 328 (1912); Wabash R. Co. v. Grate, 53 Ind. App. 583, 102 N. E. 155 (1913); Shoenhair v. Merrill, 165 Iowa 384, 145 N. W. 919 (1914); Hill v. Whidden, 158 Mass. 267, 33 N. E. 526 (1893); Kriling v. Cramer, 152 Mo. App. 431, 133 S. W. 655 (1911); Franklin State Bank v. Chaney, 94 Neb. 1, 142 N. W. 537 (1913);

Loftus v. Benjamin, 122 N. Y. Supp. 275 (1910); Hodges v. Wilson, 165 N. C. 323, 81 S. E. 340 (1914); Press Pub. Co. v. Reading News Agency, 44 Pa. Super. Ct. 428 (1911); Martin v. Hall, 115 Va. 358, 79 S. E. 320 (1913); 5 Chamb., Ev., § 3551, n. 1. Oral evidence is admissible to show the actual consideration for a deed even though the effect may be to convert the instrument from one of bargain and sale to one of pure gift. Harman v. Fisher, 90 Neb. 688, 134 N. W. 246, 39 L. R. A. (N. S.) 157 (1912). Parol to show consideration for a written instrument. See note, Bender, ed., 26 N. Y. 378. Propriety of parol evidence as to consideration, sealed and unsealed instruments. See note, Bender, ed., 70 N. Y. 63.

24. Wilford v. Bliss, 174 Ill. App. 28 (1913); Wabash R. Co. v. Grate, *supra*; Dodge v. Cutrer, 100 Miss. 647, 58 So. 208 (1912); Gill v. Ruggles, 97 S. C. 278, 81 S. E. 519 (1914); 5 Chamb., Ev., § 3551, n. 2.

25. Bray v. Arnold, 14 Ga. App. 221, 80 S. E. 669 (1914); Barthwell v. Hermanson, 158 Iowa 329, 138 N. W. 1108 (1913); Huf-facher's Ex'r v. Michigan Mut. L. Ins. Co., 154 Ky. 56, 156 S. W. 1038 (1913); MacDonald v. Dana, 154 Mass. 152, 27 N. E. 993 (1891); Paddock v. Hatch, 169 Mich. 95, 134 N. W. 990 (1912); Manse v. Hossington, 205 N. Y. 33, 98 N. E. 203 (1912); Komp v. Ray-

tion altered by the fact that it purports to be in full of all demands.²⁶ A receipt may, however, be in the nature of a contract, in which case, the rule of exclusion intervenes and forbids, the same as in other contractual writings, the admission of any extrinsic evidence which tends to contradict or vary it.²⁷ Thus, where two persons close an accord and satisfaction, by a contractual receipt in writing,²⁸ parol evidence will not be received which tends to have this effect.

§ 1110. **Exceptions; Collateral Agreements; Instrument Incomplete.**²⁹—Evidence of a prior or contemporaneous parol agreement or understanding is frequently received, where it is consistent with the writing in question and it is apparent that the instrument was not intended as a complete embodiment of the undertaking.³⁰ If it was the intention of the parties that only a part of the

mond, 175 N. Y. 102, 67 N. E. 113 (1903); Seeman v. Ohio Coal Min. Co., 22 Ohio Cir. Ct. 311 (1901); Spittall v. Allee, 55 Pa. Super. Ct. 636 (1914); Gregory v. Huslander, 227 Pa. 607, 76 Atl. 422 (1910); Seeger v. Manitowoc Steam Works, 120 Wis. 11, 97 N. W. 485 (1903); 5 Chamb., Ev., § 3552, n. 1.

26. Walrath v. Norton, 10 Ill. 437 (1878); Clark v. Marbourg, 33 Kan. 471, 6 Pac. 548 (1885); Carpenter v. Jamison, 75 Mo. 285 (1882); Meislahn v. Irving Nat. Bank, 62 App. Div. 231, 70 N. Y. Supp. 988 (1901); Trymby v. Andress, 175 Pa. 6, 34 Atl. 347 (1896); Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 9 L. ed. 860, 9 S. Ct. 113 (1891); 5 Chamb., Ev., § 3552, n. 2.

27. Loeb v. Flannery, 148 Ill. App. 471 (1909); Stevens v. Wiley, 165 Mass. 402, 23 N. E. 177 (1896); Sloma v. National Exp. Co., 134 Mich. 16, 95 N. W. 999 (1890); Meyer v. Lathrop, 73 N. Y. 315 (1878); Seeman v. Ohio Coal Min. Co., *supra*; Milos v. Covacevich, 40 Or. 239, 66 Pac. 914 (1901); Wood v. Donahue, 94 Pa. 128 (1880); 5 Chamb., Ev., § 3552, n. 3.

28. Richtman v. Watson, 150 Wis. 385, 136 N. W. 797 (1912).

29. 5 Chamberlayne, Evidence, §§ 3553, 3554.

30. Webber v. Smith, 24 Cal. App. 51, 140 Pac. 37 (1914); Carter v. Griffin, 114 Ga. 321, 40 S. E. 290 (1901); Henry School Tp. v. Meredith, *supra*; Sutton v. Weber, 127 Iowa 361, 101 N. W. 775 (1904); Ayer v. Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754 (1888); Gould v. Boston Excelsior Co., 91 Me. 214, 39 Atl. 554, 64 Am. St. Rep. 221 (1898); Chamberlain v. Lesley, 39 Fla. 452, 22 So. 736 (1897); Davis v. Tandy, 107 Mo. App. 437, 81 S. W.

457 (1904); Rochester Folding Box Co. v. Browne, 55 App. Div. 444, 66 N. Y. Supp. 867 (1900), *aff'd* 179 N. Y. 542, 71 N. E. 1139 (1904); Alexander v. Righter, 240 Pa. 22, 87 Atl. 427 (1913); Seattle Transfer & Taxicab Co. v. Kinney, 74 Wash. 179, 132 Pac. 1013 (1913); Rymer v. South Penn Oil Co., 54 W. Va. 530, 46 S. E. 559 (1904); 5 Chamb., Ev., § 3553, n. 1. See note, Bender, ed., 163 N. Y. 312. Even where the deed is silent as to the acreage and price per acre this may be shown by parol evidence. Caughron v. Stinespring, 132 Tenn. 636, 179 S. W. 152, L. R. A. 1916 C 403 (1915).

When contract complete.—Where an order for machinery has every essential of a contract,—parties, consideration, time subject-matter, and mutual assent parol evidence is not admissible to show that it is a mere skeleton. Fairbanks Steam Shovel Co. v. Holt, 79 Wash. 361, 140 Pac. 394, L. R. A. 1915 B 477 (1914). Acting under a letter containing an offer to perform service is a sufficient acceptance of the contract to make parol evidence of it inadmissible. Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847 (1912). Where the parties make an oral contract and one party makes a written memorandum of his understanding of it this does not reduce the contract to writing as far as he is concerned so that he cannot testify concerning it where this version of the contract is never accepted. Shubert v. Rosenberger, 123 C. C. A. 256, 204 Fed. 934, 45 L. R. A. (N. S.) 1062 (1913).

Collateral agreement.—A written agreement for sale of a dentist's business can be supplemented by evidence of an oral agree-

terms should be embraced in the writing, then the instrument is not one which is brought within the protection of the rule³¹ and, consequently, evidence of the remainder of the agreement, consistent with the part which has been reduced to writing, is in no way a contradiction, varying or altering of the instrument. Evidence to supplement the writing and show the entire agreement will be received, even though the evidence may be in reference to a different subject than that contained in the writing,³² unless the omission is one which will be supplied by law, in which case, parol evidence has been rejected.³³ Similarly, in the case of an agreement which is expressed in two or more writings, evidence will be received to connect them, for the purpose of showing the completed and full undertaking.³⁴ In all cases, however, where such evidence is offered, the court will receive in evidence only such terms as are consistent with the writing,³⁵ and where it satisfactorily appears that the instrument was not intended as a complete expression of the agreement.³⁶ Thus, evidence has been rejected when offered for the purpose of showing, where an instrument was valid and enforceable upon its face, that there was an agreement that it should become void on the happening of a certain event.³⁷ To permit such evidence would render written instruments, relied upon as the embodiment of the undertaking entered into, as of little value.

ment that the seller should not practice in that town for five years as this is a distinct agreement. *Locke v. Murdoch*, 20 N. M. 522, 151 Pac. 298, L. R. A 1917 B 267 (1915). Contemporaneous oral contracts and written contracts. See note, *Bender*, ed., 172 N. Y. 292, 304.

31. *Washburn-Crosby Milling Co. v. Brown*, 56 Ind. App. 104, 104 N. E. 997 (1914); *Gebber v. Western Nat. Bank*, 53 Pa. Super. Ct. 153 (1913); *Wilson v. Scarborough*, 163 N. C. 390, 79 S. E. 811 (1913); see also cases in last preceding note.

32. *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436, 17 L. R. A. 270 (1892); *Church of Holy Communion v. Paterson Extension R. Co.*, 63 N. J. L. 470, 43 Atl. 696 (1899); *Johnson v. Kindred State Bank*, 12 N. D. 336, 96 N. W. 588 (1903); 5 Chamb., Ev., § 3553, n. 3.

33. *Driver v. Ford*, 90 Ill. 595 (1878); *Warren v. Wheeler & Metc.* (Mass.) 97 (1844); *Blake Mfg. Co. v. Jaeger*, 81 Mo. App. 239 (1899); *Boehm v. Lies*, 60 N. Y. Super. Ct. 436, 18 N. Y. Supp. 577 (1892); 5 Chamb., Ev., § 3553, n. 6.

34. *O'Reilly v. Burns*, 14 Colo. 7, 22 Pac. 1090 (1890); *Hunt v. Frost*, 4 Cush. (Mass.) 54 (1849); *Hanford v. Rogers*, 11 Barb. (N. Y.) 18 (1851); *White v. Brokaw*, 14 Ohio

St. 339 (1863); *St. Louis, etc., R. Co. v. Beidler*, 45 Ark. 17 (1885); 5 Chamb., Ev., § 3553, n. 5.

35. *Halliday v. Mulligan*, 113 Ill. App. 177 (1903); *Van Fossan v. Gibbs*, 91 Kan. 866, 139 Pac. 174 (1914); *Kelly v. Thompson*, 175 Mass. 427, 56 N. E. 713 (1900); *Jenkins v. Springfield Reduction & Chem. Co.*, 169 Mo. App. 534, 154 S. W. 832 (1913); *Rochester Folding Box Co. v. Browne*, *supra*; *Seitz v. Brewers' Refrig. Mach. Co.*, 141 U. S. 510, 35 L. ed. 837, 12 S. Ct. 46 (1891); 5 Chamb., Ev., § 3553, n. 6.

36. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485 (1888); *Hand v. Ryan Drug Co.*, 63 Minn. 539, 65 N. W. 1081 (1896); *Case v. Phoenix Bridge Co.*, 134 N. Y. 78, 31 N. E. 254 (1892); 5 Chamb., Ev., § 3553, n. 7.

37. *Prouty v. Adams*, 141 Cal. 304, 74 Pac. 845 (1903); *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213 (1898); *McCormick Harv. Mach. Co. v. Market*, 107 Iowa 340, 78 N. W. 33 (1899); *Torpey v. Tibo*, 184 Mass. 307, 68 N. E. 223 (1903); *Pratt-Whitney Co. v. American Pneumatic Tool Co.*, 50 App. Div. 369, 63 N. Y. Supp. 1062 (1900); *Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048 (1913); 5 Chamb., Ev., § 3553, n. 8.

Deed may be shown to be a mortgage.—By

§ 1111. **Delivery Incomplete or Conditional.**³⁸—It is not a violation of the parol evidence rule to admit evidence showing that the instrument never had any binding force owing to a want of final delivery,³⁹ as where it was delivered to become binding upon the happening of some future event, or was delivered in escrow.⁴⁰ For this purpose, the admission of evidence will not be restricted to such agreements as may have been made at the time of delivery, but evidence of prior conversations may be received.⁴¹ Proof of the fact that there was never a complete and final delivery of the instrument is an establishment of the fact that the writing, though ostensibly binding, was never legally of any force or effect.⁴² In case, however, of the delivery of a deed to the grantee either by the grantor or by another with his knowledge and approval,

the vast preponderance of authority a deed absolute on its face may be shown to be a mortgage by parol testimony. This principle has been advanced by slow degrees and halting steps. In some of the earlier cases it was said to be necessary to allege that the right of redemption was omitted by fraud or mistake. But this position was found to unduly shackle a principle necessary to be maintained that fraud might not prevail or confidence be deceived and betrayed. *Hobbs v. Rowland*, 136 Ky. 197, 123 S. W. 1185, L. R. A. 1916 B 1 (1909). But the evidence must be clear and convincing. *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21, L. R. A. 1916 B 4 (1911). Right to show deed absolute was intended as a mortgage. See note, *Bender, ed.*, 46 N. Y. 605.

Trust.—Parol evidence is inadmissible to show that a deed absolute on its face to a church was really given in trust for a certain purpose. *Lafayette Street Church v. Norton*, 202 N. Y. 379, 95 N. E. 819, 39 L. R. A. (N. S.) 906 (1911). An absolute conveyance may not be held to have been in trust. See note, *Bender, ed.*, 8 N. Y. 415.

38. 5 Chamberlayne, Evidence, § 3554.

39. *Gray v. Blackwood*, 112 Ark. 332, 165 S. W. 958 (1914); *Norman v. McCarthy*, 56 Colo. 290, 138 Pac. 28 (1914).

40. *Osby v. Reynolds*, 260 Ill. 576, 103 N. E. 556 (1914); *Cedar Rapids Nat. Bank v. Carlson*, 156 Iowa 343, 136 N. W. 659 (1912); *Bartholomew v. Fell*, 92 Kan. 64, 139 Pac. 1016 (1914); *Elastic Tip Co. v. Graham*, 185 Mass. 597, 71 N. E. 117 (1904); *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057 (1905); *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105 (1911); *Brown v. Willis*, 13 Ohio 26 (1844); *Gamble v. Riley*, 39 Okl. 363, 135 Pac. 390 (1913); *Burke v. Dulaney*, 153

U. S. 228, 14 S. Ct. 816, 38 L. ed. 698 (1894); 5 Chamb., Ev., § 3554, n. 2. It is competent to show that a written order for goods was given on an oral condition that the goods were to be sent within a certain period. *Bowser v. Fountain*, 128 Minn. 198, 150 N. W. 795, L. R. A. 1916 B 1036 (1915). A subscription contract which contains a condition precedent may be shown to be subject to another condition that it shall not go into effect until the plaintiff should procure other subscribers who should do certain things as it may always be shown that a contract has not become effective. *Rutherford v. Holbert*, 42 Okla. 735, 142 Pac. 1090, L. R. A. 1915 B 221 (1914). Parol evidence is admissible to show that a written instrument was not signed or delivered as a concluded contract but was delivered to be held pending the happening of a contingency or the performance of some condition and that subsequently such condition was not performed and therefore that the written instrument did not actually become effective as a completed contract. *American Sales Book Co. v. Whitaker*, 100 Ark. 360, 140 S. W. 132, 37 L. R. A. (N. S.) 91 (1911).

Sham.—Parol evidence is competent to show that a written contract is only a mere sham signed for its effect on a third party and was never intended by the signers to be operative. This evidence does not vary the writing but is offered to show a collateral circumstance which would control its operation. *Coffman v. Malone*, 98 Neb. 819, 154 N. W. 726, L. R. A. 1917 B 258 (1915).

41. *Wilson v. Powers*, 131 Mass. 539 (1881); 5 Chamb., Ev., § 3554, n. 3.

42. *Sweet v. Stevens*, 7 R. I. 375 (1863); 5 Chamb., Ev., § 3554, n. 4.

the delivery is regarded as absolute and no extrinsic evidence will be received to show that it was in any way qualified or conditional.⁴³ So, where a party executes and delivers an instrument, such as a note for instance, and receives a valuable consideration therefor, he will not be permitted to shown an agreement to the effect that payment should never be enforced or demanded.⁴⁴

§ 1112. **Duress; Fraud or Fraudulent Representations.**⁴⁵—Parol evidence of the facts and circumstances attending the execution of an instrument is properly admissible where it is alleged, by a party thereto, that he signed it under duress.⁴⁶ Such evidence is not a violation of the parol evidence rule. Where one of the parties has, by any fraud or misrepresentation on his part, induced another to enter into an agreement, the innocent party is not concluded by the language used but will be permitted to introduce extrinsic evidence of any prior or contemporaneous negotiations, acts or the like,⁴⁷ tending to show the

43. *Moury v. Heney*, 86 Cal. 471, 25 Pac. 17 (1890); *Omaha & Grant Sm. & R. Co. v. Taber*, 13 Colo. 41, 21 Pac. 925 (1889); *Chicago Pressed Steel Co. v. Clark*, 87 Ill. App. 658 (1899); *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98 (1849); *Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. 925 (1895); 5 Chamb., Ev., § 3554, n. 5. In an action of covenant on a warranty in a deed parol evidence is not admissible to prove that at the time the deed was delivered the grantee agreed to take subject to an outstanding lease, *Mandler v. Starks*, 35 Okla. 809, 131 Pac. 912, L. R. A. 1916 E 213 (1913), or to pay outstanding assessments; *Williams v. Johnson*, 177 Mich. 500, 143 N. W. 627, L. R. A. 1916 E 217 (1913); *Hardage v. Durrett*, 110 Ark. 63, 160 S. W. 883m L. R. A. 1916 E 211 (1913); as such evidence would contradict the deed itself.

44. *Western Carolina Bank v. Moore*, 138 N. C. 529, 51 S. C. 79 (1905). The defence is incompetent that a note was to be paid only on a contingency even in an action by the payee. *Colvin v. Goff*, 82 Or. 314, 161 Pac. 568, L. R. A. 1917 C 300 (1916). Evidence may be offered of a contemporaneous parol agreement entered into at the time certain rent notes were signed that they were to be binding only so long as possession continued. This shows a separate parol agreement which was to be a part of the contract. *Martin v. Mask*, 158 N. C. 436, 74 S. E. 343, 41 L. R. A. (N. S.) 641 (1912).

45. 5 Chamberlayne, Evidence, §§ 3555, 3556.

46. *Hick v. Thompson*, 90 Cal. 289, 27 Pac.

208 (1891); *Linkswiler v. Hoffman*, 109 La. 948, 34 So. 34 (1903); *Mills v. Young*, 23 Wend. (N. Y.) 314 (1840); *Heeter v. Glasgow*, 79 Pa. 79 (1875); 5 Chamb., Ev., § 3555, n. 1.

47. *Swayne v. Felici*, 84 Conn. 147, 79 Atl. 62 (1911); *Pallister v. Camenisch*, 21 Colo. App. 79, 121 Pac. 958 (1912); *Briggs v. Reynolds*, 176 Ill. App. 420 (1913); *Moore v. Harmon*, 142 Ind. 555, 41 N. E. 599 (1895); *Doylestown Agricultural Co. v. Brackett, Shaw & Lunt Co.*, 109 Me. 301, 84 Atl. 146 (1912); *Trambly v. Ricard*, 130 Mass. 259 (1881); *Blanchard v. Ridgeway*, 179 Mich. 491, 146 N. W. 139 (1914); *State v. Cass*, 52 N. J. L. 77, 18 Atl. 972 (1889); *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540 (1889); *Fairbanks v. Simpson* (Tex. Civ. App.) 28 S. W. 128 (1894); 5 Chamb., Ev., § 3556, n. 1. Application of rule stated in text to.

Contracts: *Jones v. Grieve*, 15 Cal. App. 561, 115 Pac. 333 (1911); *Provident Sav. L. Assur. Soc. v. Shearer*, 151 Ky. 298, 151 S. W. 938 (1912); *Meland v. Youngberg*, 124 Minn. 446, 145 N. W. 167 (1914); *State v. Lovan*, 245 Mo. 516, 151 S. W. 141 (1912); *Mayer v. Dean*, *supra*; *Atherholt v. Hughes*, 209 Pa. 156, 58 Atl. 269 (1904); *Tevis v. Ryan*, 233 U. S. 273, 34 S. Ct. 481, 58 L. ed. 957 (1914); 5 Chamb., Ev., § 3556, n. 1.

Deeds: *McCormick v. Smith*, 127 Ind. 230, 26 N. E. 825 (1890); *Eckler v. Alden*, 125 Mich. 215, 84 N. W. 141 (1900); *Van Alstyne v. Smith*, 82 Hun 382, 31 N. Y. Supp. 277 (1894); *Cutler v. Roanoke, R. & L. Co.*, 128

exercise of fraud or misrepresentation by the other party, in the procuring of his signature to the writing. Such evidence, although it may contradict the terms of the instrument, is in all cases admissible and will be received, not only as a defense to an action on the undertaking, but in a proceeding where the active aid of the tribunal is invoked.⁴⁸

§ 1113. Illegality.— Instruments executed for an illegal object will not be enforced by legal tribunals. The law recognizes no rights, as created by such writings, and will, in all cases, permit proof of their illegality.⁴⁹ Evidence of any prior conversations, negotiations or the like will be received for the purpose of establishing such fact and its admission in no manner can be regarded as infringing upon the parol evidence rule. Thus where it is asserted that the agreement is tainted with usury evidence is admitted tending to show its invalidity on this ground.⁵⁰ But evidence will not be received of a parol contemporaneous usurious agreement, where the usury is not contained in the writing itself.⁵¹ Nor will a stranger to the writing be permitted to avoid it on this ground.⁵²

§ 1114. Incapacity.— It is essential to the validity of an instrument that a person, by whom it is executed, shall be possessed of the requisite legal capacity, otherwise the courts will not enforce it against him. Therefore it may always be shown, in a proceeding to enforce a writing, that the defendant was incapacitated at the time he signed it.⁵³ Thus, in the case of a writing executed by a woman, it may be shown that she was, owing to her being married at the time, incapacitated to act in the particular matter.⁵⁴ Similarly, a party has

N. C. 477, 39 S. E. 30 (1901); *Cover v. Mannaway*, 115 Pa. 330, 8 Atl. 393 (1886); 5 *Chamb., Ev.*, § 3556, n. 1.

48. *McLean v. Clark*, 47 Ga. 24 (1872); *Turner v. Turner*, 44 Mo. 535 (1869); *Barnard v. Roane Iron Co.*, 85 Tenn. 139, 2 S. W. 21 (1886); 5 *Chamb., Ev.*, § 3556, n. 2. Right to prove alteration of contract by parol. See note, *Bender*, ed., 163 N. Y. 312. The same rule relative to admissibility of parol evidence with relation to written contracts in equity as at law except in case of fraud. See note, *Bender*, ed., 12 N. Y. 565.

49. *Smith v. Crockett Co.*, 85 Conn. 282, 82 Atl. 569 (1912); *McNamara v. Georgia Cotton Co.*, 10 Ga. App. 669, 73 S. E. 1092 (1912); *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616 (1888); *Clemens Electrical Mfg. Co. v. Walton*, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820 (1890); *Wheeler v. Metropolitan Stock Exch.*, 72 N. H. 315, 56 Atl. 756 (1903); *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586 (1866); 5 *Chamb., Ev.*, § 3557, n. 1.

Parol evidence is always admissible to show that a contract apparently valid on its face is really void as for an illegal purpose. *Manufacturers' etc., Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847 (1912).

50. *Roe v. Kiser*, 62 Ark. 92, 34 S. W. 534 (1896); *McGuire v. Campbell*, 58 Ill. App. 188 (1894); *Lewis v. Willoughby*, 43 Minn. 307, 45 N. W. 439 (1890); *Mudgett v. Goler*, 18 Hun (N. Y.) 302 (1879); *Jackson v. Kirby*, 37 Vt. 448 (1865); 5 *Chamb., Ev.*, § 3557, n. 2.

51. *Allen v. Turnham*, 83 Ala. 323, 3 So. 854 (1887).

52. *Reading v. Weston*, 7 Conn. 409 (1829).

53. *Leblanc v. Bouchereau*, 16 La. Ann. 11 (1861).

54. *Waters v. Pearson*, 39 App. D. C. 10 (1913); *Lackey v. Boruff*, 152 Ind. 371, 53 N. E. 412 (1898); *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804 (1892); *Linderman v. Farquharson*, 101 N. Y. 434, 5 N. E. 67 (1886);

been permitted to show his infancy,⁵⁵ or that he was mentally incompetent,⁵⁶ or incapacitated by reason of intoxication,⁵⁷ at the time he executed the writing. Such evidence is in no way objectionable to the parol evidence rule, as it simply tends to show that the writing had no legal inception.

§ 1115. Interpretation and Explanation; Evidence Admissible for Purposes Of. — Parol evidence is properly admitted, as an aid in the interpretation of a writing or for the purpose of explanation.⁵⁸ This rule has been applied by the courts to contracts,⁵⁹ contracts of sale,⁶⁰ deeds,⁶¹ letters constituting a contract,⁶² and mortgages.⁶³ If the intention of the parties is obscure, it is the duty of the tribunal to receive parol evidence tending to show their actual intention in the execution of the instrument.⁶⁴

Bradley Fertilizer Co. v. Caswell, 65 Vt. 231, 26 Atl. 950 (1893); 5 Chamb., Ev., § 3558, n. 2.

55. *Buzzell v. Bennett*, 2 Cal. 101 (1852); *Des Moines Ins. Co. v. McIntire*, 99 Iowa 50, 68 N. W. 565 (1896); 5 Chamb., Ev., § 3558, n. 3.

56. *Wiley v. Ewalt*, 66 Ill. 26 (1872); *Mitchell v. Kingman*, 5 Pick. (Mass.) 431 (1827); *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040 (1896); 5 Chamb., Ev., § 3558, n. 4.

57. *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567 (1895); *Phelan v. Gardner*, 43 Cal. 306 (1872); *Burroughs v. Richman*, 13 N. J. L. 233, 23 Am. Dec. 717 (1832); 5 Chamb., Ev., § 3558, n. 5.

58. *Tyssowski v. Smith Co.*, 23 App. D. C. 403 (1911); *Alexander v. Capitol Lumber Co.*, 181 Ind. 527, 105 N. E. 45 (1914); *White v. Shippee*, 216 Mass. 23, 102 N. E. 948 (1913); *Germain v. Central Lumber Co.*, 116 Mich. 245, 74 N. W. 644 (1898); *Tilden v. Tilden*, 8 App. Div. 99, 40 N. Y. Supp. 403 (1896); *Masters v. Freeman*, 17 Ohio St. 323 (1867); *Cohee v. Turner & Wiggins*, 37 Okl. 778, 132 Pac. 1082 (1913); *Easton Power Co. v. Sterlingworth R. S. Co.*, 22 Pa. Super. Ct. 538 (1903); *Miller v. Spring Garden Ins. Co.*, 202 Fed. 442, 120 C. C. A. 548 (1913); 5 Chamb., Ev., § 3559, n. 1.

59. *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896 (1904); *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644 (1898); *Allen v. Armstrong*, 58 App. Div. 427, 68 N. Y. Supp. 1079 (1901); *Proctor v. Snodgrass*, 5 Ohio C. C. 547 (1891); *Donthett v. Ft. Pitt Gas Co.*, 202 Pa. 416, 51 Atl. 981 (1902); *Moore v. Waco Bldg. Ass'n*, 9 Tex. Civ. App. 404, 28 S. W. 1093; 5 Chamb., Ev., § 3559, n. 1.

60. *Brown v. Doane*, 87 Ga. 32, 12 S. E. 179 (1890); *Coulter Mfg. Co. v. Dodge Grocery Co.*, 97 Iowa 616, 66 N. W. 875 (1896); *Laclede Const. Co. v. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76 (1904); *Emmett v. Penoyer*, 151 N. Y. 564, 45 N. E. 1041 (1896); *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 93 N. W. 459 (1903); 5 Chamb., Ev., § 3559, n. 1.

61. *Mason v. Merrill*, 129 Ill. 503, 21 N. E. 799 (1889); *Scaplen v. Bland*, 187 Mass. 73, 72 N. E. 346 (1904); *Freeman v. Moffitt*, 119 Mo. 280, 25 S. W. 87 (1893); *Perrior v. Peck*, 167 N. Y. 582, 60 N. E. 1118 (1901); 5 Chamb., Ev., § 3559, n. 1.

62. *Gould v. Magnolia Metal Co.*, *supra*; *Butler v. Iron Cliffs Co.*, 96 Mich. 70, 55 N. W. 670 (1893); *Barney v. Forbes*, 118 N. Y. 580, 23 N. E. 890 (1890); *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253 (1891); 5 Chamb., Ev., § 3559, n. 1.

63. *Wise v. Collins*, 121 Cal. 147, 53 Pac. 640 (1898); *Finks v. Hathaway*, 64 Mo. App. 186 (1895); *Eager v. Crawford*, 76 N. Y. 97 (1879); 5 Chamb., Ev., § 3559, n. 1.

64. *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867 (1896); *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 72 N. E. 345 (1904); *Bowery Bank of New York v. Hart*, 37 Misc. 412, 75 N. Y. Supp. 781 (1902); *Thomas Mach. Co. v. Voelker*, 23 R. I. 441, 50 Atl. 838 (1901); 5 Chamb., Ev., § 3559, n. 2. Parol evidence to aid construction of written contract. See note, *Bender*, ed., 193 N. Y. 379. Acts, circumstances and conversations are admissible on construction of contract. See note, *Bender*, ed., 49 N. Y. 391, 49 N. Y. 464. Right to give parol evidence on construction of written contract. See note, *Bender*, ed., 47 N. Y. 221. Admissibility of

What Evidence is Admissible.—In all cases the court will endeavor to ascertain, and give effect to, the true meaning of the instrument and evidence of prior negotiations and conversations between the parties may be received,⁶⁵ their purpose in executing the instrument may in some cases be shown⁶⁶ and resort may also be had to the circumstances surrounding the transaction, that the court may more intelligently construe the undertaking and, if possible, give it effect according to the real intention, which impelled the parties to its execution.⁶⁷ Thus in the case of a latent ambiguity the court will receive evidence of this character.⁶⁸ In all cases, however, the presiding judge will be guided by the principles of the substantive law, which decrees that the instrument is to be regarded as the final embodiment of the agreement of the parties and will be careful to exclude all evidence which, offered under the guise of an aid in the interpretation or explanation of a writing, in reality, tends to contradict, vary or alter an instrument which is clearly expressed.⁶⁹

parol evidence to extend writing. See note, Bender, ed., 114 N. Y. 200. Parol evidence to aid or vary writing. See note, Bender, ed., 98 N. Y. 290. Admissibility of oral evidence to supply or vary writing. See note, Bender, ed., 78 N. Y. 85. When parol evidence is permissible even though contract is in writing. See note, Bender, ed., 127 N. Y. 144.

Ambiguities.—Parol evidence to solve ambiguity. See note, Bender, ed., 143 N. Y. 626. Explaining ambiguities in written contract by parol. See note, Bender, ed., 144 N. Y. 424.

65. Gould v. Magnolia Metal Co., *supra*; Proctor v. Hartigan, 139 Mass. 554, 2 N. E. 99 (1885); New York House Wrecking Co. v. O'Rourke, 92 App. Div. 217, 86 N. Y. Supp. 1116 (1904); Colvin v. McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380 (1902); 5 Chamb., Ev., § 3560, n. 1.

66. Dreyfuss v. Union Nat. Bank, 164 Ill. 83, 45 N. E. 408 (1896); Crosby v. Delaware & H. Canal Co., 128 N. Y. 641, 28 N. E. 363 (1891); First Nat. Bank v. Central Chandelier Co., 17 Ohio C. C. 443 (1898); Sheaffer v. Sensenig, 182 Pa. 634, 38 Atl. 473 (1897); 5 Chamb., Ev., § 3560, n. 2.

67. Hardwick v. McClurg, 16 Colo. App. 354, 65 Pac. 405 (1901); Gage v. Cameron, 212 Ill. 146, 72 N. E. 204 (1904); Jenkins v. Kirtley, 70 Kan. 801, 79 Pac. 671 (1905); Alvord v. Cook, 174 Mass. 120, 54 N. E. 490 (1899); Garvin Mach. Co. v. Hammond Typewriter Co., 12 App. Div. 294, 42 N. Y. Supp. 564 (1896); Masters v. Freeman, *supra*; Douthett v. Ft. Pitt Gas Co., *supra*; 5 Chamb., Ev., § 3560, n. 3. Application of rule stated

in text to deeds: Baker v. Clark, 128 Cal. 181, 60 Pac. 677 (1900); White v. Rice, 112 Mich. 403, 70 N. W. 1024 (1897); Kinney v. Hooker, 65 Vt. 333, 26 Atl. 690 (1892); 5 Chamb., Ev., § 3560, n. 3.

68. Tumlin v. Perry, 108 Ga. 520, 34 S. E. 171 (1899); Thomas v. Troxel, 26 Ind. App. 322, 59 N. E. 683 (1900); 5 Chamb., Ev., § 3560, n. 4.

69. Eberhardt v. Federal Ins. Co., 14 Ga. App. 340, 80 S. E. 856 (1914); Alvord v. Cook, *supra*; State v. Board of Com'rs of Cass County, 60 Neb. 566, 83 N. W. 733 (1900); House v. Walch, 144 N. Y. 418, 39 N. E. 327 (1895); Johnson v. Pierce, 16 Ohio St. 472 (1866); King v. New York & Cleveland Gas Coal Co., 204 Pa. 628, 54 Atl. 477 (1903); 5 Chamb., Ev., § 3560, n. 5. The scrivener of a will cannot be permitted to testify as to the testator's instructions or as to what he meant or what he himself meant. Napier v. Little, 137 Ga. 242, 73 S. E. 3, 38 L. R. A. (N. S.) 91 (1911). Parol evidence is admissible to show that the omission of a child from a will was intentional, under a statute providing that if it appears that the omission was not intentional such child shall take the statutory share of a child. *Re Motz*, 125 Minn. 40, 145 N. W. 623, 51 L. R. A. (N. S.) 645 (1914). Parole evidence may be used to show that a legacy to "my friend Richard H. Simpson" was intended for his associate Hamilton Ross Simpson and not for a man named Richard H. Simpson who was not a friend of the testator and had only met him once in twenty years and then merely spoke to him as they passed by. *Siegley v. Simp-*

Usage.—Evidence of a usage in the particular business or locality, in respect to some matter, concerning which the writing is not clear or is silent, may be received to show the actual and intended meaning of the instrument.⁷⁰ The evidence may be of a general and recognized custom of a particular trade or business or of a particular locality.⁷¹ It is received upon the assumption that, where parties have entered into an agreement, any usage which prevails in the trade, concerning which the undertaking is entered into, or in the locality is tacitly assented to, as a part of the contract, and that the document embraces only the special terms agreed upon and is to be construed in reference to such usage, in the absence of an expressed intention to the contrary. If, however, such an intention is expressed, or is clearly apparent, from the language used, such evidence will be rejected.⁷²

Words of Doubtful Meaning.—Where a writing contains words or phrases which are ambiguous or of doubtful meaning, or are used in a technical sense, and which the court is unable to interpret and apply in the particular instance, resort may be had to parol evidence of custom, usage or the like, so that the court may understand the sense in which the particular word or words were employed and properly apply them, in construing the writing.⁷³ The same rule controls here, however, as elsewhere, viz., that the court will limit the admission of evidence to such as is consistent with the writing and will, in no case, permit the introduction of extrinsic evidence, where the words used have a clear and definite meaning and are susceptible of but one interpretation.⁷⁴

son, 73 Wash. 69, 131 Pac. 479, 47 L. R. A. (N. S.) 514 (1913). Parol evidence may be used to show whether the words "without recourse" written on the back of a note refer to the indorsement just above it or to that just below it. This does not change in any way the character of the instrument. *Goolrick v. Wallace*, 154 Ky. 596, 157 S. W. 920, 49 L. R. A. (N. S.) 789 (1913). Admissibility of parol evidence to vary written. See note, *Bender*, ed., 114 N. Y. 190; note, *Bender*, ed., 122 N. Y. 87.

70. *Leavitt v. Kennicott*, 157 Ill. 235, 41 N. E. 737 (1895); *Lane v. Union Nat. Bank*, 3 Ind. App. 299, 29 N. E. 613 (1891); *De Cernea v. Cornell*, 3 Misc. 241, 22 N. Y. Supp. 941 (1893); *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593 (1897); 5 Chamb., Ev., § 3561, n. 1. Custom of enlarging scope of certification on check inadmissible. See note, *Bender*, ed., 16 N. Y. 390.

71. *Wood v. Allen*, 111 Iowa 97, 82 N. W. 451 (1900); *Brown v. Brown*, 8 Metc. (Mass.) 573 (1844); *Stillman v. Burfeind*, 21 App. Div. 13, 47 N. Y. Supp. 280 (1897); 5 Chamb., Ev., § 3561, n. 2.

72. *Swift v. Occidental Min. & P. Co.*, 141

Cal. 161, 74 Pac. 700 (1903); *Shaw v. Jacobs*, 89 Iowa 713, 55 N. W. 333 (1893); *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579 (1900); *O'Donohue v. Leggett*, 134 N. Y. 40, 31 N. E. 269 (1892); *Needy v. Western Maryland R. Co.*, 22 Pa. Super. Ct. 489 (1903); 5 Chamb., Ev., § 3561, n. 3.

73. *Morse v. Tochtermann*, 21 Cal. App. 726, 132 Pac. 1055 (1913); *Kirby Planing Mill Co. v. Hughes*, 11 Ga. App. 845, 75 S. E. 1059 (1912); *Gale v. United States Brewing Co.*, 181 Ill. App. 381 (1914); *Todd v. Howell*, 47 Ind. App. 665, 95 N. E. 279 (1911); *Lasar Mfg. Co. v. Pelligreen Const. & Inv. Co.*, 179 Mo. App. 447, 162 S. W. 691 (1914); *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209 (1878); *McKee v. DeWitt*, 12 App. Div. 617, 43 N. Y. Supp. 132 (1897); *Quarry Co. v. Clements*, 38 Ohio St. 587, 43 Am. Rep. 442 (1883); *William M. Roylance Co. v. Descalzi*, 243 Pa. 180, 90 Atl. 55 (1914); *Mills Power Co. v. Mohawk Hydro-Electric Co.*, 155 App. Div. 869, 140 N. Y. Supp. 655 (1913); *Berry v. Williams Oil Co.*, 156 Wis. 588, 146 N. W. 783 (1914); 5 Chamb., Ev., § 3562, n. 1.

74. *Hildreth v. Hartford M. & R. Trans. Co.*, 73 Conn. 631, 48 Atl. 963 (1901); *Davis*

§ 1116. **Modification or Rescission Subsequent to Execution.**⁷⁵—The rule excluding parol evidence to contradict or vary the terms of a written instrument does not apply to what may be done subsequent to the execution of the instrument. If it is deemed advisable to alter, or modify the terms or to rescind the obligation, such course may be pursued. This is a right of which parties to instruments may avail themselves and evidence showing such action is admissible,⁷⁶ and in no way infringes upon the parol evidence rule. Thus if, after the execution of a writing the parties reconsider the matter and decide that they will rescind the agreement into which they have entered, evidence of the subsequent agreement may properly be received.⁷⁷ Similarly, in the case of a subsequent agreement modifying the terms of a previous undertaking, evidence is admissible to show in what particulars and to what extent the new agreement modifies or alters the previous one.⁷⁸ In like manner it may be shown that performance by one of the parties of some of the terms contained in the writing has been waived by the other,⁷⁹ and for this purpose evidence of facts and circumstances prior to and contemporaneous with the execution of the writing have been received in connection with evidence of subsequent acts.⁸⁰ In case, however, of an instrument under seal⁸¹ or contract, agreement or other undertaking which the law requires to be in written form,⁸² evidence of any subsequent parol modification or rescission of the instrument has been held to be inadmissible.

v. Ball, 6 Cush. (Mass.); *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683 (1895); *Thompson v. Pruden*, 18 Ohio Cir. Ct. 886 (1898); *O'Connor v. Camp* (Tex. Civ. App. 1913), 158 S. W. 203; 5 Chamb., Ev., § 3562, n. 2.

75. 5 Chamberlayne. Evidence, § 3566.

76. *Andrews v. Tucker*, 127 Ala. 602, 29 So. 34 (1900); *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860 (1899); *Town v. Jepson*, 133 Mich. 673, 95 N. W. 742 (1903); *Davis v. Scovern*, 130 Mo. 303, 32 S. W. 986 (1895); *Corse v. Peck*, 102 N. Y. 513, 7 N. E. 810 (1886); *Holoway v. Frick*, 149 Pa. 178, 24 Atl. 201 (1892); 5 Chamb., Ev., § 3566, n. 1.

77. *Toledo, etc., R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773 (1890); *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967 (1895); *Midland Roofing Mfg. Co. v. Pickens*, 96 S. C. 286, 80 S. E. 484 (1914); Chamb., Ev., § 3566, n. 2.

78. *Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549 (1913); *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683 (1892); *Lawrence v. Miller*, 86 N. Y. 131 (1881); *Peck v. Beckwith*, 10 Ohio St. 498 (1860); *Putman Foundry & Mach. Co. v. Canfield*, 25 R. I. 548, 56 Atl. 1033 (1904); *Bannon v. Aultman &*

Co., 80 Wis. 307, 49 N. W. 967 (1891); *Riverside Tp. v. Stewart*, 211 Fed. 873 (C. C. A. 1914); 5 Chamb., Ev., § 3566, n. 3.

79. *Elyea-Austell Co. v. Jackson Garage*, 13 Ga. App. 182, 79 S. E. 38 (1913); *Morehouse v. Terrill*, 111 Ill. App. 460 (1903); *Leathe v. Bullard*, 8 Gray (Mass.) 545 (1857); *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814 (1895); *Raffensberger v. Cullison*, 28 Pa. 426 (1857); 5 Chamb., Ev., § 3566, n. 4.

80. *Brady v. Cassidy*, *supra*.

81. *Hiett v. Turner-Hudnut Co.*, 182 Ill. App. 524 (1914); *Farmington v. Brady*, 11 App. Div. 1, 42 N. Y. Supp. 385 (1896); 5 Chamb., Ev., § 3566, n. 6.

82. *Mitchell v. Universal Life Ins. Co.*, 54 Ga. 289 (1875); *Boggs v. Pacific Steam Laundry Co.*, 86 Mo. App. 616 (1900); *Northrip v. Burge*, 255 Mo. 641, 164 S. W. 584 (1914); 5 Chamb., Ev., § 3566, n. 7. The lessee under a written lease cannot put in evidence in a suit for a breach of the lease a subsequent oral agreement modifying the rent and agreeing what improvements the lessor should make as this renders the lease partly oral contrary to the statute of frauds. *Boncamp v. Starbuck*, 25 Okla. 483, 106 Pac. 839, L. R. A. 1917 B 141 (1910).

§ 1117. **Mistake.**⁸³—The parol evidence rule is not infringed upon by the admission of evidence showing that a written instrument was executed under a mutual mistake of fact.⁸⁴ Evidence for this purpose is frequently employed where the active aid of a court of equity is invoked for the reformation or cancellation of a writing.⁸⁵ Evidence to establish a mistake of this nature has also been received in an action at law.⁸⁶ A mistake of law is not, however, the subject of proof by parol.⁸⁷

§ 1118. **Parties; Identification Of.**—Where, owing to some omission or error, there is a want, in the instrument, of a sufficient description of a party to identify him with certainty, an exception to the general rule of exclusion is recognized,⁸⁸ and parol evidence will be received to enable the court to properly

83. 5 Chamberlayne, Evidence, § 3567.

84. Jersey Farm Co. v. Atlantic Realty Co., 164 Cal. 412, 129 Pac. 593 (1913); Kuck v. Fulfs, 68 Ill. App. 134 (1896); Maffet v. Schaar, 89 Kan. 403, 131 Pac. 589 (1913); Breeding v. Tandy, 148 Ky. 345, 146 S. W. 742 (1912); Gintehr v. Townsend, 114 Md. 122, 78 Atl. 908 (1911); Meyer v. Lathrop, 73 N. Y. 315 (1878); Mayor v. Dwight, 82 Pa. 462 (1876); 5 Chamb., Ev., § 3567, n. 1. Application of rule stated in text to

Contracts: Meyer v. Lathrop, *supra*.

Deeds: Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921 (1903); Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585 (1817); Gill v. Pelkey, 54 Ohio St. 348, 43 N. E. 991 (1896); Chew v. Gillespie, 56 Pa. 308 (1867); Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570 (1897); 5 Chamb., Ev., § 3567, n. 1. A misdescription of the land covered in an insurance policy due to the error of the company's agent will not prevent an action at law on the policy without first having it reformed in equity and parol evidence may be introduced to show the error. French v. State Farmer's Hail Ins. Co., 29 N. D. 426, 151 N. W. 7, L. R. A. 1915 D 766 (1915). An insurance policy may be contradicted by showing that the insured applied orally for the policy and the agent by error described the property wrongly, and sent it to the insured who did not read it till after the fire as this is evidence of fraud. Fisher v. Sun Ins. Office, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915 C 619 (1914). Errors made by an insurance agent in writing down the answers to questions as given to him orally by the insured may be shown as these questions go to the very essence of the insurance risk, and a representation can always be explained. Suravitz v. Prudential

Ins. Co., 244 Pa. 582, 91 Atl. 495, L. R. A. 1915 A 273 (1914). Where a beneficiary in a policy is described as "Evelyn M. Cummings his wife" and he has a wife living named Sophia but was living with "Evelyn" as his wife and she was called his wife the court has no power to change the policy and order the proceeds paid to the real wife. Mutual Life Ins. Co. v. Cummings, 66 Or. 272, 133 Pac. 1169, 47 L. R. A. (N. S.) 252 (1913).

85. Kee v. Davis, 137 Cal. 456, 70 Pac. 294 (1902); Gray v. Merchants' Ins. Co., 113 Ill. App. 537 (1903); Goode v. Riley, 153 Mass. 585, 28 N. E. 228 (1891); Bryce v. Lorillard Fire Ins. Co., 55 N. Y. 240 (1873); Finishing & Warehouse Co. v. Ozment, 132 N. C. 839, 44 S. E. 681 (1903); Gill v. Pelkey, *supra*; 5 Chamb., Ev., § 3567, n. 2.

86. Byrd v. Campbell Printing P. & M. Co., 94 Ga. 41, 20 S. E. 253 (1894); McLean County Bank v. Mitchell, 88 Ill. 52 (1878); Sparks v. Brown, 46 Mo. App. 529 (1891); Meyer v. Lathrop, *supra*; Moliere v. Pennsylvania Fire Ins. Co., 5 Rawle (Pa.) 342, 28 Am. Dec. 675 (1832); 5 Chamb., Ev., § 3567, n. 3.

87. Heavenridge v. Mondy, 49 Ind. 434 (1875); Gottra v. Sanasack, 53 Ill. 456 (1870); Potter v. Sewall, 54 Me. 142 (1866); McMurray v. St. Louis Oil Co., 33 Mo. 377 (1863); Meckley's Estate, 20 Pa. 478 (1853); 5 Chamb., Ev., § 3567, n. 4.

88. Wolff v. Elliott, 68 Ark. 326, 57 S. W. 1111 (1900); Hogan v. Wallace, 166 Ill. 328, 46 N. E. 1136 (1897); Haskell v. Tukesbury, 92 Me. 551, 43 Atl. 500 (1899); Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344 (1833); Harlan County v. Whitney, 65 Neb. 105, 90 N. W. 993 (1902); Woolsey v. Morris, 96 N. Y. 311 (1884); Cohee v. Turner

interpret the instrument and give it effect as intended. Thus in the case of a deed evidence for this purpose has been received.⁸⁹ Similarly, the fact that a person, in executing a writing, acted as agent for another,⁹⁰ or in some other representative capacity⁹¹ such, for instance, as an authorized agent or officer of a corporation⁹² may, in like manner, be shown by parol evidence.

Real Transaction May Be Shown.—Where the true nature of the transaction is not apparent from the writing itself, the court may permit the introduction of extrinsic evidence⁹³ of the circumstances attending the transaction, so that the objects and purposes of the parties in executing the writing may be ascertained and effect given thereto, provided, of course, as in other cases, that the proof offered is consistent with the language employed.

& Wiggins, 37 Okl. 778, 132 Pac. 1082 (1913); 5 Chamb., Ev., § 3563, n. 1.

89. Wakefield v. Brown, 38 Minn. 361, 37 N. W. 788 (1888); Keith v. Scales 124 N. C. 497, 32 S. E. 809 (1899); 5 Chamb., Ev., § 3563, n. 2.

90. Carr v. Louisville & N. R. Co., 141 Ga. 219, 80 S. E. 716 (1914); Meyers v. Kilgen, 177 Mo. App. 724, 160 S. W. 569 (1913); Brady v. Nally, 151 N. Y. 258, 45 N. E. 547 (1896); Crable & Son v. O'Connor, 21 Wyo. 460, 133 Pac. 376 (1913); 5 Chamb., Ev., § 3563, n. 3.

Agency.—The parol evidence rule does not exclude evidence that a person named in a written contract was the agent of an undisclosed principal. This does not vary the contract but establishes a collateral fact: that is the authority under which the agent acts. Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862, 39 L. R. A. (N. S.) 324 (1911).

Parol evidence is inadmissible to show parties to sealed instruments acting as agents. See note, Bender, ed., 192 N. Y. 229.

91. Curran v. Holland, 141 Cal. 437, 75 Pac. 46 (1903); Adams Exp. Co. v. Boskowitz, 107 Ill. 660 (1883); Rank v. Grote, 110 N. Y. 12, 17 N. E. 665 (1888); Moore v. Williams, 26 Tex. Civ. App. 142, 62 S. W. 977 (1901); 5 Chamb., Ev., § 3563, n. 4. Where an insurance policy is made in the name of an individual parol evidence is not admissible to show that he is an administrator and that the policy was intended to cover the interests of the estate and the heirs as this would be varying the terms of a written instrument. Stanley v. Firemen's Insurance Co., 34 R. I. 491, 84 Atl. 601, 42 L. R. A. (N. S.) 79 (1912).

Sureties.—In a suit between two sureties

on a bond to enforce contribution parol evidence is admissible to show the actual relation of the parties and that it was agreed between them that the defendant was not to be held as surety. Frew v. Scoular, 101 Neb. 131, 162 N. W. 496, L. R. A. 1917 F 1065 (1917). Fact that one is surety may be proved by parol. See note to Bender, ed., 171 N. Y. 52. Proper to show by parol that person who signed note was surety. See note, Bender, ed., 6 N. Y. 9.

92. Decowski v. Grabarski, 181 Ill. App. 279 (1914); Kenner v. Decatur County Rochdale Co-operative Ass'n, 87 Kan. 293, 123 Pac. 739 (1912); United Surety Co. v. Meenan, 211 N. Y. 39, 105 N. E. 106 (1914); Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 N. W. 834 (1891); 5 Chamb., Ev., § 3563, n. 5. Compare Crelier v Mackey, 243 Pa. 363, 90 Atl. 158 (1914). If a note is signed with the name of a corporation by its signing officers alone it is the note of the corporation alone and cannot be shown to be the notes of the officers, but where the names of the directors are added this leaves the matter ambiguous and it may be shown by parol that the parties intended to obligate themselves individually. Denman v. Brenneman (Okla.) (1915), 149 Pac. 1105, L. R. A. 1915 E 1047. An indemnity agreement signed by various individuals who are the officers of a drainage district where the district was the real principal in the bond is the personal obligation of the signers and parol evidence is not admissible to show that they intended to sign as representing the district. Costello v. Bridges, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915 A 853 (1914).

93. Application of rule stated in the text to **Assignments:** Reeve v. Dennett, 147 Mass.

Subject Matter Not Clear; Evidence for Purpose of Identification.—Where there is an uncertainty in the terms of an instrument as to the subject matter to which the writing relates, and which it is necessary to, in some way, identify, in order to give effect to the document with a proper degree of certainty, parol evidence will be received⁹⁴ to enable the court to apply the writing to its subject matter and its admission is, in no way, a violation of the parol evidence rule. Where the description in instruments relating to real property is not sufficiently definite to clearly identify it, the court will endeavor to give effect to the writing in accordance with the understanding of the parties and, for this purpose, will receive extrinsic evidence, consistent with the terms of the instrument, to enable it to apply the description in accordance with their intention.⁹⁵ The rule has been applied by the courts to contracts of sale,⁹⁶ deeds,⁹⁷ leases,⁹⁸ and mortgages.⁹⁹ The object of the court is, in all cases, to

315 (1884); *Matthews v. Sheehan*, 69 N. Y. 585 (1877); *Taylor v. Paul*, 6 Pa. Super. Ct. 496 (1898); 5 *Chamb., Ev.*, § 3564, n. 1.

Assignments: *Reeve v. Dennett*, 137 Mass. 315 (1884); *Matthews v. Sheehan*, 69 N. Y. 585 (1877); *Taylor v. Paul*, 6 Pa. Super. Ct. 496 (1898); 5 *Chamb., Ev.*, § 3564, n. 1.

Bills of sale: *Florida Cent. & P. R. Co. v. Usnia*, 111 Ga. 697, 36 S. E. 928 (1900); *Raphael v. Mullen*, 171 Mass. 111, 50 N. E. 515 (1898); *Martin v. Martin*, 43 Or. 119, 72 Pac. 639 (1903); 5 *Chamb., Ev.*, § 3564, n. 1. But see, *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961, aff'g 52 Hun 343, 5 N. Y. Supp. 365 (1891).

Deeds may be shown to have been given as a mortgage, trust and the like. *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939 (1894); *Myers v. Myers*, 167 Ill. 52, 47 N. E. 309 (1897); *Cobb v. Day*, 106 Mo. 278, 17 S. W. 323 (1891); *Medical College Laboratory v. New York University*, 76 App. Div. 48, 78 N. Y. Supp. 673 (1902); *Senff v. Pyle*, 46 Ohio St. 102, 24 N. E. 595 (1888); *Beringer v. Lutz*, 179 Pa. 1, 37 Atl. 640 (1897); *Schierl v. Newburg*, 102 Wis. 552, 78 N. W. 761 (1899); 5 *Chamb., Ev.*, § 3564, n. 1.

Mortgages: *Kirby v. Raynes*, 138 Ala. 194, 35 So. 118 (1902); *Sparks v. Brown*, 33 Mo. App. 505 (1888); *Lippincott v. Lawrie*, 110 Wis. 573, 97 N. W. 179 (1903); 5 *Chamb., Ev.*, § 3564, n. 1.

94. *Messenger v. German-American Ins. Co.*, 47 Colo. 448, 107 Pac. 643 (1910); *Hartwell Grocery Co. v. Mountain City Mill Co.*, 8 App. 727, 70 S. E. 48 (1911); *Stockwell v. Whitehead*, 47 Ind. App. 423, 94 N. E. 736 (1911); *Pulaski Hall Ass'n v. American*

Surety Co., 123 Minn. 222, 143 N. W. 715 (1913); *McManus v. Donohoe*, 175 Mass. 308, 56 N. E. 391 (1899); *Miller v. Tuck*, 95 App. Div. 134, 88 N. Y. Supp. 495 (1904); *Allison v. Keinon*, 163 N. C. 582, 79 S. E. 1110 (1913); *Hurd v. Robinson*, 11 Ohio St. 232 (1860); *King v. New York & Cleveland Gas Coal Co.*, 204 Pa. 628, 54 Atl. 477 (1903); *Adams v. Janes*, 83 Vt. 334, 75 Atl. 799 (1910); 5 *Chamb., Ev.*, § 3565, n. 1.

95. *Grubbs v. Boon*, 201 Ill. 98, 66 N. E. 390 (1903); *Weeks v. Brooks*, 205 Mass. 458, 92 N. E. 45 (1910); *Pettit v. Sheppard*, 32 N. Y. 97 (1865); *Trustees, etc., of Kingston v. Lehigh Valley Coal Co.*, 241 Pa. 469, 88 Atl. 763 (1913); *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706 (1912); *Roberts v. Hart* (Tex. Civ. App. 1914), 165 S. W. 473; 5 *Chamb., Ev.*, § 3565, n. 2. The description of property in a will may be corrected by showing that unless the description is corrected the land the testator owned will go as intestate property, where the testator did not own the property described in the will. *Re Boeck*, 160 Wis. 577, 152 N. W. 155, L. R. A. 1915 E 1008 (1915).

96. *Towle v. Carmelo Land & Coal Co.*, 99 Cal. 397, 33 Pac. 1126 (1893); *Clark v. Crawfordville Coffin Co.*, 125 Ind. 277, 25 N. E. 298 (1890); *Helper v. MacKinnon Mfg. Co.*, 138 Mich. 593, 101 N. W. 804 (1904); *Miller v. Tuck*, *supra*; *Crown State Co. v. Allen*, 199 Pa. 239, 48 Atl. 968 (1901); 5 *Chamb., Ev.*, § 3565, n. 2.

97. *Georgia & A. R. Co. v. Shiver*, 121 Ga. 708, 49 S. E. 700 (1904); *Richardson v. Sketchley*, 150 Iowa 393, 130 N. W. 407 (1911); *Kinlinger v. Joslyn*, 93 Neb. 40, 139

ascertain the meaning of the parties in executing the writing, and parol evidence is received only to the extent that it tends to aid in the interpretation and construction of the writing. The court will not permit the introduction of evidence, in respect to the subject matter, if there is no uncertainty in the description thereof, for, when that situation is presented, the parol evidence rule of exclusion intervenes.¹ Thus in the case of a mortgage,² lease,³ or contract of sale,⁴ the court will not permit the introduction of evidence inconsistent with the writing and which tends to contradict or vary its terms. A similar situation also exists where the language used is of such a vague character that, even with the aid of parol evidence, there would be no certainty that the real subject had been identified. The rule of exclusion is, likewise here applicable.⁵

§ 1119. Unauthorized Signing.⁶— It is always permissible for one whose name appears as a party to a writing to show that the signature is not his but was affixed to the document by one who was not authorized to act for him in the matter,⁷ and who either exceeded powers conferred upon him or forged his name thereto, since he is not bound by such an instrument. Evidence to this effect is not within the meaning of the parol evidence rule.

N. W. 1019 (1913); *Petrie v. Hamilton College*, 158 N. Y. 458, 53 N. E. 216 (1899); *Johnson v. Branning Mfg. Co.*, 165 N. C. 105, 80 S. E. 980 (1914); 5 *Chamb., Ev.*, § 3565, n. 2.

98. *Durr v. Chase*, 161 Mass. 40, 36 N. E. 741 (1894); *Myers v. Sea Beach R. Co.*, 167 N. Y. 581, 60 N. E. 1117 (1901); *Boice v. Zimmerman*, 3 Pa. Super. Ct. 181 (1896); *Goodsell v. Rutland Canadian R. Co.*, 75 Vt. 375, 56 Atl. 7 (1902); 5 *Chamb., Ev.*, § 3565, n. 2.

99. *California Title Ins. & T. Co. v. Pauly*, 111 Cal. 122, 43 Pac. 586 (1896); *Clapp v. Trowbridge*, 74 Iowa 550, 38 N. W. 411 (1888); *Taft v. Stoddard*, 141 Mass. 150, 6 N. E. 836 (1886); *Farr v. Nichols*, 132 N. Y. 327, 30 N. E. 834 (1892); 5 *Chamb., Ev.*, § 3565, n. 2.

1. *Daniel v. Williams*, 177 Ala. 140, 58 So. 419 (1912); *Mead v. Peabody*, 183 Ill. 126, 55 N. E. 719 (1899); *Miller v. Washburn*, 117 Mass. 371 (1875); *Duffield v. Hue*, 129 Pa. 94, 18 Atl. 566 (1889); 5 *Chamb., Ev.*, § 3565, n. 3.

2. *Lawrence v. Comstock*, 124 Mich. 120, 82 N. W. 808 (1900); *Drexel v. Murphy*, 59 Neb. 210, 80 N. W. 813 (1899); *Coombs v. Patterson*, 19 R. I. 25, 31 Atl. 428 (1897); 5 *Chamb., Ev.*, § 3565, n. 4.

3. *Haycock v. Johnson*, 81 Minn. 49, 83

N. W. 494, 1118 (1900); *Kraus v. Smolen*, 46 Misc. 463, 92 N. Y. Supp. 329 (1905); *Duffield v. Hue*, *supra*; 5 *Chamb., Ev.*, § 3565, n. 5.

4. *Fitzgerald v. Clark*, 6 Gray (Mass.) 393 (1856); *Dady v. O'Rourke*, 172 N. Y. 447, 65 N. E. 273 (1902); *Ormsbee v. Machir*, 20 Ohio St. 295 (1870); *Baugh v. White*, 161 Pa. 632, 29 Atl. 267 (1894); 5 *Chamb., Ev.*, § 3565, n. 6.

5. *First Nat. Bank v. Sonnelitner*, 6 Ida. 21, 51 Pac. 993 (1898); *Augustine v. McDowell*, 120 Iowa 401, 94 N. W. 918 (1903); *Ham v. Johnson*, 51 Minn. 105, 52 N. W. 1080 (1892); *Farthing v. Rochelle*, 131 N. C. 563, 43 S. E. 1 (1902); 5 *Chamb., Ev.*, § 3565, n. 7. A contract for sale of land described as "lots 11, 12, and 13 in Block 13, Lemp's addition" which fails to state the state county or city or town where the land lies is insufficient and cannot be aided by parol evidence. *Allen v. Kitchen*, 16 Idaho 133, 100 Pac. 1052, L. R. A. 1917 A 563 (1909).

6. 5 *Chamberlayne, Evidence*, § 3568.

7. *Harper v. Lockhart*, 9 Colo. App. 430, 48 Pac. 901 (1897); *Remick v. Sandford*, 118 Mass. 102 (1875); *Pierce v. Georger*, 103 Mo. 540, 15 S. W. 848 (1890); *Porter v. Hardy*, 10 N. D. 551, 88 N. W. 458 (1901); *Hunter v. Reilly*, 36 Pa. 509 (1860); *Ellis v. Watkins*, 73 Vt. 371, 50 Atl. 1105 (1900); 5 *Chamb., Ev.*, § 3568, n. 1.

§ 1120. **Public Records.**⁸—The parol evidence rule applies to public records⁹ forbidding the introduction of any extrinsic evidence which in any respect tends to contradict, alter or vary them. The same principle controls in the case of judicial records,¹⁰ in which are recorded the various steps in judicial proceedings from their inception to their termination. An occasion may, however, arise when parol evidence may be admitted for the purpose of explaining some matter of record which is not clear or for supplying some omission therein.

8. 5 Chamberlayne, Evidence, § 3569.

9. *Wilson v. Jarron*, 23 Ida. 563, 131 Pac. 12 (1913); *City of Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946 (1913); *In re Burmaster's Estate*, 161 Iowa 116, 141 N. W. 55 (1913); *Cobb v. Alberti*, 38 Okl. 206, 132 Pac. 1075 (1913); *Olson Land Co. v. Seattle*, 76 Wash. 142, 136 Pac. 118 (1913); *Cote v. New England Nav. Co.*, 213 Mass. 177, 99 N. E. 972 (1912); 5 Chamb., Ev., § 3569, n. 1. Parol evidence is not admissible to show that before the governor vetoed a bill he signed it intending to approve it, as a legislative record cannot be varied by parol. *Arkansas State Fair Association v. Hodges*, 120 Ark. 131, 178 S. W. 936. It is not proper to attack a requisition of a governor of another state for extradition by affidavits of outside persons as this is an official document which cannot be impeached. *Massee, ex parte*, 95 S. C. 315, 79 S. E. 97, 46 L. R. A. (N. S.) 781 (1913). A record made by the clerk of a school district of its annual meeting may be supplemented by evidence of a vote which does not appear on the records where the record does not purport to be complete but is a mere abstract of the action taken. *Gilmer v. School District No. 26*, 41 Okla. 12, 136 Pac. 1036, 50 L. R. A. (N. S.) 99 (1913). Parol evidence is not admissible to show that

a municipal ordinance was passed by a yeas and nays vote where its journal does not show it. It is the general rule that the official records of a city may be shown only by its official records as if these records could be varied by parol they would be uncertain and unreliable. *Spalding v. Lebanon*, 156 Ky. 37, 160 S. W. 751, 49 L. R. A. (N. S.) 387 (1913).

10. *Montgomery Co. v. Taylor*, 142 Ky. 547, 134 S. W. 894 (1911); *Cote v. New England Nav. Co.*, *supra*; *Rust v. State* (Tex. Civ. App. 1913), 158 S. W. 519; *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, 206 Fed. 813 (1913); 5 Chamb., Ev., § 3569, n. 2. But see *Brand v. Swindle*, 68 W. Va. 571, 70 S. E. 362 (1911) (justice's docket).

Alteration.—Parole evidence may be admitted to show that a record of a judgment has been changed by altering its date. *Sackett v. Rose* (Okla. 1916), 154 Pac. 1177, L. R. A. 1916 D 820.

Acknowledgment of deed.—A certificate of acknowledgment on a deed may be impeached by evidence of the interested parties that they did not sign it in those states where the acknowledgment is regarded as a ministerial and not a judicial act. *People's Gas Co. v. Fletcher*, 81 Kan. 76, 105 Pac. 34, 41 L. R. A. (N. S.) 1161 (1909).

CHAPTER LIX.

BEST EVIDENCE RULE.

Best evidence rule; application to documents, 1121.

writing executed in duplicate, 1122.

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§ 1121. **Best Evidence Rule; Application to Documents.**¹—The principles of justice demand that nothing short of the most probative evidence,—the “best” evidence so called,—shall be used. In any case, where a party has it in his power to furnish either a primary or secondary grade of proof, the primary must be produced.² This principle, as applied in the case of constituent documents, requires the production of the original, in preference to proof by copy or any verbal testimony of their contents, and the present scope of the “best evidence rule,” viewed as one of procedure, is practically limited to proof of the contents and execution of such documents.³ In any such case, where a party has it within his power to produce the original, he will be required to do so.⁴ This is the general rule which applies alike, subject to some exceptions which will be considered in the following sections of this chapter, to all classes

1. 5 Chamberlayne, Evidence, § 3570.

2. Mordecai v. Beal, 8 Port. (Ala.) 529 (1839).

A marriage ceremony may be proved by parol notwithstanding there is a marriage certificate in existence at the time. The testimony of eye witnesses is primary evidence and the certificate is not to be preferred to it. Watson v. Lawrence, 134 La. 194, 63 So. 873, L. R. A. 1915 E 121 (1913).

3. *Supra*, § 228; 1 Chamb., Ev., § 466.

4. Spangenberg v. Nesbitt, 22 Cal. App. 274, 134 Pac. 343 (1913); Peoples' Nat. Bank v. Rhoads (Del. Super. 1914), 90 Atl. 409;

Hunt v. Lavender, 140 Ga. 790, 79 S. E. 1127 (1913); Bernstein v. Berlinger, 170 Ill. App. 519 (1912); Post v. Leland, 184 Mass. 601, 69 N. E. 361 (1903); Washoe Copper Co. v. Junila, 43 Mont. 178, 115 Pac. 917 (1911); Ruemer v. Clark, 121 App. Div. 231, 105 N. Y. Supp. 659 (1907); State v. Lent, Tapp. (Ohio) 105 (1816); Commercial Union Assur. Co. v. Wolfe, 41 Okl. 342, 137 Pac. 704 (1914); Grauley v. Jermyn, 163 Pa. 501, 30 Atl. 203 (1894); Trainer v. Lee, 34 R. I. 345, 83 Atl. 847 (1912); Aetna Ins. Co. v. Bank of Brunson, 194 Fed. 385, 114 C. C. A. 303 (1912); 5 Chamb., Ev., § 3570, n. 4.

of constituent documents. For example, the courts have applied the rule to particular writings, such as agency, etc.,⁵ assignments,⁶ awards,⁷ ballots,⁸ bills of sale,⁹ bonds,¹⁰ contracts,¹¹ deeds, conveyances, etc.,¹² leases,¹³ letters,¹⁴ notes,¹⁵ notices of loss,¹⁶ and wills.¹⁷ The original is, in all cases, regarded as the primary or "best evidence" so called if it is in existence and its production is possible. The rule is rigidly enforced, and resort must be had thereto unless the presiding judge is satisfied of the proponent's inability to offer the original in evidence.

§ 1122. Writings Executed in Duplicate.¹⁸—Where the writing embodying the terms of a transaction agreed upon between the parties is executed in duplicate, triplicate or more counterparts, each being the exact counterpart of the other, except that the writing held by each party may in some instances only have the signature of the other party or parties thereto, both are originals

5. *Lee v. Agricultural Ins. Co.*, 79 Iowa 379, 44 N. W. 683 (1890); *Kennebeck Purchase v. Call*, 1 Mass. 483 (1805); *Emery v. King*, 64 N. J. L. 529, 45 Atl. 915 (1900); *Langhein v. Tongue*, 25 Misc. 757, 54 N. Y. Supp. 145 (1898); *Beale v. Com.*, 11 Serg. & R. (Pa.) 299 (1824); 5 Chamb., Ev., § 3570, n. 5.

6. *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107 (1903); *Van Doren v. Jelliffe*, 1 Misc. 354, 20 N. Y. Supp. 636 (1892); *Johnston v. Southern Well Works Co.*, 208 Fed. 145, 125 C. C. A. 361 (1913); 5 C. § 3570, n. 5.

7. *Sirrinc v. Briggs*, 31 Mich. 443 (1875); *Osen v. Sherman*, 27 Wis. 501 (1871); 5 Chamb., Ev., § 3570, n. 5.

8. *Moon v. Harris*, 122 Minn. 138, 142 N. W. 12 (1913); *Caldwell v. McElvain*, 184 Ill. 552, 6 N. E. 1012 (1900); *Albert v. Twohig*, 35 Neb. 563, 53 N. W. 582 (1892); 5 Chamb., Ev., § 3570, n. 5.

9. *Epping v. Mockler*, 55 Ga. 376 (1875); *Hood v. Olin*, 80 Mich. 296, 45 N. W. 341 (1890); *Dunn v. Hewitt*, 2 Den. (N. Y.) 637 (1846); *Price v. Wolfer*, 33 Or. 15, 52 Pac. 759 (1898); *Bratt v. Lee*, 7 U. C. C. P. 280 (1908); 5 Chamb., Ev., § 3570, n. 5.

10. *Traylor v. Epps*, 11 Ga. App. 497, 75 S. E. 828 (1912); *Montana Min. Co. v. St. Louis Min., etc., Co.*, 20 Mont. 394, 51 Pac. 824 (1898); *Rank v. Shewey*, 4 Watts (Pa.) 218 (1835); 5 Chamb., Ev., § 3570, n. 5.

11. *Burton v. Meinert & Miller*, 136 Ga. 420, 71 S. E. 870 (1911); *Kitza v. Oregon Short Line R. Co.*, 169 Ill. App. 609 (1912); *Kingman v. Hett*, 9 Kan. App. 533, 58 Pac. 1022 (1899); *Holmes v. Hunt*, 122 Mass. 505,

23 Am. Rep. 381 (1877); *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903 (1903); *McDevitt v. Pewel*, Tapp. (Ohio) 54 (1816); *Irwin v. Irwin*, 34 Pa. 525 (1859); 5 Chamb., Ev., § 3570, n. 5.

12. *Harbison Walker Refractories Co. v. Scott*, 185 Ala. 641, 64 So. 547 (1914); *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132 (1898); *Wright v. Roberts*, 116 Ga. 194, 42 S. E. 369 (1902); *Brock v. Satchell*, 130 La. 853, 58 So. 686 (1912); *Brackett v. Evans*, 1 Cush. (Mass.) 79 (1848); *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369 (1830); *Deppen v. Bogar*, 7 Pa. Super. Ct. 434 (1898); 5 Chamb., Ev., § 3570, n. 5.

13. *Wallace v. Wallace*, 62 Iowa 651, 17 N. W. 905 (1883); *Gilbert v. Kennedy*, 22 Mich. 5 (1870); *Putnam v. Goodall*, 31 N. H. 419 (1855); 5 Chamb., Ev., § 3570, n. 5.

14. *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69 (1907); *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771 (1904); *Connecticut Fire Ins. Co. v. Moore*, 154 Ky. 18, 156 S. W. 867 (1913); *Post v. Leland*, 184 Mass. 601, 69 N. E. 361 (1904); *Stern v. Stanton*, 184 Pa. 468, 39 Atl. 404 (1898); 5 Chamb., Ev., § 3570, n. 5.

15. *Dale v. Christian*, 140 Ga. 790, 79 S. E. 1127 (1913).

16. *Aetna Ins. Co. v. Bank of Brunson*, 194 Fed. 385, 114 C. C. A. 303 (1912).

17. *McNear v. Roberson*, 12 Ind. App. 87, 39 N. E. 806 (1894); *Morrill v. Otis*, 12 N. H. 466 (1841); *Matter of Smith*, 61 Hun 101, 15 N. Y. Supp. 425 (1891); 5 Chamb., Ev., § 3570, n. 5.

18. 5 Chamberlayne, Evidence, § 3571.

and primary evidence of the terms of the transaction and either may be admitted as such in evidence,¹⁹ without proof being required of any reason for the non-production of the other. If, however, where there are duplicate originals, a party seeks to introduce secondary evidence he will not be permitted to do so until the court has been satisfied of his inability to produce either original.²⁰ *Carbon copies* being made by the same imprint as that which is designated the original, are regarded as originals,²¹ and the same rules as apply in the case of duplicates, triplicates and the like are applicable.

§ 1123. When Proof Other Than by Original Allowed; Administrative Requirements.²²—As appears in the subsequent sections of this chapter, the proponent, upon satisfactorily establishing the fact of his inability to produce the original document, will be permitted to prove its contents by other evidence. The court, however, must be satisfied that, whatever the reason assigned by him for the non-production of the document may be, the condition which he asserts as excusing him for not complying with the requirements of the rule, does in fact actually exist.²³ He must show that he has exercised due diligence in endeavoring to obtain the writing itself.

Must Be Authenticated as Genuine.—In all cases where a party, who relies upon the loss, destruction or unavailability of the instrument, seeks to prove its contents, other than by the production of the original, it will be required, as in the case of the production of the original private writing or document, that the genuineness of the writing, or in other words its due and proper execution by the party whose act it is asserted to be, shall be established to the satisfaction of the presiding judge.²⁴ So a failure to produce documents so called for

19. *Westbrook v. Fulton*, 79 Ala. 510 (1885); *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146 (1890); *Catron v. German Ins. Co.*, 67 Mo. App. 544 (1896); *Manchester & Lawrence Railroad v. Fisk*, 33 N. H. 297 (1856); *Hubbard v. Russell*, 24 Barb. (N. Y.) 404 (1857); *First Nat. Bank v. Jamison*, 63 Or. 594, 128 Pac. 433 (1913); *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057 (1912); 5 Chamb., Ev., § 3571, n. 1.

20. *Cincinnati, etc., R. Co. v. Disbrow*, 76 Ga. 253 (1886); *Holden's Steam Mill Co. v. Westervelt*, 67 Me. 446 (1877); *Peaks v. Cobb*, 192 Mass. 196, 77 N. E. 881 (1906); 5 Chamb., Ev., § 3571, n. 2.

21. *Hay v. American Fire Clay Co.*, 179 Mo. App. 567, 162 S. W. 666 (1913); *Cole v. Ellwood Power Co.*, 216 Pa. 283, 65 Atl. 678 (1907); *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057 (1912); *Chesapeake & O. Ry. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161 (1905); 5 Chamb., Ev., § 3571, n. 3.

22. 5 Chamberlayne, *Evidence*, §§ 3572-3574.

23. *Larsen v. All Persons*, 165 Cal. 407, 132 Pac. 751 (1913); *Empire State Surety Co. v. Lindenmeier*, 54 Colo. 497, 131 Pac. 437 (1913); *Cerny v. Glos*, 261 Ill. 331, 103 N. E. 973 (1914); *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114 (1854); *Sullivan v. Godkin*, 172 Mich. 257, 137 N. W. 521 (1912); *Kearney v. New York*, 92 N. Y. 617 (1883); *Greene & Kahl v. Mesick Grocery Co.*, 159 N. C. 119, 74 S. E. 813 (1912); *Choteau v. Raitt*, 20 Ohio 132 (1851); *Gladstone Lumber Co. v. Kelly*, 64 Or. 163, 129 Pac. 763 (1913); *Heller v. Peters*, 140 Pa. 648, 21 Atl. 416 (1891); 5 Chamb., Ev., § 3572, n. 2.

24. *Rucker v. Jackson*, 180 Ala. 109, 60 So. 139 (1912); *Kelsey v. Hanmer*, 18 Conn. 311 (1847); *Garbutt Lumber Co. v. Gress Lumber Co.*, 111 Ga. 821, 35 S. E. 686 (1900); *Helton v. Asher*, 103 Ky. 730, 46 S. W. 20 (1898); *Zollman v. Tarr*, 93 Mo. App. 234 (1902); *Edwards v. Noyes*, 65 N. Y. 125 (1875); *Burr v. Kase*, 168 Pa. 81, 31 Atl. 954 (1895); 5 Chamb., Ev., § 3573, n. 1.

from an adverse party, is not of itself proof of the fact of their existence; they must be proved.²⁵

Admissions Relating to Contents.— There has been much diversity of opinion whether, in case of an admission by an opponent of the contents of a writing, there should be a relaxation of the rule requiring the production of the original, and the proponent should be allowed to introduce such admission in evidence, as proof of contents. In England the rule seems to be established that he may, and in many jurisdictions in the United States, and also in the Canadian courts, the same conclusion has been reached,²⁶ upon the principle that the situation here presented differs from that in which it is proposed to introduce parol proof of the contents from other sources, in that that which has been admitted may reasonably be presumed to be true. In other jurisdictions, however, this doctrine has been repudiated,²⁷ generally, upon the ground of the opportunity for fraud which would exist if a party could establish the contents of a writing in this manner.

§ 1124. **Loss or Destruction of Original.**²⁸— Upon its being established to the satisfaction of the presiding judge that a writing, which is relevant to the issue, has been lost or destroyed, proof of its contents may then be made by parol. This applies alike to all classes of constituent documents.²⁹ It being thus satisfactorily shown that a party is unable to produce the original in evidence, the so-called "best evidence rule" permits proof of the contents of a writing to be made by the best evidence of which the nature of the case will admit.

25. *Jones v. Reilly*, 174 N. Y. 97, 66 N. E. 649 (1903).

26. *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127 (1893); *Combs v. Union Trust Co.*, 146 Ind. 688, 46 N. E. 16 (1896); *Loomis v. Walhams*, 8 Gray (Mass.) 557 (1857); *Edgar v. Richardson*, 33 Ohio St. 381, 31 Am. Rep. 571 (1878); *Krise v. Neason*, 66 Pa. 253 (1870); *Reg v. Basingstoke*, 14 Q. B. 611, 68 E. C. L. 611 (1851); *Rogers v. Card*, 7 U. C. C. P. 89 (1857); 5 Chamb., Ev., § 3574, n. 1.

27. *Flournoy v. Newton*, 8 Ga. 306 (1850); *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771 (1904); *Bank of North America v. Crandall*, 87 Mo. 208 (1885); *Cumberland Mut. F. Ins. Co. v. Giltinan*, 48 N. J. L. 495, 7 Atl. 424 (1886); *Sherman v. People*, 13 Hun (N. Y.) 575 (1878); *Com. v. County Prison*, 11 Wkly. Notes Cas. (Pa.) 341 (1882); 5 Chamb., Ev., § 3574, n. 2.

28. 5 Chamberlayne. Evidence. §§ 3575-3578.

29. *People v. Murphy*, 20 Cal. App. 398, 129 Pac. 603 (1913); *Eagan v. Mahoney*, 24 Colo.

App. 285, 134 Pac. 156 (1913); *Hicks & Son v. Mozley & Co.*, 12 Ga. App. 661, 78 S. E. 133 (1913); *People v. Henkle*, 256 Ill. 585, 100 N. E. 175 (1912); *Wolf v. Wolf*, 152 Iowa 121, 131 N. W. 882 (1911); *Hersey v. Jones*, 128 Mass. 473 (1880); *Huntoon v. Brendemuehl*, 124 Minn. 54, 144 N. W. 426 (1914); *Risher v. Madsen*, 94 Neb. 72, 142 N. W. 700 (1913); *Corona Kid Co. v. Lichtman*, 84 N. J. L. 363, 86 Atl. 371 (1913); *Sundelewitz v. Fourteenth St. Bank*, 127 N. Y. Supp. 315 (1911); *John v. John*, Wright (Ohio) 584 (1834); *Reus v. Mattison*, 30 Okl. 720, 121 Pac. 253 (1912); *In re Daly's Estate*, 55 Pa. Super. Ct. 488 (1914); *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361 (1914); 5 Chamb., Ev., § 3575, n. 1.

The mere fact that a writing is out of the jurisdiction of the court in another State in the possession of a party does not permit him to give secondary evidence of its contents. *Federal Chemical Co. v. Jennings*, 112 Miss. 513, 73 So. 567, L. R. A. 1917 D 529 (1917).

Evidence to Establish.—Although a frequent, if not the usual mode, of proving the loss of a document is by an affidavit to that effect,³⁰ yet loss may also be established by other evidence, such as by the testimony of the person last in possession of the instrument.³¹ It should appear either from the testimony of such person, if he can be produced, or by some other satisfactory evidence, that the writing is not in the former's possession.³² In case the writing cannot be traced to the possession of one particular person, but the evidence tends to show that it was equally likely to have been in the possession of any one of several, then evidence should be introduced tending to show that it was not in the possession of any of such persons.³³

Amount of Proof Required.—What shall constitute sufficient proof of the loss or destruction of the original, to authorize the admission of secondary evidence of the contents, is dependent, to a great extent, upon the circumstances of the case and the nature of the instrument.³⁴ Where the writing was not of such a character that a person would, naturally, exercise any considerable degree of care to preserve it, the court would not be as insistent upon the same amount of proof being furnished, to establish its loss or destruction, as would be required in the case of instruments, such as deeds, which ordinary persons usually guard with much caution, preserving them, under conditions and in places, where they can readily obtain them and where the chances of their loss or destruction are minimized.³⁵ In the former case, a slight amount of proof might be considered sufficient, while, in the latter instance, the court would insist upon evidence of much more convincing effect.³⁶ Should some

30. *Fallon v. Dougherty*, 12 Cal. 104 (1859); *Blake v. Fash*, 44 Ill. 302 (1867); *Joannes v. Bennett*, 5 Allen (Mass.) 169 (1862); *Blade v. Nolan*, 12 Wend. (N. Y.) 173 (1834); *Wells v. Martin*, 1 Ohio St. 386 (1853); 5 Chamb., Ev., § 3576, n. 1.

31. *Kearney v. Mayor*, 92 N. Y. 617 (1883); *Hale v. Darter*, 10 Humph. (Tenn.) 92 (1849); *Trimble v. Edwards*, 84 Tex. 497, 19 S. W. 772 (182).

32. *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771 (1904); *Murray v. Buchanan*, 7 Blackf. (Ind.) 549 (1845); *Myers v. Bealer*, 30 Neb. 280, 46 N. W. 479 (1890); *Koehler v. Schilling*, 70 N. J. L. 585, 57 Atl. 154 (1904); *Kearney v. New York*, 92 N. Y. 617 (1883); *Richardson v. Fellner*, 9 Okl. 513, 60 Pac. 270 (1900); 5 Chamb., Ev., § 3576, n. 3.

33. Thus, where it is doubtful whether a letter is in the possession of the addressee or of the party who wishes to use its contents as evidence, it must be shown that, after the use of due diligence, it cannot be found in the possession of either. *Bogan v. McCutchen*, 48 Ala. 493 (1872). Similarly, in the case of a deed which was left in a store, a

search of the store about a year after it had been left there was not regarded as sufficient, it being held that the person who was the occupant of the store during that period and who was within reach of the process of the court, should have been produced. *King v. Randlett*, 33 Cal. 318 (1867). Evidence may also be introduced of the admission of an opponent to the same effect. *Pentecost v. State*, 107 Ala. 81, 18 So. 146 (1894).

34. *Jernegan v. State*, 81 Ala. 58, 1 So. 72 (1886); *Wiseman v. Northern Pac. R. Co.*, 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135 (1891).

35. *Waller v. Eleventh School Dist.*, 22 Conn. 326 (1853); *Houghtalling v. Houghtalling* (Iowa 1907), 112 N. W. 197; *Bartlett v. Robbins*, 53 Md. 485 (1879); 5 Chamb., Ev., § 3577, n. 2.

36. *Wiseman v. Northern Pac. R. Co.*, *supra*; 5 Chamb., Ev., § 3577, n. 3. Thus, in the case of letters which a party might reasonably suppose would never be of any particular value and that no occasion might ever arise for their use in the future, such fact would be considered by the presiding

suspicion exist that a party is withholding a writing, a rigid inquiry would be made as to the alleged reasons for its non-production.³⁷ If it should appear that the writing was destroyed by the proponent, the court will require a full explanation of the circumstances, so that any suspicion of fraud or improper intent on the part of the one destroying it may be overcome.³⁸ Proof that an instrument whose contents a party desires to prove by parol was not intentionally destroyed, may also be necessary under some statutes.³⁹ In any event the presiding judge must be satisfied that the instrument, the contents of which a party seeks to prove by secondary evidence, has, in fact, been lost or destroyed, before he will permit proof by the latter mode.⁴⁰ If he is satisfied that the claim of the proponent is established, he will admit the writing in evidence; proof of an absolute character, beyond the possibility of a mistake, will not be required.⁴¹ If it appears to a reasonable certainty that the instrument in question has been lost or destroyed, it is ordinarily sufficient to permit of the introduction of proof of contents by other evidence than that afforded by the original.⁴² The weight and effect of the evidence thus afforded is for the jury.⁴³

A Question for the Presiding Judge.—The question as to the amount of proof which will be sufficient to establish the loss or destruction of the original, so as to admit other evidence of its contents, is one for the determination of the presiding judge, taking into consideration the character of the writing and the circumstances of the case.⁴⁴ The ruling must depend upon the circumstances of each particular case.⁴⁵

judge, in connection with a slighter degree of proof of inability to produce them than would be required in the case of some other writing of importance, which a person would be more likely to preserve with greater care. *Hoblitt v. Houser*, 171 Ill. App. 19 (1913).

37. *Mordecai v. Beal*, 8 Port. (Ala.) 529 (1839); *Minor v. Tillotson*, 7 Pet. (U. S.) 99, 32 L. ed. 621 (1833).

38. *Bagley v. McMickle*, 9 Cal. 430, 447 (1858); *United States v. Reyburn*, 6 Pet. (U. S.) 352, 367, 8 L. ed. 424 (1832); 5 Chamb., Ev., § 3577, n. 6.

39. *Vawmazos v. Gloss*, 263 Ill. 314, 104 N. E. 1053 (1914).

40. *Larsen v. All Persons*, 165 Cal. 407, 132 Pac. 751 (1913); *Winler v. Dibble*, 251 Ill. 200, 95 N. E. 1093 (1911); *Smith, Carey & Co. v. Atchison Live Stock Co.*, 92 Kan. 5, 140 Pac. 108 (1914); *Post v. Leland*, 184 Mass. 601, 69 N. E. 361 (1904); *Mathes v. Switzer Lumber Co.*, 173 Mo. App. 239, 158 S. W. 729 (1913); *Abel v. Brewster*, 12 N. Y. Supp. 331 (1890); *Emig v. Diehl*, 76 Pa. 359 (1874); 5 Chamb., Ev., § 3577, n. 8.

41. *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436 (1827); *Burt v. Long*, 106 Mich. 210, 64 N. W. 60 (1895); *Kleinmann v. Geiselmann*, 114 Mo. 437, 21 S. W. 796 (1893); *Kane v. Metropolitan El. R. Co.*, 15 Daly 294, 6 N. Y. Supp. 526 (1889); *Wells v. Martin*, 1 Ohio St. 386 (1853); *Bright v. Allan*, 203 Pa. 386, 53 Atl. 248 (1902); *U. S. v. Sutter*, 21 How. (U. S.) 170 (1858); 5 Chamb., Ev., § 3577, n. 9.

42. *Empire State Surety Co. v. Lindenmeier*, 54 Colo. 497, 131 Pac. 437 (1913); *Harper v. Scott*, 12 Ga. 125 (1852).

43. *Graham v. Campbell*, 56 Ga. 258 (1876).

44. *Hayden v. Mitchell*, 103 Ga. 431, 30 S. E. 287 (1897); *Bain v. Walsh*, 85 Me. 108, 26 Atl. 1001 (1892); *Stevens v. Miles*, 142 Mass. 571, 8 N. E. 426 (1886); *Wells v. Preasy*, 105 Mo. 164, 16 S. W. 670 (1891); *Isaacs v. Cohn*, 10 App. Div. 216, 41 N. Y. Supp. 779 (1896); *Blackburn v. Blackburn*, 8 Ohio 81 (1837); *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. 489 (1858); *Moore v. Beattie*, 33 Vt. 219 (1860); 5 Chamb., Ev., § 3578, n. 1.

45. *Wells v. Martin*, 1 Ohio St. 386 (1853).

Province of the Jury.—The jury is in no way concerned with the determination of this question. It is for them to decide on the sufficiency of the evidence afforded by the writing thus proven.⁴⁶

§ 1125. *Diligence Required in Search.*⁴⁷—Evidence to prove the loss or destruction of a writing must, in order to authorize the relaxation of the rule respecting the production of the original, show that reasonable diligence has been used in searching for the missing document.⁴⁸ A mere casual, indifferent or careless search will not be sufficient. Something more will be required; something tending to show that the proponent was actuated by a desire to find the alleged lost or destroyed instrument and that his efforts were exerted, *bona fide*, to accomplish that result.⁴⁹ The court must be satisfied that the party has acted in good faith in his endeavor to find it; that he has exercised the same degree of diligence, in his search for it, that an ordinary person, actually desirous of finding and producing it, would have employed, which would require his looking for it in those places where one might fairly have expected to find it and the exercise by him, generally, of all reasonable endeavors to discover it.⁵⁰

A Question for the Presiding Judge.—The questions whether good faith has been exercised by a person, in his search for an alleged missing document, and whether he has exercised the required degree of diligence, are ones which the presiding judge must determine, in the exercise of sound reason. If he is satisfied that the proponent has exercised reasonable diligence and good faith, in his search for the writing, he will permit the introduction in evidence of secondary evidence of its contents; otherwise it will be rejected.⁵¹ His determination in the matter will ordinarily not be disturbed on appeal.⁵²

46. *Glassell v. Mason*, 32 Ala. 719 (1858); *Witter v. Latham*, 12 Conn. 392 (1837); *Page v. Page*, 15 Pick. (Mass.) 368 (1834); *Jackson v. Firer*, 16 Johns. (N. Y.) 193 (1819); 5 Chamb., Ev., § 3578, n. 3.

Review on appeal.—The determination of the presiding judge in the matter will not, as a general rule, be reviewed on appeal. *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31 (1890); *Kearney v. Mayor, etc., of New York*, 92 N. Y. 617 (1883).

47. 5 Chamberlayne, Evidence, §§ 3579, 3580.

48. *Empire Surety Co. v. Lindenmeier*, *supra*; *Prussing v. Jackson*, *supra*; *Howe v. Fleming*, 123 Ind. 262, 24 N. E. 238 (1889); *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114 (1891); *Windom v. Brown*, 65 Minn. 394, 67 N. W. 1028 (1896); *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207 (1897); *Gladstone Lumber Co. v. Kelly*, 64 Or. 163, 129 Pac. 763 (1913); *Heller v. Peters*,

140 Pa. 648, 21 Atl. 416 (1891); 5 Chamb., Ev., § 3579, n. 2.

49. *Post v. Leland*, 184 Mass. 601, 69 N. E. 361 (1904); *Kidder v. Blaisdell*, 45 Me. 461 (1858); *Slocum v. Bracy*, 65 Minn. 100, 67 N. W. 843; 5 Chamb., Ev., § 3579, n. 3.

50. *Pilcher v. Dothan Mule Co.*, 6 Ala. App. 552, 60 So. 547 (1913); *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37 (1898); *Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856 (1892); *Atherton v. Phoenix Ins. Co.*, 109 Mass. 32 (1871); *Thomson v. Flint & P. M. R. Co.*, 131 Mich. 95, 90 N. W. 1037 (1902); *Kleinmann v. Geiselmänn*, *supra*; *Blair v. Flack*, 141 N. Y. 53, 35 N. E. 941 (1894); *Empire Transp. Co. v. Steele*, 70 Pa. 188 (1871); 5 Chamb., Ev., § 3579, n. 4.

51. *Hobson v. Porter*, 2 Colo. 28 (1873); *Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175 (1906); *Kleinmann v. Geiselmänn*, *supra*; *Kearney v. City of New York* *supra*; *Gorgas*

§ 1126. **Public Records; Official and Judicial.**⁵³—Public records, consisting of official registers, papers and writings and judicial records, constitute an exception to the rule requiring the production of the original, unless the failure to produce it is explained to the satisfaction of the presiding judge. In the inconvenience attending the removal of such records and the danger of loss or destruction are found the reasons for permitting proof of public records other than by production of the original.⁵⁴ In the case, however, of public official⁵⁵ and judicial⁵⁶ records, which are shown to have been lost or destroyed, the same principle controls, as to proof other than by the original, as in the case of other documents and writings. When the fact of their loss or destruction is established, to the satisfaction of the presiding judge, he will permit the introduction of parol evidence of their contents.⁵⁷

§ 1127. **Voluminous Facts in Different Writings.**⁵⁸—Another instance of where the court will not insist upon the production of the original occurs where the evidence consists of the result of voluminous facts, contained in books, writings and the like, and an examination or inspection of them could not, conveniently, be made in the presence of the tribunal.⁵⁹ In such a case one who is sufficiently competent and who has examined the particular writings may be permitted to state the result ascertained by him.⁶⁰ The same

v. Hertz, 150 Pa. 538, 24 Atl. 756 (1892); 5 Chamb., Ev., § 3580, n. 1.

52. Morison v. Weik, 19 Cal. App. 139, 124 Pac. 869 (1912); Stevens v. Miles, 142 Mass. 571, 8 N. E. 426 (1886).

53. 5 Chamberlayne, Evidence, § 3581.

54. Tobin v. Seay, 2 Brev. (S. C.) 470 (1811); Ballard v. Thomas, 19 Gratt. (Va.) 14 (1868); Doe v. Roberts, 13 M. & W. 520 (1844); 5 Chamb., Ev., § 3581, nn. 1, 2.

55. People v. Pike, 197 Ill. 449, 64 N. E. 393 (1902); Bowland v. McDonald Ind. Teleph. Co., 82 Kan. 84, 107 Pac. 797 (1910); Winn Parish Bank v. White Sulphur Lumber Co., 133 La. 282, 62 So. 907 (1913); U. S. Peg Wood, etc., Co. v. Bangor & A. R. Co., 104 Me. 472, 72 Atl. 190 (1909); Wallace v. First Parish in Townsend, 109 Mass. 263 (1872); Van Pelt v. Parry, 218 Mo. 680, 118 S. W. 425 (1909); Leland v. Cameron, 31 N. Y. 115 (1865); Young v. Buckingham, 5 Ohio 485 (1832); Richard's Appeal, 122 Pa. 547, 15 Alt. 903 (1888); 5 Chamb., Ev., § 3581, n. 3.

56. Hibernia Sav. & Loan Soc. v. Boyd, 155 Cal. 193, 100 Pac. 239 (1909); Brown v. Madden, 141 Ga. 419, 81 S. E. 196 (1914); Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767 (1907); Dailey v. Coleman, 122 Mass. 64 (1877); Crane v. Waldron, 133 Mich. 73, 94

N. W. 593 (1903); McKellar v. McKay, 156 N. C. 283, 72 S. E. 375 (1911); Heeney v. Kilbane, 59 Ohio St. 499, 53 N. E. 262 (1898); Coombs v. Cook, 35 Okl. 326, 129 Pac. 698 (1913); Richard's Appeal, *supra*; 5 Chamb., Ev., § 3581, n. 4.

57. Davies v. Pettit, 11 Ark. 349 (1850); Morrison v. Price, 130 Ky. 139, 112 S. W. 1090 (1908); Davis v. Montgomery, 205 Mo. 271, 103 S. W. 979 (1907); 5 Chamb., Ev., § 3581, n. 5.

58. 5 Chamberlayne, Evidence, § 3582.

59. New La Junta & Lamar Canal Co. v. Kyerhill, 17 Colo. App. 26, 67 Pac. 1026 (1902); Elmira Roofing Co. v. Gould, 71 Conn. 629, 42 Atl. 1002 (1899); Culver v. Marks, 122 Ind. 554, 23 N. E. 1086 (1889); State v. Brady, 100 Iowa 191, 69 N. W. 290 (1896); Greenfield v. Massachusetts Mut. L. Ins. Co., 47 N. Y. 430 (1872); Boston 7 W. R. Co. v. Dana, 1 Gray (Mass.) 83 (1854); Scott v. Astoria R. Co., 43 Or. 26, 72 Pac. 594 (1903); 5 Chamb., Ev., § 3582, n. 1.

60. Elmira Roofing Co. v. Gould, *supra*. Thus, where a witness has been permitted, as bearing upon the question of a person's solvency, to state the result of an inspection by him of books of account, securities and the like belonging to such person. Meyer v. Sefton, 2 Stark. 274 (1817). In like manner

principle controls where the results sought to be established are negative, instead of affirmative, as where the object is to show that the books examined did not contain certain facts.⁶¹ In such cases, however, it has been held that if required by the opposing party the books should, unless some legal excuse exists, be produced for examination or to enable him to cross-examine the witness.⁶² It frequently happens that the result of an examination of voluminous books is embodied in the form of an abstract or schedule, containing in itself numerous figures, tabulations or statements which if orally stated to the jury might nevertheless tend to confuse them in their deliberations. Therefore an abstract made as a result of an examination, by an expert, may be received in evidence where such person has testified as a witness and an opportunity has been afforded for cross-examination.⁶³

§ 1128. **Writing Collateral to Issues.**⁶⁴—The “best evidence rule” is not operative in all cases, as exclusive of proof by parol of some fact or facts evidenced by the instrument. In so far as the contents of the writing are concerned and the legal effect thereby created it may be collateral to the issue, in which case some fact asserted therein may be established by extrinsic evidence.⁶⁵ Thus, where it is desired to prove the existence of a partnership, and not the mutual obligations and rights, as expressed in the partnership agreement, parol evidence has been received to establish that fact.⁶⁶ So, where the fact that a person occupies the relation of a tenant to another is sought to be proved, proof of the relation may be made by extrinsic evidence.⁶⁷ In like manner where

a witness may be permitted to testify as to a balance due between parties. *Walford v. Farnham*, 47 Minn. 95, 49 N. W. 528 (1891); *Roberts v. Duxon*, Pea 83, 3 R. R. 660 (1791). Thus witnesses who, in an official capacity, have examined the accounts of a state treasurer in his dealings with the state and who have made a written report in regard thereto, have been permitted to testify as to the general balance of his accounts with the state. *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. ed. 269 (1873).

A report of a city treasurer is not rendered secondary evidence by the fact that it is copied from other records in his office. The reports were made pursuant to official duty and were originals and not mere copies. *Dickinson v. White*, 25 N. D. 523, 143 N. W. 754, 49 L. R. A. (N. S.) 362 (1913).

61. *Woodruff v. State*, 61 Ark. 157, 170, 32 S. W. 102 (1895). Such a situation is presented where a witness is permitted to testify that he had examined the books of a bank to ascertain whether the defendant, when he passed a check and received an advance on it, had any account with the bank, and that

he had no account at that time. *People v. Dole*, 122 Cal. 486, 55 Pac. 581 (1898).

62. *Elmira Roofing Co. v. Gould*, *supra*; *Culver v. Marks*, *supra*.

63. *Culver v. Marks*, *supra*. The question of the admission of an abstract or schedule is a matter for the presiding judge to determine as a matter of sound administration. *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001 (1893).

64. 5 Chamberlayne, Evidence, § 3583.

65. *Knight v. Landis*, 11 Ga. App. 536, 75 S. E. 834 (1912); *Johnson v. Carlin*, 121 Minn. 176, 141 N. W. 4 (1913); *Hoisting Mach. Co. v. Goeller Iron Works*, 84 N. J. L. 504, 87 Atl. 331 (1913); *Peters & Roberts Furniture Co. v. Queen City F. Ins. Co.*, 63 Or. 382, 126 Pac. 1005 (1912); 5 Chamb., Ev., § 3583, n. 1.

66. *Griffin v. Stoddard*, 12 Ala. 783 (1848); *Trowbridge v. Cushman*, 24 Pick. (Mass.) 310 (1834); *Price v. Hunt*, 59 Mo. 258 (1875); *Edwards v. Tracy*, 62 Pa. 374 (1869); *Cutler v. Thomas*, 25 Vt. 73 (1852); 5 Chamb., Ev., § 3583, n. 2.

67. *Doe v. Gray*, 2 Houst. (Del.) 135

the question of the ownership of personal⁶⁸ or real property⁶⁹ is collateral to the issue, proof of such fact by parol evidence has been allowed. That a particular writing has been executed may also be shown in this manner.⁷⁰ In much the same way, evidence apart from the writing itself has been received to show the fact of a sale,⁷¹ an indebtedness,⁷² the delivery of a contract.⁷³ that one is president of a corporation,⁷⁴ the payment of a license fee,⁷⁵ taxes⁷⁶ or money upon an order,⁷⁷ or in settlement of an account⁷⁸ and the like.

§ 1129. **Writing in Control of Adverse Party.**⁷⁹—Another instance of where the production of an original instrument is excused exists where it is in the possession or under the control of the opponent, who fails or refuses to produce it after reasonable notice to him to do so.⁸⁰ In such case the same principle controls as where the document is lost or destroyed. It is the fact that the instrument is not within the power of the party to produce which permits of the introduction of secondary evidence.⁸¹

Notice to Produce; Necessity of.—The proponent will be required, as a

(1858); *Straw v. Jones*, 9 N. H. 400 (1838); *Rayner v. Lee*, 20 N. H. 384 (1870); *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633 (1847); *Wolf v. Unhelm* (Tex. Civ. App. 1912), 146 S. W. 216; *Taylor v. Peck*, 21 Gratt. (Va.) 11 (1871); 5 Chamb., Ev., § 3583, n. 3.

68. *Patterson v. Kicker*, 72 Ala. 406 (1882); *Oaks v. West* (Tex. Civ. App. 1901), 64 S. W. 1033; *Sleep v. Heymann*, 57 Wis. 495, 16 N. W. 17 (1883); 5 Chamb., Ev., § 3583, n. 4.

69. *Wright v. Roberts*, 116 Ga. 104, 42 S. E. 369 (1902); *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137 (1821); *Babcock v. Beaver Creek Tp.*, 65 Mich. 479, 32 N. W. 653 (1887); 5 Chamb., Ev., § 3583, n. 5.

70. *McLendon v. Rubenstine*, 180 Ala. 615, 61 So. 902 (1913); *Massey v. Farmers' Nat. Bank*, 113 Ill. 334 (1885); *Gilbert v. Duncan*, 29 N. J. L. 133 (1861); *Reynolds v. Kelly*, 1 Daly (N. Y.) 283 (1863); *Shoenberger v. Hackman*, 37 Pa. 87 (1860); 5 Chamb., Ev., § 3583, n. 6.

Proofs of loss.—*Hagan v. Merchants' & Bankers' Ins. Co.*, 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 492 (1890); *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562 (1891).

71. *Johnson v. Carlin*, *supra*.

72. *Stein v. Local Board of Review*, 135 Iowa 539, 113 N. W. 339 (1907); *Cooper v. Breckenridge*, 11 Minn. 341 (1866).

73. *Pecos & N. T. Ry. Co. v. Cox* (Tex. Civ. App. 1912), 150 S. W. 265.

74. *Knight v. Landis*, *supra*.

75. *Eastman & Co. v. Watson*, 72 Wash. 522, 130 Pac. 1144 (1913).

76. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57 (1914).

77. *Phillips v. Pippin*, 4 Ala. App. 426, 58 So. 111 (1912).

78. *Raymond v. Sellick*, 10 Conn. 480 (1835); 5 Chamb., Ev., § 3583, n. 14.

79. 5 Chamberlayne, Evidence, §§ 3584–3586.

80. *Atlantic Coast Line R. Co. v. Hill*, 12 Ga. App. 392, 77 S. E. 316 (1913); *Young v. People*, 221 Ill. 51, 77 N. E. 536 (1906); *Chicago, etc., R. Co. v. Benedict's Adm'r.*, 154 Ky. 675, 159 S. W. 526 (1913); *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525, 27 N. E. 1010 (1891); *Hoffman Heading & Stave Co. v. St. Louis, etc., Ry. Co.*, 119 Mo. App. 495, 94 S. W. 597 (1906); *Bissell v. Myton*, 160 App. Div. 268, 145 N. Y. Supp. 591 (1914); *John v. John, Wright* (Ohio) 584 (1834); *McFadden v. McFadden*, 32 Pa. Super. Ct. 534 (1907); *Missouri, K. & T. Ry. Co. v. Elliott*, 102 Fed. 96, 42 C. C. A. 188 (1900); 5 Chamb., Ev., § 3584, n. 1.

81. *Attorney-General v. Le Merchant*, 2 T. R. 201 (1772). The fact that the adverse party is not in the actual possession of the writing called for is not material; if he has the legal right to, and may demand, possession of the instrument, his failure to produce it will authorize the admission of secondary evidence. *Wilson v. Wright*, 8 Utah, 215, 30 Pac. 754 (1892); 5 Chamb., Ev., § 3584, n. 3.

general rule, to show to the satisfaction of the presiding judge that the adverse party, being in possession of the writing, has failed or refused to produce the same; after notice given to him or to his attorney,⁸² sufficiently reasonable in point of time to allow of its production at the trial.⁸³ The object of the notice is to give sufficient opportunity to an opponent to enable him, if he desires, to produce the writing so that the tribunal may be in the possession of the best evidence of its contents, and where he fails to produce it, to satisfy the court that the proponent is entitled to introduce secondary evidence, owing to his inability to procure the original.⁸⁴ It is the general rule that, if the adverse party is in possession of the document and it is in court, a demand for its production at the trial, without any prior notice, is sufficient.⁸⁵ A formal written notice to an opponent to produce a writing may also be excused where, from the nature of the proceeding, the pleadings and the like, knowledge by him of the fact that the instrument will be required may be presumed.⁸⁶ Under such circumstances a failure by him to produce it will, without any formal notice calling for its production, enable the proponent to introduce other evidence of its contents.⁸⁷ Much the same principle, as is mentioned in the last instance, controls where the writing in question is a notice; such as a notice to quit, notice of protest and the like.⁸⁸ A denial by the adverse party of his ever having been in possession of the writing desired, as where, in the case of a letter⁸⁹ or telegram⁹⁰ he denies ever having received it, has been considered as excusing the proponent from giving notice to him to produce it.

82. *Rockwell Stock & Land Co. v. Castroni*, 6 Colo. App. 521, 42 Pac. 180 (1895); *Janatt v. Corbett*, 99 Ga. 72, 24 S. E. 408 (1896); *International Text-Book Co. v. Mackhorn*, 158 Ill. App. 543 (1911); *Anderson Bridge Co. v. Applegate*, 13 Ind. 339 (1859); *Com. v. Emery*, 2 Gray (Mass.) 80 (1854); *Weeks v. Lyon*, 18 Barb. (N. Y.) 530 (1854); *Choteau v. Raitt*, 20 Ohio 132 (1851); *Eibert v. Finkheiner*, 68 Pa. 234, 8 Am. Rep. 176 (1871); 5 Chamb., Ev., § 3585, n. 1.

83. *Burke v. Table Mountain Water Co.*, 12 Cal. 403 (1859); *Jack v. Rowland*, 98 Ill. App. 352 (1901); *Lowell v. Flint*, 20 Me. 401 (1841); *Pitt v. Emmons*, 92 Mich. 542, 52 N. W. 1004 (1892); *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296 (1829); *Beard v. Southern Ry. Co.*, 143 N. C. 137, 55 S. E. 505 (1906); *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728 (1863); 5 Chamb., Ev., § 3585, n. 2.

84. *Sayer v. Glossop*, 2 Exch. 409 (1848); 5 Chamb., Ev., § 3585, n. 3.

85. *Stadler Brewing Co. v. Weadley*, 99 Ill. App. 161 (1900); *Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 587 (1828); *Overlock v. Hall*, 81 Me. 348, 17 Atl. 169 (1889); *Whelan v.*

Gorton, 15 Misc. 625, 37 N. Y. Supp. 334 (1896); *Scioto Valley R. Co. v. Cromin*, 38 Ohio St. 122 (1882); 5 Chamb., Ev., § 3585, n. 4.

86. *Brown v. Booth*, 66 Ill. 419 (1872); *McGinnis v. State*, 24 Ind. 500 (1865); *Rose v. Lewis*, 10 Mich. 483 (1862); *Nealley v. Greenough*, 25 N. H. 325 (1852); *Eisenhart v. Slaymaker*, 14 Serg. & R. (Pa.) 153 (1826); *U. S. v. Doehler*, 1 Baldw. (U. S.) 519 (1832); 5 Chamb., Ev., § 3585, n. 5.

87. *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242 (1887); *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83, 86 Am. Dec. 351 (1864); *Peter & Roberts Furniture Co. v. Queen City Fire Ins. Co.*, *supra*; *McClellan v. Hertzog*, 6 Serg. & R. (Pa.) 154 (1820); 5 Chamb., Ev., § 3585, n. 6.

88. *Brown v. Booth*, *supra*; *Brentner v. Chicago, etc., R. Co.*, 58 Iowa 625, 12 N. W. 615 (1882); *Edwards v. Bonneau*, 1 Sandf. (N. Y.) 610 (1848); *Morrow v. Com.*, 48 Pa. 305 (1864); 5 Chamb., Ev., § 3585, n. 7.

89. *Boyd v. Warden*, 163 Cal. 155, 124 Pac. 841 (1912).

90. *Kohl v. Bradley, Clark & Co.*, 130 Wis. 301, 110 N. W. 265 (1907).

Requirements as to Notice.—The notice to produce, in order to accomplish the purpose for which it is intended, should so designate the writing or writings called for as to inform the adverse party of the particular instrument required. As a general rule, if the writing desired is described in such a manner that the adverse party must have been aware of what particular instrument was called for, it will be sufficient⁹¹ to the extent that a failure or refusal to comply therewith being shown, secondary proof concerning the contents will be admitted.⁹²

§ 1130. *Writing in Possession or Control of Third Party; Out of Jurisdiction.*⁹³ — If a writing is in the possession or control of a third party, the proponent will not be permitted to produce extrinsic proof of its contents, until the presiding judge has been satisfied of his inability, after having used all proper efforts, to obtain the original.⁹⁴ There is, apparently, an entire lack of harmony as to the admissibility of secondary evidence of the contents of a writing, which is in the possession of a third party, who is beyond the jurisdiction of the court. Many courts require that some effort or the use of due diligence by the proponent, in seeking to obtain the writing in question, must be shown before the presiding judge will admit secondary evidence of its contents.⁹⁵ According to other decisions it is sufficient if it appears that efforts to procure it would be fruitless.⁹⁶ The United States Supreme Court has, however, declared that secondary evidence of the contents of a writing may be given upon proof, merely, that it is beyond the jurisdiction of the court.⁹⁷ This doctrine also has the sanctions of numerous other jurisdictions⁹⁸ and seems to be that which is most consistent with the principles of sound administration.

91. *Rogers v. Custance*, 2 Moo. & Rob. 179 (1839).

92. *Burke v. Table Mountain Water Co.*, *supra*; *McDowell v. Aetna Ins. Co.*, 164 Mass. 444, 41 N. E. 665 (1895); *Walden v. Davison*, 11 Wend. (N. Y.) 65, 25 Am. Rep. 602 (1833); 5 Chamb., Ev., § 3586, n. 2.

93. 5 Chamberlayne, Evidence, § 3587.

94. *Scott v. Bassett*, 186 Ill. 98, 57 N. E. 875 (1900); *Butler v. Mail & Express Pub. Co.*, 171 N. Y. 208, 63 N. E. 951 (1902); 5 Chamb., Ev., § 3587, n. 1.

95. *McDonald v. Erhes*, 231 Ill. 295, 83 N. E. 162 (1907); *Waite v. High*, 96 Iowa 742, 65 N. W. 397 (1895); *Knowlton v. Knowlton*, 84 Me. 283, 24 Atl. 847 (1892); *Pringey v. Guss*, 16 Okl. 82, 86 Pac. 292 (1905); *Wiseman v. Northern Pac. R. Co.*, 20 Or. 425, 26 Pac. 272 (1891); *Bruger v. Princeton & St. M. Mut. F. Ins. Co.*, 129 Wis. 281, 109 N. W. 95 (1906); 5 Chamb., Ev., § 3587, n. 2.

96. *Bishop v. American Preservers Co.*, 157 Ill. 284, 41 N. E. 785 (1895); *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368 (1894); *People v. Seaman*, 107 Mich.

348, 65 N. W. 203 (1895); 5 Chamb., Ev., § 3587, n. 3.

97. *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. ed. 299 (1873). "It is well settled that if books and papers necessary as evidence in one State be in the possession of a person living in another State, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary." *Id.*, per Mr. Justice Swayne.

98. *Webb v. Gray*, 181 Ala. 408, 62 So. 194 (1913); *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786 (1893); *Owers v. Olather Silver Min. Co.*, 6 Colo. App. 1, 39 Pac. 980 (1895); *Stewart Bros. v. Randall Bros.*, 138 Ga. 796, 76 S. E. 352 (1912); *Wright v. Chicago, etc., R. Co.*, 118 Mo. App. 392, 94 S. W. 555 (1906); *Butler v. Mail & Express Pub. Co.*, *supra*; *Wiseman v. Northern Pac. R. Co.*, *supra*; *Ralph v. Brown*, 3 Watts & S. (Pa.) 395 (1842); *Texas, etc., Ry. Co. v. Berlin* (Tex. Civ. App. 1914), 165 S. W. 62; 5 Chamb., Ev., § 3587, n. 6.

CHAPTER LX.

EVIDENCE BY PERCEPTION.

Evidence by perception; meaning of term, 1131.

Administrative power of court, 1132.

Subjects of; animals, 1133.

persons; facts to be proved; age, 1134.

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§ 1131. **Evidence by perception; meaning of term.**¹— Real evidence is a term which covers those facts which are presented to the perceptive faculties of the court and jury by things; personal evidence is a term which denotes such facts as have their origin or source in persons, whether viewed in a physical or mental capacity, or regarded as acting in an involuntary or voluntary manner; and such portion of personal evidence as falls within the direct observation of the judge or jury constitutes, together with real evidence as above defined, evidence by perception.² This term will be used in the following sections, evidence by perception having reference to those facts of which the court acquires knowledge by the exercise of its own perceptive faculties.³ In a great measure proof by this means may be more potent than by any other evidence. It is not founded upon the opinion or testimony of others but upon the knowledge acquired by the exercise of one's own senses,⁴ which is ordinarily the most convincing. What one sees or hears is a matter of personal knowledge and furnishes to him a much better test of truth, a stronger probability of the existence of the fact observed, than would result from the testimony of others.⁵ Therefore, such evidence will ordinarily be received.

§ 1132. **Administrative Power of Court.**⁶— The question whether such evidence shall be admitted is largely one for the presiding judge to determine, as a matter of sound administration,⁷ or, as it is frequently expressed, it is a

1. 5 Chamberlayne, Evidence, § 3588.

2. *Supra*, § 21: 1 Chamb., Ev., § 31. See also, 1 Chamb., Ev., §§ 27-31 for discussion of real evidence and evidence by perception.

3. *People v. Kinney*, 124 Mich. 486, 83 N. W. 147 (1900); *House v. State*, 42 Tex. Cr. 125, 57 S. W. 825 (1900).

4. *Warlick v. White*, 76 N. C. 175 (1877).

5. *Gentry v. McMinnis*, 3 Dana (Ky.) 382 (1835); 5 Chamb., Ev., § 3588.

6. 5 Chamberlayne, Evidence, §§ 3589, 3590.

7. *Marshall v. Gantt*, 15 Ala. 682 (1849); *Leonard v. Southern Pac. Co.*, 21 Or. 555, 28

matter in the discretion of the court,⁸ having in view the proper application of the general rules of evidence. If the evidence offered is too remotely related to the issues involved to be of any evidentiary value it will be rejected,⁹ as in other cases. It will, however, ordinarily be received if it is relevant to the issue involved,¹⁰ even though it may be offensive to the senses, unless the fact to be proved may be established equally as well by some other evidence,¹¹ and providing it is not indecent. An exception may, however, well be, and should be, made, and the evidence rejected, where it would be contrary to public policy, morals or decency to admit it.¹² Thus the presiding judge might properly reject an offer to prove a fact by an exposure of the person which would be indecent and shock one's sensibilities.¹³ He may also in the exercise of his administrative powers refuse to admit the evidence where it would tend to prejudice,¹⁴ confuse, or mislead the jury.¹⁵

Review by Appellate Court.—Owing to the fact that this evidence is of such a character that it cannot be reported on appeal, it has been held that the discretion exercised by the presiding judge, in respect to the admission or rejection of such evidence, is not subject to review.¹⁶ It would seem, however, that in a case of clear abuse of discretion by the trial court, the appellate court may act, as in other cases of a want of sound administration of the rules of evidence in the court below.¹⁷

§ 1133. Subjects Of; Animals.¹⁸—The presiding judge may, in the exercise of his administrative powers, permit the production of animals in court, or an inspection of them outside of the court, whenever the evidence afforded thereby is relevant to the issue.¹⁹

§ 1134. Persons; Facts to be Proved; Age,²⁰ etc.—Where the age of a person is a relevant fact, the tribunal may, in many cases, be guided by an observation of his or her appearance.²¹ In the great majority of cases, better evidence,

Pac. 887 (1892); 5 Chamb., Ev., § 3589, n. 1.

8. *Tudor Iron Works v. Weber*, 129 Ill. 535, 21 N. E. 1078 (1889).

9. *Murrah v. State* (Tex. Civ. App. 1901), 63 S. W. 318; *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801 (1884).

10. *People v. Fernandez*, 35 N. Y. 40, 62 (1866).

11. *Knowles v. Crampton*, 55 Conn. 336 (1887).

12. *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462 (1902); *Vierling v. Binder*, 113 Iowa 337, 85 N. W. 621 (1901).

13. *Warlick v. White*, *supra*.

14. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176 (1893); *Rost v. Brooklyn Heights R. Co.* 10 App. Div. 477, 41 N. Y. Supp. 1069 (1896); *Selleck v. Janesville*, 104 Wis. 570, 80 N. W. 944 (1899).

15. *Mann v. Sioux City & P. R. Co.*, 46 Iowa 637 (1877); *Stewart v. Everts*, 76 Wis. 35, 44 N. W. 1092 (1890); 5 Chamb., Ev., § 3589, n. 9.

16. *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672 (1900).

17. *Meier v. Weikel*, 22 Ky. L. Rep. 953, 59 S. W. 496 (1900); *Hunter v. Allen*, 35 Barb. (N. Y.) 42 (1860); *Philadelphia v. Rule*, 93 Pa. 15 (1880); 5 Chamb., Ev., § 3590, n. 2.

18. 5 Chamberlayne, Evidence, § 3591.

19. *Dillard v. State*, 58 Miss. 368 (1880); *Beaver v. Whitney*, 3 Pa. Co. Ct. 613 (1885); 5 Chamb., Ev., § 3591, n. 1.

20. 5 Chamberlayne, Evidence, §§ 3592–3599.

21. *First Nat. Bank v. Casey*, 158 Iowa 349, 138 N. W. 897 (1913); *Com. v. Hollis*, 170 Mass. 433, 49 N. E. 632 (1898); *People v.*

tending to more satisfactorily establish such fact, is obtainable and should be produced.²² Each case, however, must depend upon its own facts.²³

Color, Race, Etc.—The question of the color of a person is a matter respecting which the court may often obtain knowledge from observation.²⁴ This method of perception, as an aid in establishing such fact, is more frequently employed in cases of alleged mixed ancestry.²⁵

Identity.—The question of identity is one concerning which the tribunal may well exercise its sense of perception.²⁶ Thus the identity of a person may be proved by inspection and when so established it will require strong proof to the contrary to overcome it.²⁷

Mental Condition, Insanity, Intelligence, Etc.—The question of the mental condition of a person such as whether he is insane or an idiot, while one upon which expert testimony is of much weight,²⁸ is, nevertheless, a matter for observation by the tribunal before which the issue is being tried. Thus a person's appearance, actions and conduct are matters concerning which the tribunal may exercise its perceptive faculties as an aid to a determination respecting his mental condition.²⁹ Similarly where a person of tender years is called as a witness, the question of his intelligence may be determined by the court on an examination *on voir dire*.³⁰

Physical Injuries.—Unless the exhibition be such as may be characterized as indecent,³¹ it is, as a general rule, permissible in actions to recover damages for physical injuries, sustained as the result of some wilful or negligent act, to exhibit the part of the body injured to the tribunal.³² The rule of

Meade, 10 N. Y. Supp. 943 (1890); Hermann v. State, 73 Wis. 248, 41 N. W. 171 (1888); 5 Chamb., Ev., § 3592, n. 1. And where a person has voluntarily presented himself as a witness in his own behalf and has testified as to his age, a direction by the court that he stand up before the jury that they may judge of his age from his appearance is in no way a violation of the constitutional provision that an accused person shall not be compelled to give evidence against himself. Williams v. State, 98 Ala. 52, 13 So. 333 (1892).

22. Stephenson v. State, 28 Ind. 272 (1867); Robinius v. State, 63 Ind. 235 (1878).

23. Hermann v. State, *supra*.

24. Garvin v. State, 52 Miss. 207 (1876); Almehouse Com'rs v. Whistelo, 3 Wheel. Cr. (N. Y.) 194 (1808).

25. Chancellor v. Milly, 9 Dana (Ky.) 23 (1839); Warlick v. White, 76 N. C. 175 (1877); 5 Chamb., Ev., § 3593, n. 2.

26. William's Case, 29 Fed. Cas. No. 17,709, Crabbe (U. S.) 243 (1839); 5 Chamb., Ev.

§ 3594, n. 1. The exhibition to the jury in a bastardy case of a child three years old to show a resemblance between the child and the alleged father is error as the child is too young to have distinctive features. Johnston v. Great Northern R. Co., 128 Minn. 365, 151 N. W. 125, L. R. A. 1917 B 1140 (1915).

27. William's Case, *supra*.

28. *Supra*, §§ 722, 812; 3 Chamb., Ev., §§ 2007 *et seq*; §§ 2415 *et seq*.

29. Com. Braley, 1 Mass. 103 (1804); Beau-bien v. Cicotte, 12 Mich. 459 (1864); Matter of Russell, 1 Barb. Ch. (N. Y.) 38 (1845); 5 Chamb., Ev., § 3595, n. 2.

30. Com. v. Robinson, 165 Mass. 426, 43 N. E. 121 (1896); State v. Juneau, 88 Wis. 180, 59 N. W. 580 (1894); Wheeler v. U. S., 159 U. S. 523, 16 S. Ct. 93, 40 L. ed. 244 (1895); 5 Chamb., Ev., § 3595, n. 3.

31. Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582 (1878).

32. Stewart v. Driscoll, 56 Colo. 316, 139 Pac. 18 (1914); Johnson v. Wasson Coal Co., 173 Ill. App. 414 (1913); Cleveland, etc., R. Co. v. Colson, 51 Ind. App. 225, 99 N. E.

relevancy, also, controls, as in all other cases, and, if the evidence is irrelevant, it will be rejected.³³ Such an exhibition is not subject to the influence of bias, to which the testimony of witnesses may be; on the other hand, the tribunal is in the possession of the best evidence obtainable which, in other instances, the proponent is required to produce and, for the exclusion of which, in this particular class of cases there is no satisfactory reason to be found.³⁴ If, however, the presiding judge is satisfied that no good object will be attained by the proposed exhibition and that the main controlling reason is to make an appeal to the jury and arouse their sympathies, he will refuse to permit it.³⁵ It should appear that the condition, at the time of the exhibition, was a result of the injury sustained and for which the action is brought and not due to some other cause which has intervened.³⁶

Compulsory Submission to Examination.—Among the several decisions which are opposed to the exercise by the court of a power, independent of statute, compelling a plaintiff, in a civil action for physical injuries, to submit his person to an examination, for the purpose of discovering the extent of his injury, that of the United States Supreme Court, as enunciated by Mr. Justice Gray,³⁷ is perhaps the most frequently referred to. The conclusion reached by the court, in this case, is based upon the ground of the sacred right of the individual to the possession and control of his own person, free from inviolability, and that there is no power, at common law, to compel a person to forego this right by submission to an examination by order of court. This view, which is also endorsed in other jurisdictions,³⁸ was dissented from by two justices of the United States Supreme Court, in the case just referred to,³⁹ in an opinion written by Mr. Justice Brewer, and the conclusion, as expressed in the prevailing opinion, has not met with approval, in the majority

433. (1913); *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299 (1899); *Willis v. Browning*, 161 Mo. App. 461, 143 S. W. 516 (1912); *Perry v. Metropolitan St. R. Co.*, 68 App. Div. 351, 74 N. Y. Supp. 1 (1902); *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 Pac. 16 (1913); 5 Chamb., Ev., § 3596, n. 2. *Photographs* showing a person's crippled condition have been received. *Faivre v. Manderscheid*, 117 Iowa 724, 90 N. W. 76 (1902).

33. *Grand Lodge B. of R. T. v. Randolph*, 186 Ill. 89, 57 N. E. 882 (1900).

34. *Faivre v. Manderscheid*, *supra*; *Carrico v. West Va. Cent. & P. Ry. Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50 (1894).

35. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176 (1893); *Svetkovic v. Union Pac. R. Co.*, 95 Neb. 369, 145 N. W. 990 (1914); *Rost v. Brooklyn Heights R. Co.*, 10 App. Div. 477, 41 N. Y. Supp. 1069 (1896); 5 Chamb., Ev., § 3596, n. 6.

36. *French v. Wilkinson*, 93 Mich. 322, 53 N. W. 530 (1892).

37. *Union Pac. R. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 S. Ct. 1000 (1890). Right to compel party to action to submit to a physical examination either before trial or in the presence of the jury. See note, *Bender*, ed., 129 N. Y. 51.

38. *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269, 40 Atl. 1114 (1894); *Peoria, etc., Ry. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951 (1893); *Stack v. New Haven & H. R. Co.*, 177 Mass. 155, 58 N. E. 686 (1900); *McQuigan v. Delaware, L. & W. R. Co.*, 129 N. Y. 50, 29 N. E. 235 (1891); *Easler v. Southern Ry. Co.*, 60 S. C. 117, 38 S. E. 238 (1900); *Gulf, etc., R. Co. v. Brown* (Tex. Civ. App. 1903), 75 S. W. 807; 5 Chamb., Ev., § 3597, n. 2.

39. *Union Pac. R. Co. v. Botsford*, *supra*.

of the cases in which the question has arisen, the weight of authority being that the court may, in the absence of any statutory power, require a submission to such an examination.⁴⁰ In these cases, while the theory of the inviolability and sacredness of the person from interference by others is recognized, the extent to which it is carried is said to be based upon, as it is expressed in one opinion, "a fallacious and somewhat sentimental line of argument," which would, in many cases, operate as a "denial of justice."⁴¹ An examination of the opinions, which decide against the existence of the power, certainly fails to disclose the reasons of any great weight in support of their conclusion. Much of the same situation exists where the presiding judge is requested to direct a person to perform some physical act, in the presence of the jury, to show the nature and extent of the injuries. Thus it seems that, in such a case, the court may, in its discretion, grant or refuse a request to direct a person to walk in the presence of the jury, where it is claimed that the injury has resulted in lameness.⁴² Where a party has voluntarily exhibited a physical injury to the jury, the right of the opponent to have an examination made by experts, for the purpose of introducing their testimony respecting the injury, is recognized and a denial of a request to that effect has been held to be error.⁴³

Exercise of Power by Presiding Judge.—Those jurisdictions which recognize the existence of the power to compel a person to submit his body, or some part thereof, to an examination in actions for physical injuries, do not generally regard the order as one which may be insisted upon as a matter of right.⁴⁴

40. *Bagwell v. Atlanta Consol. St. Ry. Co.*, 109 Ga. 611, 34 S. E. 1018 (1899); *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462 (1902); *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616 (1895); *Aske v. Duluth & Iron Range R. Co.*, 83 Minn. 197, 85 N. W. 1101 (1901); *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053 (1898); *McGovern v. Hope*, 63 N. J. L. 76, 42 Atl. 830 (1899); *Miami Turnpike Co. v. Baily*, 37 Ohio St. 104 (1881); *Hess v. Lake Shore & M. S. R. Co.*, 7 Pa. Co. Ct. 565 (1890); 5 Chamb., Ev., § 3597, n. 5.

41. *Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851 (1899).

42. *Hatfield v. St. Paul & Duluth R. Co.*, 33 Minn. 130, 22 N. W. 176 (1885).

43. *Haynes v. Trenton*, 123 Mo. 326, 27 S. W. 622 (1894).

44. *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200 (1900).

Facts established by majority doctrine.—In one of the leading cases in which this question is considered and which contains an exhaustive review of the authorities upon the

subject it is said that the following propositions may be regarded as established by the cases which sustain what may be said to be the prevailing opinion of the courts. "(1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in case of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the end of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without damage to the plaintiff's life or health or the infliction of serious pain; (5) that the refusal of the motion, when the circum-

It is rather a question for the presiding judge to determine, as a matter of administration, guided by sound reasoning having in view the attainment of justice.⁴⁵ His conclusion in the matter will not ordinarily be disturbed on appeal, where it appears that sound reason has been employed or, as it is sometimes expressed, unless there has been an abuse of discretion.⁴⁶

§ 1135. **Resemblance, Paternity, Etc.**⁴⁷—In some jurisdictions, in bastardy and seduction cases where it is sought to establish parentage by a resemblance between the child and the putative father, the exhibition of a child for this purpose has been refused, without regard to the age.⁴⁸ Ordinarily, however, the decisions have generally been founded upon the circumstance that the child was of very immature age and had not outgrown certain characteristics which tend to create a resemblance between very young infants and the uncertainty in a resemblance between any such infant and its reputed father.⁴⁹ Under such circumstances the evidence afforded by the comparison may be somewhat fanciful⁵⁰ and should be sparingly resorted to.⁵¹ Ordinarily, however, the general rule seems to be that for the purpose of establishing a resemblance, such resemblance being relevant, a child of the proper age may be produced in court and submitted to the inspection of the jury.⁵² As bearing upon the question of a want of resemblance a child may also be exhibited to the jury.⁵³ In Iowa the rule seems to be that a child under two years of age should not be thus exhibited as, in any way, an aid in determining its parentage, owing to the immaturity of the features of a child under that age.⁵⁴ In other jurisdictions, and this seems to be the general rule, the youth of the child is not a ground for exclusion, but rather goes to the weight of the evidence.⁵⁵

stances appearing in the record present a reasonably clear case for the examination under the rules stated is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced not by punishment as for a contempt, but by delaying or dismissing the proceeding." *City of South Bend v. Turner, supra.*

45. *Southern Bell Teleph. Co. v. Lynch*, 95 Ga. 529, 20 S. E. 500 (1894); *City of South Bend v. Turner, supra*; *Hatfield v. St. Paul & D. R. Co., supra*; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 21 N. W. 524 (1884); 5 Chamb., Ev., § 3598, n. 2.

46. *Hatfield v. St. Paul & D. R. Co., supra*; *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 169, 8 S. W. 350 (1888).

47. 5 Chamberlayne, Evidence, § 3600.

48. *Reitz v. State*, 38 Ind. 187 (1870); *People v. Carney*, 29 Hun (N. Y.) 47 (1883); *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489 (1885).

49. *Risk v. State*, 19 Ind. 152 (1862); *State*

v. Danforth, 48 Iowa 43 (1878); 5 Chamb., Ev., § 3600, n. 2.

50. *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56 (1888); *Hanawalt v. State, supra.*

51. *Udy v. Stewart*, 10 Ont. Rep. 591 (1886). Similarly, in such a case, a want of resemblance is not to be regarded as a strong circumstance against the alleged paternity. *Id.*

52. *Re Jessup*, 81 Cal. 408, 21 Pac. 976 (1889); *State v. Smith*, 54 Iowa 104, 6 N. W. 153 (1880); *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871 (1891); *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600 (1888); *Finnegan v. Dugan*, 14 Allen (Mass.) 197 (1867); *Crow v. Jordan*, 49 Ohio St. 655, 32 N. E. 750 (1892); 5 Chamb., Ev., § 3600, n. 6.

53. *Paulk v. State*, 52 Ala. 427 (1875).

54. *State v. Harvey*, 112 Iowa 416, 84 N. W. 535 (1900), though it is said that an exception may exist where the parents are of different races.

55. *Scott v. Donovan, supra.* As in other cases if the evidence is not relevant it will be

cide, the relative position of the parties at the time of the slaying. Articles found upon the body of the deceased, or shown to have belonged to him,⁸⁰ may, also, under the proper conditions of relevancy, frequently be produced for the inspection of the jury. Similarly clothes worn by a witness of the crime have also been thus exhibited.⁸¹ Nor is it any objection to the admission of evidence of this character that it cannot be made a part of the record.⁸²

Identification of Articles.—It will be required where a weapon or the article used in committing the offense, or connected with its commission, is offered as belonging to the accused,⁸³ clothes or other personal property as being his,⁸⁴ or some article as the property of the injured or deceased person, or some part of a body as that of the deceased,⁸⁵ that it should be identified as such to the satisfaction of the presiding judge.

§ 1138. *Experiments.*⁸⁶—Where it is convenient and practical and the relevancy of the evidence has been established, the court may permit an experiment to be made in order to demonstrate to the jury the working of machinery,⁸⁷ the use of tools or the like,⁸⁸ or firearms,⁸⁹ whether under specified conditions a certain result will ensue⁹⁰ and the like.⁹¹ Similarly in the case of a physical injury it may be proper, in an action to recover damages therefor, to conduct an experiment in the presence of the jury, for the purpose of demonstrating the extent of the injury.⁹² The question whether an experiment shall be made is one for the court to determine;⁹³ much caution should be exercised,⁹⁴

less to show the nature of the injury or to identify the person killed or the slayer as they tend to prejudice the jury. *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106 (1913).

80. *Mitchell v. State*, *supra*; *Gardiner v. People*, *supra*.

81. *Thomas v. State*, 45 Tex. Cr. 111, 74 S. W. 36 (1903).

82. *Hart v. State*, 15 Tex. App. 202 (1883).

83. *People v. Sullivan*, *supra*; *Com. v. Bentley*, 97 Mass. 551 (1867); *State v. Cadotte*, 17 Mont. 315, 42 Pac. 857 (1895); *State v. Hill*, 65 N. J. L. 626, 47 Atl. 814 (1900); *People v. Gonzalez*, *supra*; 5 Chamb., Ev., § 3605, n. 1.

84. *State v. Porter*, 32 Or. 135, 45 Pac. 964 (1897).

85. *State v. Moxley*, 102 Mo. 374, 14 S. W. 969 (1890).

86. 5 Chamberlayne. Evidence, § 3606.

87. *Taylor v. U. S.*, 89 Fed. 954, 32 C. C. A. 449 (1898).

88. *People v. Hope*, 62 Cal. 291 (1882).

89. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812 (1893).

90. *Jumpertz v. People*, 21 Ill. 375 (1859);

Eidt v. Cutter, 127 Mass. 522 (1879); *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130, 22 N. W. 176 (1885); 5 Chamb., Ev., § 3606, n. 4.

91. *Tudor Iron Works v. Weber*, 31 Ill. App. 306 (1888); *Horan v. Chicago, etc., R. Co.*, 89 Iowa 328, 56 N. W. 507 (1893); *Adams v. Thief River Falls*, 84 Minn. 30, 86 N. W. 767 (1901); *Clark v. Brooklyn Heights R. Co.*, 78 App. Div. 478, 79 N. Y. Supp. 811 (1903); *Schweinfurth v. Cleveland, etc., Ry. Co.*, 60 Ohio St. 215, 54 N. E. 89 (1899); 5 Chamb., Ev., § 3606, n. 5.

92. *Adams v. Thief River Falls*, *supra*. Thus it was held proper to permit a doctor to insert a pin in the plaintiff's side, where it was alleged she had become paralyzed as a result of the injury, the object of the experiment being to show her insensibility to pain. *Osborne v. Detroit*, 32 Fed. 36 (1886), rev'd upon other grounds in 135 U. S. 500, 34 L. ed. 260, 10 S. Ct. 1012 (1890).

93. *Campbell v. State*, 55 Ala. 80 (1876); *Jumpertz v. People*, *supra*.

94. *Hatfield v. St. Paul & D. R. Co.*, *supra*; *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833 (1898).

and where it may reasonably be anticipated that an opportunity will be thereby afforded to fabricate evidence, or that, otherwise, the jury may be confused or misled, the court may well refuse permission to make the experiment.⁹⁵ The court will require that the experiment be made under similar conditions and like circumstances to those which existed in the case in issue.⁹⁶ In a criminal proceeding where the state has been allowed to examine witnesses in respect to experiments made by them, it is proper to allow the defense to prove similar experiments, with different results under like circumstances.⁹⁷

§ 1139. **View.**⁹⁸— It will frequently be of value as an aid to the jury, in the determination of the issues, that they be permitted to visit a locality for the purpose of inspecting premises.⁹⁹ The right of the presiding judge, when, in the exercise of his administrative powers he deems it advisable to permit the jury to inspect real property involved in the controversy under proper conditions and with a due regard for the rights of the litigants, is recognized as better tending to the discovery of the truth.¹ Sometimes personal property which is of such a character that it cannot be produced before the tribunal, may be viewed by the jury under similar conditions.² Whether the power of the trial court in respect to permitting such action is conferred by statute, or exists independent thereof as one of its inherent powers, early recognized at common law and sustained by numerous decisions, it is regarded as one which the presiding judge is to exercise guided by sound reason,³ and whose action will not generally be disturbed on appeal. He may ordinarily refuse to permit a view where he is satisfied that there has been a substantial change or alteration in the subject of the inspection,⁴ that by the production of photographs,⁵ maps or drawings, the premises are sufficiently and clearly portrayed,⁶ or that the loss

95. *Campbell v. State*, *supra*; *Com. v. Scott*, 123 Mass. 222 (1877).

96. *Leonard v. Southern Pac. R. Co.*, 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221 (1892); *Hardwick Sav. Bank & Trust Co. v. Drenan*, 72 Vt. 438, 48 Atl. 645 (1900); *Daniels v. Stock*, 23 Colo. App. 529, 130 Pac. 1031 (1913).

97. *Smith v. State*, 2 Ohio St. 512 (1853). Practical tests and experiments in evidence. See note, *Bender*, ed., 30 N. Y. 370. Practical tests in. See note, *Bender's* ed., 35 N. Y. 49.

Pantomime.— A witness may be allowed to go through a pantomime before the jury showing his conclusions as to how a crime was committed where he has already testified to the physical marks at the scene of the crime on which he bases his opinion. *Flowers v. State*, — Fla. —, 68 So. 754, L. R. A. 1915 E 848 (1915).

98. 5 Chamberlayne, *Evidence*, § 3607, see *supra*, § 116, *Chamb., Ev.*, § 26.

99. *Mayor v. Brown*, 87 Ga. 596, 13 S. E. 638 (1891); *Springer v. Chicago*, 135 Ill. 552, 26 N. E. 514 (1891); *Schweinfurth v. Cleveland, etc., Ry. Co.*, *supra*; 5 *Chamb., Ev.*, § 3607, n. 1.

1. *Springer v. Chicago*, *supra*; *Tulley v. Fitchburg R. Co.*, 134 Mass. 499 (1883).

2. *Nutter v. Ricketts*, 6 Iowa 92 (1858).

3. *Johnson v. Winship Mach. Co.*, 108 Ga. 554, 33 S. E. 1013 (1899); *Com. v. Chance*, 174 Mass. 245, 54 N. E. 551 (1899); *Springer v. City of Chicago*, *supra*; *People v. Buddensieck*, 103 N. Y. 487, 9 N. E. 44 (1886); *Com. v. Miller*, 139 Pa. 77, 21 Atl. 138 (1891); 5 *Chamb., Ev.*, § 3607, n. 4.

4. *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389 (1895); *Tully v. Fitchburg R. Co.*, *supra*; 5 *Chamb., Ev.*, § 3607, n. 5.

5. *People v. Buddensieck*, *supra*.

6. *Jenkins v. Wilmington, etc., R. Co.*, 110 N. C. 438, 15 S. E. 193 (1892).

of time, in taking the view, will not compensate for the advantages to be gained. He should be careful, however, in not permitting the jury to be guided too strongly by the results of their view so that they entirely disregard other evidence in the case.⁷ It is also essential that the view should be taken in accordance with such provisions as may be prescribed by statute, or, in the absence thereof, in compliance with directions by the trial court,⁸ having in view, in a criminal case, the protection of the rights of the accused.⁹ Where, by statute, a provision is made that the jury may view the premises, the action not only of the court, but of the jury and sheriff, or other officer in whose charge they are, should be in accordance with the law and, in no way, exceed the power conferred.¹⁰

7. Thus where the question involves one of damage to land, the jury may, under some circumstances, be permitted to view the property to enable them to better understand the evidence or to harmonize or weigh conflicting testimony: to instruct them, however, that they may disregard or are not to be guided by the opinions of witnesses as to value, would be error. *Hoffman v. Bloomsburg & S. R. Co.*, 143 Pa. St. 503, 22 Atl. 823 (1891); *Flower v. Baltimore & P. R. Co.*, 132 Pa. 524, 19 Atl. 274 (1890); *Boardman v. Westchester Fire Ins. Co.*, 54 Wis. 364 (1882).

8. *Eastwood v. Parker*, 3 Park. Cr. R. (N. Y.) 25 (1855).

9. *State v. Bertin*, 24 La. Ann. 46 (1872).

10. Thus, while they may view a manufacturing plant or factory, it is held to be improper to direct the person in charge of such place to put the machinery in operation for the benefit of the jury, owing to the fact

that it may be operated under conditions differing from those at the time in question. *Hughes v. General Elec. L. & P. Co.*, 107 Ky. 485, 54 S. W. 723, 21 Ky. L. Rep. 1202 (1900).

A judge sitting as a trier of facts without a jury may at common law take a view without statutory authority as may also a master or referee. *Carpenter v. Carpenter* (N. H. 1917), 101 Atl. 628, L. R. A. 1917 F 974.

View outside jurisdiction.—A view is a method of procedure conducted in the absence of the court as an aid in the ascertainment of the truth from the physical act of inspection which does not require the exercise of the judicial powers of a court at the time for its proper performance. Hence a view taken outside the state if it is a jurisdictional irregularity may be waived. *Carpenter v. Carpenter* (N. H. 1917), 101 Atl. 628, L. R. A. 1917 F 974.

CHAPTER LXI.

WITNESSES; ATTENDANCE OF.

Attendance of witnesses; power of court as to, 1140.

mode of procuring; subpoena, 1141.

subpoena duces tecum, 1142.

habeas corpus ad testificandum, 1143.

recognizance, 1144.

compulsory process; not a taking of property; duty to testify, 1145.

payment for attendance, 1146.

punishment for contempt, 1147.

§ 1140. **Attendance of Witnesses; Power of Court as to.**¹—Although prior to the statute of Elizabeth,² the existence of the power of procuring the attendance and testimony of witnesses had been recognized, and is, in fact, to be regarded as inherent,³ yet by that act authorizing the issuance of process, calling upon a person to testify and imposing a penalty upon him for a failure to appear in accordance therewith, an attempt was first made to relieve the situation which existed during the early development of the common law, owing to the doctrine of maintenance,⁴ by defining a positive means for procuring the attendance and testimony of witnesses. The source of the power is now generally found in the constitutions and statutes of the various jurisdictions.

Persons Exempt or Excused from Attendance.—The provisions of the United States Constitution, securing to an accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his behalf, is not regarded as authorizing the issuance for this purpose of process to ambassadors, whose personal inviolability is recognized by the law of nations, or to consuls who are exempted by express treaty.⁵ At common law, while few exemptions were allowed, yet, where it was apparent that it would inflict a hardship upon a person to require him to appear, the court would not, in all cases, exercise its power in this respect. Thus, should it be shown that the witness was sick or that a member of his family was seriously ill,⁶ or that he was so enfeebled by reason of age or other cause that it would imperil his life

1. 5 Chamberlayne, Evidence, §§ 3609, 3610.

2. Stat. 5, Eliz. c. 9.

3. Crosby v. Potts, 8 Ga. App. 463, 69 S. E. 582 (1910).

4. Thayer, Pre. Treat. Ev., pp. 122, et seq.; 5 Chamb., Ev., § 3609.

5. Baiz v. Malo, 27 Misc. (N. Y. 685, 58

N. Y. Supp. 806 (1899); *In re Dillon*, 7 Sawy. (U. S. D. C.) 561, 7 Fed. Cas. No. 3,914 (1854).

6. Cutler v. State, 42 Ind. 244 (1873); *State v. Hatfield*, 72 Mo. 518 (1880); *Foster v. McDonald*, 12 Heisk. (Tenn.) 619 (1874); 5 Chamb., Ev., § 3610, n. 2.

to make the trip,⁷ or that it would inflict a hardship upon him in his business relations or affairs,⁸ the presiding judge would, where he was satisfied that the purposes of justice would be served equally as well, permit of the taking of his testimony by deposition. The mere fact, however, that a person is ill or has received some slight injury or wound,⁹ or the slight indisposition of the wife or other member of the family of the witness,¹⁰ will not be regarded as sufficient to relieve him from his duty to attend. In some states an exception has been made by statute in the case of females, to the extent that the court may allow of the taking of their testimony by deposition,¹¹ but not generally exempting them from attendance where it is necessary that they should appear.¹² Other exceptions have also from time to time been made and in some instances abolished by statute, resort to which must be had, in each jurisdiction, to determine in what cases they exist.

§ 1141. **Mode of Procuring; Subpœna.**¹³—The power of the court to require a person to appear as a witness is ordinarily exercised in one of four ways, namely, by (1) subpœna, (2) subpœna *duces tecum*, (3) *habeas corpus ad testificandum*, and (4) recognizance.¹⁴ The usual mode is by means of a subpœna, which is a judicial writ served upon him and commanding him to be present in court at a time and place specified, and to testify to what he knows in the cause which the writ refers to.¹⁵ The fact that the day specified is a legal holiday is not material, provided it is a day upon which the court may transact judicial business.¹⁶

Attachment.—The court may enforce the attendance of a witness by attachment,¹⁷ upon its being shown that he has failed to appear, after due and proper service of a subpœna upon him and the performance of all acts such as payment or tender of fees and the like which are essential to render the summons effective.¹⁸ A party is entitled to it as a matter of right under certain statutes.¹⁹ Ordinarily, however, the granting of it is a matter in the discretion of the court. It may be refused where it is shown that the witness is dying.²⁰

7. Jackson v. Perkins, 2 Wend. (N. Y.) 308 (1829).

8. People v. Davis, 15 Wend. (N. Y.) 602 (1836).

9. Eller v. Roberts, 3 Ired. L. (N. C.) 11 (1842).

10. Foster v. McDonald, *supra*.

11. *Ex parte* Branch, 105 Ala. 231, 16 So. 926 (1894); Western & A. R. Co. v. Denmead, 83 Ga. 351, 9 S. E. 683 (1889); 5 Chamb., Ev., § 3610, n. 7.

12. Augusta & S. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706 (1890).

13. 5 Chamberlayne, Evidence, §§ 3611–3614.

14. 5 Chamb., Ev., § 3611.

15. Cairns v. Sampsell, 158 Ill. App. 415 (1910).

16. Chambers v. Oehler, 107 Iowa 155, 77 N. W. 853 (1899). It is essential that there should be some proceeding pending in the court where the presence of the witness is desired. *Id.*

17. Com. v. Carter, 11 Pick. (Mass.) 277 (1853); State v. Huff, 161 Mo. 459, 61 S. W. 900, 1104 (1901); People v. Vermilyea, 7 Cow. (N. Y.) 108 (1827); Bowen v. Thornton, 9 Wkly. Notes Cas. (Pa.) 575 (1881); 5 Chamb., Ev., § 3613, n. 1.

18. State v. Stewart, 117 La. 476, 41 So. 798 (1906); State v. Trumbull, 4 N. J. L. 139 (1818); Anonymous, 2 Ohio Dec. 407 (1860); 5 Chamb., Ev., § 3613, n. 2.

19. Green v. State, 17 Fla. 649 (1880).

20. State v. McCarthy, 43 La. Ann. 541, 9 So. 493 (1891).

or is prevented from attending by reason of sickness,²¹ or that his testimony would not have been relevant or material.

Service of Subpœna.— In the absence of statutory provision, it is usually required that the service shall be a personal one, and that it should be made a reasonable time before the date the witness is directed to appear,²²

§ 1142. Subpœna Duces Tecum.²³— In case there are books, documents, or other writings in the possession of an adverse or third party, or under his control, which it is desired to have him produce, a clause describing them with such reasonable certainty as to inform him of what is required and directing him to produce them is inserted in the writ, which is then known as a *subpœna duces tecum*. This prerogative of the courts is an ancient one²⁴ and is essential to the existence of legal tribunals, as an aid to them in the discovery of truth and the attainment of justice.²⁵ The *ad testificandum* clause is not essential in a subpœna *duces tecum*, and, where it contains such a clause, it is not necessary that such person be sworn as a witness.²⁶ Whether the process of the court has been obeyed, in respect to a subpœna *duces tecum*, is a matter concerning which the court may require to be informed as a preliminary to the trial.²⁷

Requirement as to Certainty of Description of Writings.— It is essential that a subpœna *duces tecum* should describe the writings, which it is desired to have produced, with reasonable certainty and that it should not be in the nature of an omnibus subpœna.²⁸ A party will not be allowed the use of such a process for the purpose, as it is frequently expressed, of conducting a mere “fishing expedition.”²⁹

Duty of Witness.— In case of such a subpœna it is, as a general rule, the duty of the witness to comply with the mandate of the court and submit the writings for the inspection of the presiding judge, who will then decide the question of privilege and relevancy, although it may happen that a failure to produce them may, in some cases, be excused.³⁰ His failure to appear for the

21. *Cutler v. State*, *supra*; *State v. McCarthy*, *supra*; *State v. Hatfield*, 72 Mo. 518 (1880); 5 Chamb., Ev., § 3613, n. 5.

22. *Hammond v. Stewart*, 1 Strange 510 (1722); 5 Chamb., Ev., § 3614.

23. 5 Chamberlayne, Evidence, §§ 3615–3620.

24. *Shull v. Boyd*, 251 Mo. 452, 473, 158 S. W. 313 (1913); *Summers v. Moseley*, 2 Cr. & M. 477 (1834). The United States Courts have power, under Judiciary Act 1789, § 14 and U. S. Rev. St. § 716, to issue subpœna *duces tecum*. *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 31 S. Ct. 676, 55 L. ed. 873 (1911).

25. *Amey v. Long*, 9 East 473 (1808).

26. *Wilson v. U. S.*, 221 U. S. 361, 31 S. Ct. 538, 55 L. ed. 771 (1911).

27. *Shull v. Boyd*, *supra*.

28. *Ex parte Jaynes*, 70 Cal. 638, 12 Pac. 117 (1886); *Ex parte Calhoun*, 87 Ga. 359, 13 S. E. 694 (1891); *State v. Davis*, 117 Mo. 614, 23 S. W. 759 (1893); *Hoppe v. Ostrander & Co.*, 183 Fed. 786 (1910); 5 Chamb., Ev., § 3616, n. 1.

29. *American Car & Foundry Co. v. Alexandria Water Co.*, 221 Pa. 529, 70 Atl. 867, 128 Am. St. Rep. 749 (1908).

30. *Chaplain v. Briscoe*, 5 Sm. & M. (Miss.) 198 (1845); *In re Hirsch*, 74 Fed. 928 (1890); 5 Chamb., Ev., § 3617, n. 1.

purpose of testifying as required by such a subpoena will not be justified by the fact that it may contain directions to produce books and papers in violation of his rights.³¹ In case such a subpoena is directed to a corporation, an officer thereof in whose custody the books or other documents called for may be, should obey the summons.³²

As an Unreasonable Search and Seizure.—A subpoena *duces tecum*, which is suitably specific and properly limited in its scope and calls for the production of documents, which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced, is not violative of the Fourth Amendment to the Constitution of the United States, as to unreasonable search and seizure.³³ On the other hand, however, this provisions and others of a like nature in state constitutions have, for their object, the protection of the individual in his rights to his chattels, personal papers, documents and writings, and where a subpoena *duces tecum* is of such a broad and sweeping character as to come within the meaning of the phrase, “unreasonable search and seizure,” the aid of the court by such process will be refused.³⁴

Application For.—On application to the court for a subpoena *duces tecum*, it is generally regarded as essential that the petition should set forth facts sufficient to inform the court as to what writings are desired and to show in what respect they are relevant or material.³⁵ It must appear that the writings desired are relevant and material;³⁶ a *prima facie* case, however, sufficient to create a reasonable belief that the evidence furnished by the documents is relevant or material is all that will ordinarily be required.³⁷

Statutes.—Statutory or code provisions, in respect to the issuance of a subpoena *duces tecum*, are frequently controlling and should be followed.³⁸

§ 1143. *Habeas Corpus Ad Testificandum.*³⁹—Where the person desired as a witness is detained, under process of law, in a prison or other institution of a similar nature, in consequence of which he would be unable to appear in

31. *Leber v. U. S.*, 170 Fed. 881, 96 C. C. A. 57 (1909).

32. *Wilson v. United States*, *supra*.

33. *Wilson v. United States*, *supra*.

34. *Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 276, 114 Pac. 589 (1911); *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426 (1880); *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. ed. 652; 5 Chamb., Ev., § 3618, n. 2.

35. *State ex rel. Ozark Cooperage & Lumber Co. v. Wurdeman*, 176 Mo. App. 540, 158 S. W. 436 (1913); *United States v. Hunter*, 15 Fed. 712 (1882), in the case of telegrams. It is not regarded as sufficient for the mover to allege, in his petition for such a subpoena, “that the documents desired are material and

relevant to the issue in that cause,” such an allegation being a mere conclusion of law; the facts should be set out leaving it for the court to determine whether the relief sought should be granted. *United States v. Terminal R. Ass’n*, 154 Fed. 268 (1907).

36. *U. S. v. Terminal R. Ass’n*, *supra*; *Dancel v. Goodyear Shoe Mfg. Co.*, 128 Fed. 753 (1904); *Bentley v. State*, 107 Ill. App. 245 (1903); 5 Chamb., Ev., § 3619, n. 3.

37. *U. S. v. Terminal R. Ass’n*, *supra*.

38. *Gaynor v. New York Breweries Co.*, 154 App. Div. 881, 138 N. Y. Supp. 899 (1912); *Beebe & Co. v. Equitable Mut. L. & E. Assn.*, 76 Iowa 129, 40 N. W. 122; 5 Chamb., Ev., § 3620.

39. 5 Chamberlayne, Evidence, § 3621.

court, his presence may be obtained by a writ of *habeas corpus ad testificandum*, the granting of which was a matter of discretion at common law,⁴⁰ the power in this respect, being inherent.⁴¹ The granting of an order for the attendance of such a person in court rests in the sound discretion of the presiding judge.⁴² If he should be satisfied that the purposes of justice will be equally as well accomplished, and the statute permits of it, he may refuse the order and direct the taking of the deposition of the imprisoned person.⁴³

§ 1144. **Recognizance.**⁴⁴—Another mode by which the attendance of a witness, in behalf of the state in a criminal proceeding may be provided for is by a recognizance for his appearance and, in case of his refusal or inability to comply with the order of the court in this respect, his commitment in some place of detention until the trial.⁴⁵ A bond so given should be definite as to the time the witness is to appear and if not sufficient in this respect is a nullity, as where the witness is required to appear at an impossible date.⁴⁶ The power to bind witnesses by recognizance to appear and give evidence in criminal cases is said to be an extraordinary one, which cannot be exercised in the absence of statutory authority.⁴⁷

§ 1145. **Compulsory Process; Not a Taking of Property; Duty to Testify.**⁴⁸—The exercise by the court of its power to compel a witness to attend trial and to testify is not a taking of property in violation of the constitutional provision.⁴⁹ Such attendance, accompanied by the giving of testimony, is rather regarded as a duty which the individual owes to society as a member thereof.⁵⁰

In Criminal Cases.—The same rule as prevails in civil cases, is also held to control in the case of misdemeanors.⁵¹ In criminal cases, involving the commission of felonies, witnesses in behalf of the government may be summoned

40. *Van Vliissingen v. Van Vliissingen*, 173 Ill. App. 124 (1912); *Hayden v. Com.*, 140 Ky. 634, 131 S. W. 521 (1910); *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91 (1886); *People v. Sebring*, 14 Misc. (N. Y.) 31, 35 N. Y. Supp. 237 (1895); 5 Chamb., Ev., § 3621, n. 1.

41. *Jackson v. Mobley*, 157 Ala. 408, 47 So. 590 (1908); *People v. Sebring*, *supra*.

42. *Roberts v. State*, 94 Ga. 66, 21 S. E. 132 (1894); *Ex parte Marmaduke*, *supra*; *In re Thaw*, 166 Fed. 71, 91 C. C. A. 657 (1908); 5 Chamb., Ev., § 3621, n. 3.

43. *People v. Putnam*, 129 Cal. 258, 61 Pac. 961 (1900); *Buckley v. Von Claussen*, 53 N. Y. Law J. (June 9, 1915), No. 59. *Compare Hancock v. Parker*, 100 Ky. 143, 37 S. W. 594, 18 Ky. L. Rep. 622 (1896).

44. 5 Chamberlayne, Evidence, § 3622.

45. *Ex parte Shaw*, 61 Cal. 58 (1882); *Clayborn v. Tompkins*, 141 Ind. 19, 49 N. E.

121 (1895); *In re Petrie*, 1 Kan. App. 184, 40 Pac. 118 (1895); *Lutshaw's Case*, 1 Ohio Dec. 96 (1848); *Crosby v. Potts*, 8 Ga. App. 463, 69 S. E. 582 (1910); 5 Chamb., Ev., § 3622, n. 1.

46. *Mackey v. State*, 38 Tex. Cr. 24, 40 S. W. 982 (1897) (a date prior to giving of the bond).

47. *Little v. Territory*, 28 Okl. 467, 114 Pac. 699 (1911).

48. 5 Chamberlayne, Evidence, §§ 3623-3625.

49. *West v. State*, 1 Wis. 209, 233 (1853); 1 Starkie's Ev., 85; 5 Chamb., Ev., § 3623, n. 1.

50. *Bennett v. Waller*, 23 Ill. 97, 179 (1859); *Israel v. State*, 8 Ind. 467 (1857); *Baird v. Cochran*, 4 Serg. & R. (Pa.) 397 (1818); 5 Chamb., Ev., § 3623, n. 2.

51. *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49 (1825).

without a tender of fees, upon the principle that it is the duty which every citizen owes to the public to appear in such cases and give his testimony even without any compensation.⁵² The accused, however, could not under the early English common law demand, as a matter of right, compulsory process for his witnesses.⁵³ This situation, however, is generally provided for and remedied at the present time by constitutional provision and legislative enactments regulatory of the exercise of the right.⁵⁴ Good faith on the part of a defendant is essential and it is said that the materiality and importance of the evidence should be established to the satisfaction of the presiding judge before this process will be issued.⁵⁵ The mere service of a subpoena is not regarded as satisfying the provision of the constitution, the actual production of the witness in court being required,⁵⁶ unless this is impossible, as where the witnesses desired are beyond the reach of process.⁵⁷ In fact it is said that such a provision does not guarantee any more than ordinary diligence, on the part of the officers who may be seeking to serve a desired witness.⁵⁸ The provision of the United States Constitution together with the amendments thereto,⁵⁹ are not regarded as affecting or applying to prosecutions or proceedings in the courts of the states or to laws enacted by the legislatures of the states, but only to prosecutions and proceedings in the courts of the United States and laws enacted by Congress.⁶⁰

Granting of Matter of Discretion.— Ordinarily, under such provisions, the accused is required to show his inability to pay the expense of procuring witnesses; to state the names of those he desires and what he intends to prove by each. The purpose of this is to place it within the power of the court to determine, in the exercise of sound reason, the good faith of the accused in the matter and the nature of the proposed testimony so that, if the presiding judge deems it proper, he may grant the application.⁶¹ If he is not so satisfied, he may refuse to grant the order, as where it appears from the application that

52. *Id.*

53. *Pittman v. State*, 51 Fla. 94, 41 So. 385 (1906); *Crosby v. Potts*, 8 Ga. App. 463, 69 S. E. 582 (1910).

54. *Bush v. State*, 168 Ala. 77, 53 So. 266 (1910); *People v. Bossert*, 14 Cal. App. 111, 111 Pac. 15 (1910); *Moore v. State*, 59 Fla. 23, 52 So. 971 (1910); *State v. Robertson*, 133 La. 806, 63 So. 863 (1913); *State v. Berkley*, 92 Mo. 41, 4 S. W. 24 (1887); *State v. Archer*, 54 N. H. 465 (1874); *Romine v. State*, 10 Okl. Cr. 350, 136 Pac. 775 (1913); *State v. Sheehan*, 28 R. I. 160, 66 Atl. 66 (1907); 5 *Chamb., Ev.*, § 3624, n. 4.

55. *People v. Willard*, 92 Cal. 482, 28 Pac. 585.

56. *State v. Berkley*, *supra*; *State v. Baker*,

81 Tenn. 326 (1884); *State v. Grimes*, 4 Wash. 445, 35 Pac. 361 (1893).

57. *State v. Yetzer*, 97 Iowa 423, 66 N. W. 737 (1896); *State v. Richard*, 127 La. 413, 3 So. 669 (1910).

58. *Smith v. State*, 118 Ga. 61, 44 S. E. 817 (1903).

59. U. S. Const., § 2, Art. 3 and amendments five and six.

60. *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228 (1906); *Anderson v. State*, 8 Okla. Cr. 90, 126 Pac. 840 (1912); *Presser v. Illinois*, 116 U. S. 252, 6 S. Ct. 580, 29 L. ed. 615 (1885); 5 *Chamb., Ev.*, § 3624, n. 10.

61. *Jenkins v. State*, 31 Fla. 190, 12 So. 680 (1893); *State v. Nix*, 111 La. 812, 35 So. 917 (1904); *State v. Grimes*, *supra*; 5 *Chamb., Ev.*, § 3625, n. 1.

the testimony, which the witness would be expected to give, would be inadmissible.⁶² Generally, however, if the attendance of the witness can be procured and his testimony is material, the court should grant a motion for compulsory process; a substitution therefor, as by permitting his testimony upon a former trial to be read, will not satisfy the requirement;⁶³ nor will the fact that an admission is made by the prosecution be allowed,⁶⁴ a statute permitting the latter substitute being held unconstitutional.⁶⁵ If it should appear, however, that the attendance of the witness can not be procured, owing to compulsory process being ineffectual and exhausted, an admission may be received.⁶⁶ Where by statute the right to summon witnesses at the expense of the state is left to the discretion of the trial court, its action is not reviewable on appeal.⁶⁷

§ 1146. **Payment for Attendance.**⁶⁸—By the Statute of Elizabeth,⁶⁹ it was made necessary, in order to secure the attendance of a witness in a civil cause, to pay or tender to him “his reasonable charges,” at the time of the service of the subpoena, which charges included a reasonable sum for travel to and from the trial and for his necessary stay at the place of trial and, if the party desiring his testimony did not at least tender him some reasonable amount therefor, he could not be compelled to testify, nor would the court proceed against him in any way for his refusal to appear.⁷⁰ Much the same situation now exists under modern statutes,⁷¹ a witness not being obliged to obey such a summons, unless he has been paid or tendered his traveling expenses to and from the trial, with some allowances for the expenses of his necessary stay. The amount which he is paid, both for his traveling and his attendance at the trial, is now, as a general rule, fixed by legislative enactment.⁷²

Experts; Services Performed By.—In those cases where an expert is not merely called upon to testify, to render the same duty to society which any other member thereof is required to do, but is asked to perform some special act, aside and apart from that obligation,⁷³ as for instance a physician to make a post-mortem examination,⁷⁴ a chemical analysis,⁷⁵ or to examine the facts

62. *State v. Berger* (Iowa 1902), 90 N. W. 621.

63. *People v. Bossert, supra*.

64. *People v. Fong Chung*, 5 Cal. App. 591, 91 Pac. 106 (1910); *State v. Salge*, 2 Nev. 321 (1866); *State v. Richard, supra*.

65. *State v. Berkley, supra*.

66. *Kelly v. State*, 160 Ala. 48, 49 So. 535 (1909); *State v. Wilcox*, 21 S. D. 532, 114 N. W. 687 (1907).

67. *Goldsby v. U. S.*, 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343 (1895).

68. 5 Chamberlayne, *Evidence*, §§ 3626-3630.

69. Stat. 5 Eliz. c. 9.

70. *Newton v. Harland*, 9 Dowl. 16 (1840).

71. *People v. Healey*, 139 Ill. App. 363

(1908); *Atwood v. Scott*, 99 Mass. 177, 96 Am. Dec. 728 (1868); *Larimore v. Bobb*, 114 Mo. 446, 21 S. W. 922 (1893); *In re Depue*, 185 N. Y. 60, 77 N. E. 798 (1906); *Wohlforth v. Kuppler*, 77 Wash. 339, 137 Pac. 477 (1914); 5 Chamb., Ev., § 3626, n. 3. See also, the statutes of the various states.

72. *Engel v. Ehret*, 21 Cal. App. 112, 130 Pac. 1197 (1913); *Anderson v. Board of County Com'rs*, 91 Kan. 362, 137 Pac. 799 (1914).

73. See *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619 (1896); *Lyon v. Wilkes*, 1 Cow. (N. Y.) 591 (1823).

74. *Board of County Com'rs v. Lee*, 3 Colo. App. 177, 32 Pac. 841 (1893); *County of Northampton v. Innes*, 26 Pa. 156 (1846);

of the case or attend court during an entire trial for the purpose of hearing all of the testimony so as to qualify him to pass an opinion,⁷⁶ or an expert accountant to make an examination of books,⁷⁷ no good reason can be suggested why he should either be compelled to do so or be asked to without compensation for the services rendered.⁷⁸

Opinions of; Extra Compensation.—In another class of cases where one who is an expert is called upon to testify, not merely to facts within his knowledge, but also to express an opinion based upon facts presented to him, there is some authority in favor of the view that he should not be compelled to do so without extra compensation,⁷⁹ founded upon the theory that when a witness testifies as an expert, he is then rendering a special service, one peculiarly professional, which places him in a position entirely different and distinct from that occupied by him or any other witness when testifying to facts.⁸⁰ The weight of authority, however, favors the view that courts possess the power to summon experts to testify without any increase over the fees paid to other witnesses.⁸¹ The decisions are founded upon the theory of the duty which each individual owes to society, even though the performance of that duty may, in some cases, result in a pecuniary loss to him. It is true that, financially, his loss may be greater in amount than that of an ordinary witness. On the other hand, however, it may not be proportionately greater. The law does not attempt to discriminate in the case of other witnesses for the purpose of remunerating them for the value of their time when serving the state as witnesses, nor when citizens are called to serve as jurors. Why should an exception be made in the case of an expert and others whose loss may be more serious, though smaller in amount, be ignored? The majority doctrine has wisely refused to make any exception but requires all to testify, upon the same basis of compensation.⁸²

Statutes.—In some jurisdictions statutes have been enacted having in view

Summers v. State, 5 Tex. App. 365, 32 Am. Rep. 573 (1879); 5 Chamb., Ev., § 3627, n. 1.

75. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450 (1912).

76. *Flinn v. Prairie County*, 60 Ark. 204, 29 S. W. 459 (1895); *Schofield v. Little*; 2 Ga. App. 286, 58 S. E. 666 (1907); *People v. Montgomery*, 13 Abb. Pr. N. S. (N. Y.) 207, 240 (1895).

77. *Harrison v. City of New Orleans*, 40 La. Ann. 509, 4 So. 133 (1888).

78. *Philler v. Waukesha County*, 139 Wis. 211, 120 N. W. 829 (1909).

79. *Buckman v. State*, 59 Ind. 1 (1877); *Re Roelker*, 1 Sprague (U. S.) 276 (1855); 5 Chamb., Ev., § 3628, n. 1.

80. Thus in the case of a physician it is said that his professional knowledge and

learning are in the nature of property which ought not be extorted from him in the form of an opinion without just compensation therefor. *Buckman v. State*, *supra*.

81. *Flinn v. Prairie County*, *supra*; *People v. Conte*, *supra*; *Board of County Com'rs v. Lee*, *supra*; *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 704 (1912); *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 54 N. E. 1006 (1899); *Barrus v. Phaneuf*, *supra*; *Burnett v. Freeman*, 134 Mo. App. 709, 115 S. W. 488 (1909); *Lyon v. Wilkes*, *supra*; *State v. Darby*, 9 Ohio Dec. (Reprint) 725 (1886); *Com. v. Higgins*, 5 Kulp. (Pa.) 260 (1889); *Philler v. Waukesha County*, *supra*; 5 Chamb., Ev., § 3629, n. 1.

82. *Main v. Sherman County*, 74 Neb. 155, 103 N. W. 1038 (1904).

the payment of an extra compensation to an expert, testifying as such. Such a statute has to be construed with reference to the witness actually testifying as an expert and not to include the case of one who though he is an expert is testifying to physical facts falling within his observation.⁸³ Under a statute providing that "witnesses called to testify in court only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and to state the result thereof, shall receive additional compensation to be fixed by the court with reference to the value of time employed and the degree of learning required," it is sufficient to entitle them to such compensation that they have been called to testify only to an opinion, or to the result of scientific or professional examination; it is not necessary that they should be appointed by the courts as experts or summoned as such.⁸⁴

§ 1147. **Punishment for Contempt,**⁸⁵—A judicial tribunal has power, in case a person, who has been lawfully subpoenaed as a witness, fails to appear,⁸⁶ or, in case he appears in response to the summons, refuses to answer questions as to matters concerning which he may be lawfully interrogated,⁸⁷ or refuses to obey a subpoena *duces tecum*,⁸⁸ to punish him as for a contempt of court. The subpoena is a direct order of court commanding the person to do as directed therein and, for his refusal to comply therewith, the court has the power,⁸⁹ which at common law was inherent in courts of record,⁹⁰ to punish him for contempt; otherwise, it would be powerless to enforce any obedience to its process.

83. *Le Mere v. McHale*, 30 Minn. 410, 15 N. W. 682 (1883); 5 Chamb., Ev., § 3630, n. 1.

84. *Suthon v. Laws*, 132 La. 207, 61 So. 204 (1913).

85. 5 Chamberlayne, Evidence, § 3631.

86. *Brockman v. Aulger*, 12 Ill. 277 (1850); *Wilson v. State*, 57 Ind. 71 (1877); *State v. Seaton*, 61 Iowa 563, 16 N. W. 736 (1883); *People v. Brown*, 46 Hun (N. Y.) 320 (1887); *State v. Nixon, Wright* (Ohio) 763 (1884); 5 Chamb., Ev., § 3631, n. 1.

87. *Rogers v. Superior Court*, 145 Cal. 88, 78 Pac. 344 (1904); *Goodman v. State*, 90 Ill. App. 533 (1900); *Ex parte Creasy*, 243 Mo. 679, 148 S. W. 914, 41 L. R. A. (N. S.) 478 (1912); *People v. Kelly*, 12 Abb. Pr. (N.

Y.) 150 (1861); *State v. Keyes*, 75 Wis. 288, 44 N. W. 13 (1889); 5 Chamb., Ev., § 3631, n. 2.

88. *Foster v. Wait*, 151 App. Div. 933, 136 N. Y. Supp. 209 (1912).

89. *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820 (1890); *Tredway v. Van Wagenen*, 91 Iowa 556, 60 N. W. 130 (1894); *Woods v. De Figanieri*, 1 Rob. (N. Y.) 607, 16 Abb. Pr. 1 (1863); 5 Chamb., Ev., § 3631, n. 4.

90. *Matter of Kerrigan*, 32 N. J. L. 344 (1869); *Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374 (1855). There must have been authority to issue the summons and one of the requisites to that authority is the pendency of an action in court. *Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853 (1899).

CHAPTER LXII.

INCOMPETENCY OF WITNESSES; MENTAL INCOMPETENCY.

Incompetency of witnesses; nature of an oath, 1148.

immaturity of children's minds, 1149.

insanity, idiocy, etc., 1150.

intoxication, 1151.

victims of drug habits, 1152.

§ 1148. **Incompetency of Witnesses; Nature of an Oath.**¹—It is the general rule that a person of intelligence may, provided he has knowledge respecting some relevant fact,² testify in regard thereto. Personal knowledge is essential.³ From the earliest times the solemnity and binding force of an oath have been recognized. "The forms of an oath have been always different in all countries according to the different laws, religion and constitution of those countries. But still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say."⁴ "No case can be found which has allowed a witness to be sworn upon a belief falling short of a belief in the existence of God."⁵

Mental Incapacity; Deaf and Dumb Persons.—It is a general rule that a person must, in order to be qualified as a witness, possess the necessary understanding to retain in his memory a clear recollection of the events or occurrences witnessed by him so as to be able to narrate them intelligently, and that he must be able to discern between right and wrong and to appreciate the obligation imposed upon him to tell the truth respecting the matters concerning which he has knowledge and is called upon to testify.⁶ These are requirements which will be insisted upon in all cases. If it appears that a person, offered as a witness, is so wanting in either essential as to render his testimony of no evidentiary value it will be rejected.⁷ Deaf and dumb persons were, at

1. 5 Chamberlayne, Evidence, §§ 3632-3636

2. Hodges v. Kyle, 9 Ala. App. 449, 63 So. 761 (1914); Davitte v. Southern Ry. Co., 108 Ga. 665, 34 S. E. 327 (1899); Purcell v. Henry, 67 Ill. App. 256 (1896); Missouri Pac. Ry. Co. v. Stevens, 35 Kan. 662, 12 Pac. 25 (1886); *In re Kuhman's Estate*, 94 Neb. 793, 144 N. W. 778 (1914); People v. Gillman, 161 App. Div. 920, 145 N. Y. Supp. 775 (1914); Cleveland, etc., R. Co. v. Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142 (1900); Schubkagel v. Dierstein, 131 Pa.

46, 18 Atl. 1059 (1890); 5 Chamb., Ev., § 3632, n. 1.

3. Gillespie v. Ashford, 125 Iowa 729, 101 N. W. 649 (1899); Tanner v. Page, 106 Mich. 155, 63 N. W. 993 (1895).

4. Omichund v. Barker, Willes 538 (1744); 5 Chamb., Ev., § 3633.

5. Arnold v. Estate of Arnold, 13 Vt. 362 (1841).

6. Hartford v. Palmer, 16 Johns. (N. Y.) 143 (1819).

7. *Infra*, other sections in this chapter; 5 Chamb., Ev., § 3634.

one time, excluded as a class, because of the fact that persons so afflicted were regarded, in the law, as idiots and, therefore, incompetent to testify. The fallacy of this idea has, gradually, become a relic of the past, especially in view of the means and facilities, which have been afforded by modern learning,⁸ of educating them, until, at the present time, they are received as witnesses. If such a person possesses sufficient intelligence to understand the obligation of an oath and to convey, correctly, such knowledge as he may possess to the court he will be received.⁹ The same presumption in favor of sanity applies to deaf and dumb persons, as applies in the case of others.¹⁰

Means of Conveying Information to Court.—If such a witness can write, that mode of answering questions is to be preferred to that of signs.¹¹ If a witness is able to communicate his ideas better by means of signs than by writing, the use of the former mode in answering questions may be permitted.¹² So the use of an interpreter has been permitted, the same as where a witness is unable to speak the English language.¹³ Though a dumb person may not be educated in the use of signs and can only express assent and dissent by a nod or shake of the head, thus rendering cross-examination difficult, he may nevertheless be permitted to testify, but it is said that his disability may be considered by the jury, as bearing upon the weight of his testimony.¹⁴ That difficulty attends the examination of a deaf-mute is no reason why his testimony should be excluded.¹⁵

§ 1149. *Immaturity of Children's Minds.*¹⁶—Children are, in many cases, excluded as witnesses, owing to the immaturity of their mental faculties. Formerly the rule was, to a great extent, an arbitrary one, children under the age of nine being regarded as incompetent and, between that age and fourteen, their admission being a matter for the court to determine.¹⁷ With the progress of time, however, and the improved educational facilities, resulting in the cultivation and development of the intellect of children at an early age, a more reasonable rule has been adopted,¹⁸ and age is not the test, but the degree of intelligence and understanding of the obligation of an oath.¹⁹

General Rule.—No precise age can be stated as controlling the question of the admission of the testimony of children. It must, in each instance be de-

8. *State v. Edwards*, 79 N. C. 648 (1878).

14. *Quinn v. Halbert*, 55 Vt. 224 (1882).

9. *State v. Butler*, 157 Iowa 163, 138 N. W. 383 (1912); *Kirk v. State*, 35 Tex. Cr. 224, 37 S. W. 440 (1895); 5 *Chamb. Ev.*, § 3635.

15. *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272 (1896).

10. *Harrod v. Harrod*, 1 K. & J. 4 (1854).

16. 5 *Chamberlayne, Evidence*, §§ 3637-3641.

11. *Morrison v. Lennard*, 3 C. & P. 127 (1827).

17. *State v. Whittier*, 21 Me. (8 Shep.) 341, 38 Am. Dec. 272 (1842).

12. *State v. De Wolf*, 8 Conn. 93 (1830); *Snyder v. Nations*, 5 Blackf. (Ind.) 295 (1840); 5 *Chamb. Ev.*, § 3636, n. 2.

18. *McGuff v. State*, 88 Ala. 147, 7 So. 35 (1889); *State v. Edwards*, 79 N. C. 648 (1878).

13. *State v. Howard*, 118 Mo. 127, 24 S. W. 41 (1893); *State v. Weldon*, 39 S. C. 318, 17 S. E. 388, 24 L. R. A. 126 (1892).

19. *McGuire v. People*, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265 (1880); 5 *Chamb. Ev.*, § 3637.

terminated according to the circumstances of the case,²⁰ taking into consideration the intelligence of the child and his ability to discern between right and wrong, to appreciate the difference between truth and falsehood.²¹ If a child's mind does not appear to be so sufficiently matured that he can distinguish right from wrong, or he does not understand the obligation of an oath, he should not be permitted to testify.²² On the other hand, though he may be of tender years, yet his education and moral and religious training may be such that he will entirely satisfy the requirements, in the foregoing respects. In such a case the court will receive his testimony.²³ In practice, children are often allowed to testify whose legal capacity to do so is very liberally construed.²⁴

A Question for the Presiding Judge.—The presiding judge must be satisfied that a child, offered as a witness, feels some obligation imposed upon him to tell the truth, concerning the matter in respect to which the inquiries relate and, for this purpose, he may examine the child.²⁵ This is a matter which he must determine in each case, under the particular facts there existing, and his conclusion will not ordinarily be disturbed on appeal.²⁶ His action must be guided by the exercise of sound reason, and, thus guided, some test should be made of the qualifications of such a witness before refusing to permit him to testify.²⁷ On the other hand, if the child does not possess sufficient intelligence to understand the nature of an oath, the admission of his testimony, especially in a capital case, would be a grave error. Under such circumstances, the action of the court would be in violation of the constitutional provision permitting the accused to demand the nature and cause of the accusation and to meet the witnesses against him face to face.²⁸

20. *Draper v. Draper*, 68 Ill. 17 (1873).

21. *State v. Severson*, 78 Iowa 653, 43 N. W. 533 (1889); *Com. v. Furman*, 211 Pa. 549, 60 Atl. 1089, 107 Am. St. Rep. 594 (1905); *Wheeler v. U. S.*, 159 U. S. 523, 40 L. ed. 244, 16 S. Ct. 93 (1895).

22. *Miller v. State*, 109 Ga. 512, 35 S. E. 152 (1900); *Olson v. Olson*, 130 Iowa 353, 106 N. W. 758 (1906); *People v. Frindel*, 58 Hun 482, 12 N. Y. Supp. 498 (1890); *State v. Belton*, 24 S. C. 185, 58 Am. Rep. 245 (1886); *State v. Michael*, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605 (1893); 5 *Chamb., Ev.*, § 3638, n. 3.

23. *Bone v. State*, 8 Ala. App. 59, 62 So. 445 (1913); *Berry v. State*, 9 Ga. App. 868, 72 S. E. 433 (1911); *People v. Lewis*, 252 Ill. 281, 96 N. E. 1005 (1911); *State v. Young*, 153 Iowa 4, 132 N. W. 813 (1911); *Com. v. Marshall*, 211 Mass. 86, 97 N. E. 632 (1912); *State v. Anderson*, 252 Mo. 83, 158 S. W. 817 (1913); *State v. Cracker*, 65 N. J. L. 410, 47 Atl. 643 (1900); *People v. Linzey*, 79 Hun 23, 29 N. Y. Supp. 560 (1894); *Com.*

v. Furman, *supra*; *Gabler v. State*, 49 Tex. Cr. 623, 95 S. W. 521 (1906); 5 *Chamb., Ev.*, § 3638, n. 4.

24. *Hughes v. Detroit, etc., Ry. Co.*, 65 Mich. 10, 31 N. W. 605 (1887).

25. *Carter v. State*, 63 Ala. 52 (1879); *Hughes v. Detroit, etc., Ry. Co.*, *supra*.

26. *City of Victor v. Smilanich*, 54 Colo. 479, 131 Pac. 392 (1913); *Epstein v. Berkowsky*, 64 Ill. App. 498 (1896); *State v. Williams*, 130 La. 280, 57 So. 927 (1912); *Com. v. Marshall*, *supra*; *State v. Connors*, 233 Mo. 348, 135 S. W. 444 (1910); *State v. Talla*, 72 N. J. L. 515, 62 Atl. 675 (1905); *People v. Smith*, 86 Hun 485, 33 N. Y. Supp. 989 (1895); *Kelberg v. The Bon Marche*, 64 Wash. 452, 117 Pac. 227 (1911); *State v. Juneau*, 88 Wis. 180, 59 N. W. 580 (1894); 5 *Chamb., Ev.*, § 3639, n. 2; *Wheeler v. U. S.*, *supra*.

27. *Piepkke v. Philadelphia & R. Ry. Co.*, 242 Pa. 321, 80 Atl. 124 (1913).

28. *Territory v. Duran*, 3 N. M. 189, 3 Pac. 53 (1884).

Time to Which Inquiry Relates.—The inquiry, as to the competency of a child to testify, relates to the time of his giving his testimony and not to the time of the occurrence of the event or other matters concerning which his testimony relates.²⁹

Instruction of Child.—Instruction of a child, in respect to the nature of an oath and the obligation imposed thereby to speak the truth, may, in some cases, be permitted so that he may be competent to testify.³⁰ Thus, the judge may, in some cases, explain these essentials to a child,³¹ and the postponement of a trial, in a criminal case, has been allowed, to permit of such instruction, in the case of an important witness.³²

§ 1150. *Insanity, Idiocy, Etc.*³³—The general statement has been made that insane persons, or persons *non compos mentis*, are not competent witnesses.³⁴ The statement, however, is entirely too broad and sweeping, as taken in the ordinary acceptation of the word insanity, which manifests itself in various forms.³⁵ The views of the judges in one of the leading English cases,³⁶ are expressive of the general view, as taken by the various tribunals in which this question has arisen, the accepted rule being that a person who possesses, at the time of the inquiry, sufficient mental capacity to correctly narrate facts observed by him and to understand the obligation of an oath, may be permitted to testify, though he may be affected by some delusion, concerning which he is irrational on occasions, or by some form of temporary insanity.³⁷

Incapacity of Time of Occurrence of Transaction.—Where it appears that the mental condition of the witness, at the time of the occurrence of the events which he is called upon to relate, was such that he was unable to receive and retain a correct mental impression of the event or transaction, the court will reject his testimony, having in view the fact that the evidentiary value of the testimony consists, as much in the ability of the witness to correctly observe and receive the right impression of the transaction, as to correctly narrate those impressions received.³⁸ There is authority, however, for the admission

29. *Kelly v. State*, 75 Ala. 21 (1883); 5 Chamb., Ev., § 3640.

30. *Com. v. Carey*, 2 Brewst. (Pa.) 404 (1868).

31. *McAmore v. Wiley*, 49 Ill. App. 615 (1893); *Day v. Day*, 56 N. H. 316 (1876).

32. *Carter v. State*, *supra*; *Com. v. Lynes*, 142 Mass. 577, 8 N. E. 408 (1886); *Holst v. State*, 23 Tex. App. 1, 3 S. W. 757 (1887); 5 Chamb., Ev., § 3641, n. 3.

33. 5 Chamberlayne, *Evidence*, §§ 3642–3647.

34. *Armstrong's Lessees v. Timmons*, 3 Harr. (Del.) 342 (1841); *Livingston v. Kiersted*, 19 Johns. (N. Y.) 362 (1813).

35. *District of Columbia v. Arms*, 107 U. S. 519, 2 Sup. Ct. 540, 27 L. ed. 618 (1882); 5 Chamb., Ev., § 3642, n. 2.

36. *Reg. v. Hill*, 5 Cox Cr. Cas. 259 (1851); 5 Chamb., Ev., § 3643, containing a summary of the same.

37. *McKinstry v. City of Tuscaloosa*, 172 Ala. 344, 54 So. 629 (1911); *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784 (1913); *People v. Enright*, 256 Ill. 221, 99 N. E. 936 (1912); *Kendall v. May*, 92 Mass. 59 (1863); *People v. New York Hospital*, 3 Abb. N. C. 229 (N. Y.) (1876); *Brown v. Armstrong & Latta Co.*, 239 Pa. 549, 87 Atl. 11 (1913); *Coleman v. Com.*, 25 Gratt. (Va.) 865, 23 Am. Rep. 711 (1874); 5 Chamb., Ev., § 3644, n. 2.

38. *Holcomb v. Holcomb*, 28 Conn. 177 (1859); 5 Chamb., Ev., § 3645.

of the testimony of such a witness, it being declared that the fact of his being under a delusion or his mind otherwise affected at the time goes to the question of credibility and not competency.³⁹ In any event, mental impairment, at the time of the occurrence will not necessarily render a witness incompetent; the question of the extent of his infirmity, as affecting his competency as a witness, is for the trial court.⁴⁰

Effect of Allegations in Pleadings.—An allegation by a person, in a pleading, of his mental unsoundness will not necessarily operate to exclude him as a witness.⁴¹ So the fact that one sues by his next friend, as a person of unsound mind, his mental unsoundness being admitted in the complaint, does not necessarily prevent him from being a witness, the question of his competency being, nevertheless, one for the court to determine.⁴² Similarly, though a person, in an action for damages for an assault committed upon him, alleges that he has been injured in body and mind, he is not necessarily precluded thereby from becoming a witness; the question of his competency is for the presiding judge to determine.⁴³

A Question for the Presiding Judge.—The question whether a person possesses the necessary mental qualification, to justify the court in permitting him to testify as a witness, is a matter peculiarly within the province of the presiding judge. If he is satisfied that the witness is possessed of the necessary qualifications, he will permit him to testify; otherwise not.⁴⁴ His conclusion upon the competency of the witness will not be disturbed except upon clear proof of an error in his determination.⁴⁵ It is, however, held to be the duty of the court, where a party offers to introduce evidence tending to show that a person is *non compos*, to permit of its introduction, since, if a proposed witness is incompetent on this ground, the fact should be ascertained and his testimony excluded.⁴⁶ The presiding judge may examine the proposed witness and others who may be acquainted with him, or the examination may be conducted by counsel under the direction of the court.⁴⁷ A finding in lunacy several years previous to the trial, by which a person was adjudged an idiot and incapable of managing his affairs, does not necessarily exclude him as a witness.⁴⁸

§ 1151. Intoxication.⁴⁹—A person may be excluded, as *non compos mentis*,

39. Sarbach v. Jones, 20 Kan. 497 (1878).

40. Burns v. State, 145 Wis. 373, 128 N. W. 987 (1911).

41. Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164 (1881).

42. Worthington v. Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407 (1891).

43. Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 41 Am. St. Rep. 440 (1893); 5 Chamb., Ev., § 3646, n. 3.

44. Worthington v. Mencer, *supra*; Hol-

comb v. Holcomb, *supra*; Cannady v. Lynch, *supra*; Coleman v. Com., *supra*; Burns v. State, *supra*; District of Columbia v. Arms, *supra*; 5 Chamb., Ev., § 3647, n. 1.

45. Coleman v. Com., *supra*.

46. Livingston v. Kiersted, *supra*.

47. Holcomb v. Holcomb, *supra*; District of Columbia v. Arms, *supra*.

48. Barker v. Washburn, 200 N. Y. 280, 93 N. E. 958 (1911), *aff'g* 128 App. Div. 931, 113 N. Y. Supp. 1124 (1908).

49. 5 Chamberlayne, Evidence, § 3648.

on account of intoxication, that is, if it is of such a degree as to render him incompetent to understand the nature and obligation of an oath.⁵⁰ The mere fact that a person may be intoxicated, when he is called upon to testify, is not sufficient to operate as a disqualification.⁵¹ Nor will the fact that a man may be a habitual drunkard render him incompetent. His intoxication, at the time, must be of the character stated. The question as to competency is, in all cases, one for the presiding judge to determine, in the exercise of sound reason, and his determination will seldom be interfered with on appeal.⁵² Intoxication, at the time of the occurrence to which the inquiry relates, has been held not to affect a person's competency, though it may bear upon the question of his credibility and the weight of his testimony.⁵³ Intoxication, at the time of testifying, may, also, be of such a character as not to exclude a person as a witness but it may bear upon the question of his credibility.⁵⁴ The fact that a person is deprived of the control of his property, in consequence of his drinking habits, does not operate to exclude him as a witness.⁵⁵

§ 1152. **Victims of Drug Habits.**⁵⁶—Where persons are addicted to a drug habit it is a fact of general knowledge that to a great extent statements made by them are unreliable. It is therefore properly said in a case, where one admitted himself to be an opium consumer and that he was under the influence of the drug both at the time of the occurrences he testified to and at the time of the trial, that the jury should be carefully cautioned as to their credence to the testimony.⁵⁷ The question of the competency of such persons is one for the presiding judge, as in other cases of mental unsoundness.

50. *State v. Underwood*, 6 Ired. L. (N. C.) 96 (1845); *Hartford v. Palmer*, 16 Johns. (N. Y.) 143 (1810); 5 *Chamb., Ev.*, § 3648, n. 1.

51. *Eskridge v. State*, 25 Ala. 30 (1854); *Gould v. Crawford*, 2 Pa. 89 (1846).

52. *Id.*; *State v. Underwood*, *supra*.

53. *State v. Sejoins*, 113 La. 676, 37 So. 509 (1904).

54. *Meyers v. State*, 37 Tex. Cr. 208, 39 S. W. 111 (1897).

55. *Gebhart v. Shindle*, 15 Serg. & R. (Pa.) 235 (1824).

56. 5 *Chamberlayne, Evidence*, § 3649.

57. *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442 (1895); 5 *Chamb., Ev.*, § 3649.

CHAPTER LXIII.

INCOMPETENCY OF WITNESSES; POLICY OF THE LAW.

Incompetency of witnesses; policy of the law; atheism and other disbelief in God, 1153.

attorneys, 1154.

husband and wife; general rule, 1155.

infamous crimes; common law rule, 1156.

interest, etc., 1157.

judge and jurors, 1158.

§ 1153. **Incompetency of Witnesses; Policy of the Law; Atheism and Other Disbelief in God.**¹—The rule, as generally stated, is that a person, who does not believe in a supreme being and in future rewards and punishment for acts committed in this world, is not competent as a witness.² The latter part of this statement is, it would seem, somewhat too broad, for a person may believe in a supreme ruler of the universe who punishes and rewards during one's earthly existence. In such a case there is no good reason why his testimony should be rejected.³ The fact, however, that a person expressed a disbelief in a supreme being, at some time prior to the trial, will not, necessarily exclude him.⁴ The inquiry does not relate to the particular creed or denomination of the witness. Belief in the existence of a supreme being and the sanction of an oath seem to be the requisites.⁵ A frequent mode of establishing the fact of disbelief is by declarations, made out of court, in the presence of others.⁶ After it has been established that a person, offered as a witness, is an infidel it is said that he will not then be permitted to establish, by his statements in court, that he is not.⁷

1. 5 Chamberlayne, Evidence, §§ 3650–3652.

2. Central Military Tract. R. Co. v. Rockafellow, 17 Ill. 541 (1856); Thurston v. Whitney 56 Mass. 104 (1848); People v. McGarren, 17 Wend. (N. Y.) 460 (1837); Com. v. Winnemore, 2 Brewst. (Pa.) 378 (1867); Scott v. Hooper, 14 Vt. 535 (1842); 5 Chamb., Ev., § 3650, n. 1.

3. Beeson v. Moore, 132 Ala. 391, 31 So. 456 (1902); Ewing v. Bailey, 36 Ill. App. 191 (1889); Hunscom v. Hunscom, 15 Mass. 184 (1818); People v. Matteson, 2 Cow. (N. Y.) 433 (1823); Brock v. Milligan, 10 Ohio 121 (1840); Blair v. Seaver, 26 Pa. 274 (1856); 5 Chamb., Ev., § 3650, n. 2.

4. Smith v. Coffin, 18 Me. 157 (1840); Jackson v. Gridley, 18 Johns. (N. Y.) 98 (1820); Scott v. Hooper, *supra*.

5. Donkle v. Kohn, 44 Ga. 206 (1871); Arnold v. Estate of Arnold, 13 Vt. 362 (1841); State v. Browning, 153 Iowa 37, 133 N. W. 330 (1911); 5 Chamb., Ev., § 3650, n. 4.

6. Smith v. Coffin, *supra*; Thurston v. Whitney, *supra*; Norton v. Ladd, 4 N. H. 444 (1828); Jackson v. Gridley, *supra*; Blair v. Seaver, *supra*; 5 Chamb., Ev., § 3650, n. 5. Expressions to this effect, however, are by no means conclusive. Thurston v. Whitney, *supra*.

7. Smith v. Coffin, *supra*; Jackson v. Grid-

§ 1154. **Attorneys.**⁸—The right of an attorney in a cause to take the stand as a witness in that cause is generally acknowledged,⁹ unless by statute some modification or change in the general rule is made.¹⁰ Such a right has been recognized, even though the fee of the attorney, either in whole or in part, may depend upon the success or failure of his client,¹¹ although, under such circumstances, his testimony has, in some cases, been rejected on the ground of interest.¹² On account of bias and partiality arising from the relation between the attorney and his client the jury may in some cases regard his testimony as thus affected, giving weight to this situation.¹³ The propriety of such procedure, undoubtedly, cannot in some cases, be questioned; in fact there may be circumstances when it might be regarded as in the nature of a duty, which the attorney owes, to so act.¹⁴ Ordinarily, however, courts have regarded such a course with much disfavor,¹⁵ having variously characterized it, both mildly, as a question of professional propriety which the attorney must decide,¹⁶ as a practice not to be encouraged,¹⁷ and, severely, as an indecent practice which should be discountenanced.¹⁸ If an attorney desires to avail himself of such a right it seems that, as has been suggested in some decisions,¹⁹ the proper

ley, *supra*. Compare *Thurston v. Whitney*, *supra*

Theory of Rule.—The theory upon which this rule is founded is, that one, who does not possess such belief, feels in no way obligated or bound by an oath, which is the nature of an appeal to God to be a witness of what one may testify to and is a recognition of the power to punish for speaking that which is untrue. *Thurston v. Whitney*, *supra*; *Arnold v. Estate of Arnold*, *supra*; 5 *Chamb., Ev.*, § 3651.

Should testimony of disbelievers be received?—Viewed in all its aspects it would seem that the testimony of all such persons should be received and the fact of their disbelief be considered upon the question of their credibility. *Easterday v. Kilborn*, *Wright* (Ohio) 345 (1833); 5 *Chamb., Ev.*, § 3652.

8. 5 *Chamberlayne*, Evidence, §§ 3653, 3654.

9. *Morgan v. Roberts*, 38 *Ill.* 65 (1865); *Lloyd v. Davis*, 2 *Ind. App.* 170, 28 *N. E.* 232 (1891); *Potter v. Inhabitants of Ware*, 1 *Cush. (Mass.)* 519 (1848); *State v. Hedgepeth*, 125 *Mo.* 14, 28 *S. W.* 160 (1894); *Thon v. Rochester Ry. Co.*, 83 *Hun* 443, 30 *N. Y. Supp.* 620 (1894); *Cox's Adm'rs v. Hill*, 3 *Ohio* 411 (1828); *Follansbe v. Walker*, 72 *Pa* 228, 13 *Am. Rep.* 671 (1872); 5 *Chamb., Ev.*, § 3653, n. 1.

10. *Hines v. State*, 26 *Ga.* 614 (1859);

Cox v. Williams, 5 *Mart. (N. S.) La.* 139 (1826).

11. *Central Branch Union Pac. R. Co. v. Andrews*, 41 *Kan.* 370, 21 *Pac.* 276 (1889); *Flower v. O'Conner*, 7 *La.* 198 (1834); *Slocum v. Newly*, 5 *N. C.* 423 (1810); 5 *Chamb., Ev.*, § 3653, n. 3. The fact of the fee being contingent has been regarded as affecting only his credibility. *Central Branch Union Pac. Co. v. Andrews*, *supra*.

12. *Hall v. Acklen*, 9 *La. Ann.* 219 (1854); *Dailey v. Monday*, 32 *Tex.* 141 (1869). The right of an attorney to testify being admitted, the fact of his fee being dependent upon the success of the client, even though the former's testimony might be rejected at common law, on the ground of interest, yet, incompetency, due to the witness being a party to or interested in the suit, being removed by statute, there could exist no reason for rejecting his testimony. *Central Branch Union Pac. R. Co. v. Andrews*, *supra*.

13. *Little v. McKeon*, 3 *N. Y. Super. Ct. (1 Sandf.)* 607.

14. *Potter v. Inhabitants of Ware*, *supra*.

15. *Little v. McKeon*, *supra*.

16. *Morgan v. Roberts*, *supra*; *Hall & Co. v. Renfro*, 3 *Metr. (Ky.)* 51 (1860).

17. *State v. Woodside*, 9 *Ired. L. (31 N. C.)* 496 (1849).

18. *Frear v. Drinker*, 8 *Pa.* 520 (1848).

19. *State v. Woodside*, *supra*; *Bell v. Bell*, 12 *Pa.* 235 (1849).

course for him to pursue, consistent with the dignity of the profession and the maintenance of the standards which should be adhered to by it, would be to retire from the conduct of the case.

§ 1155. **Husband and Wife; General Rule.**²⁰—According to the common law rule a husband or wife was regarded as incompetent to testify either for or against the other.²¹ Such persons were excluded upon what were deemed to be reasons of public policy.²² In criminal prosecutions for an offense committed either by a husband or wife, the other party to the marriage relation was ordinarily excluded under the general rule.²³ And the wife of one of several defendants on trial at the same time cannot, under this rule, be called as a witness for or against any of them.²⁴ The marriage relation also operates to exclude the wife as a witness in an action by the husband for criminal conversation.²⁵ Likewise, the fact of non-access of the husband to the wife, frequently sought to be proved in cases involving the legitimacy of a child, was not allowed to be established by either the husband or wife.²⁶ Nor can the husband testify in a suit involving the separate estate of his wife under the common

20. 5 Chamberlayne, Evidence, §§ 3655-3662.

21. Stanford v. Murphy, 63 Ga. 410 (1879); People v. Bladck, 259 Ill. 69, 102 N. E. 243 (1913); Burlen v. Shannon, 80 Mass. 433 (1860); Whelpley v. Stoughton, 119 Mich. 314, 78 N. W. 137 (1899); State v. Vaughan, 136 Mo. App. 645, 118 S. W. 1186 (1909); Weckerly v. Taylor, 74 Neb. 772, 105 N. W. 254 (1905); People v. Moore, 65 How. Pr. (N. Y.) 177 (1882); Collendar v. Kelly, 190 Pa. 455, 42 Atl. 957 (1899); Wilkes' Adm'r v. Wilkes, 115 Va. 886, 80 S. E. 745 (1914); Talbott v. U. S., 208 Fed. 144, 125 C. C. A. 360 (1913); 5 Chamb., Ev., § 3655, n. 1.

22. It was thought that by not permitting their testimony to be received dissensions and distrust between them would be avoided which result it was believed would not ensue in many cases if they testified to the truth. Furthermore their desire frequently to avoid such a result or to protect each other was regarded as a strong incentive to the commission of perjury. In view of such considerations as these, variously expressed by the courts, it was considered that the policy of the law would be better served by refusing to permit them to testify under such circumstances. Wilson v. Shepard, 28 Ala. 623 (1856); Dwelly v. Dwelly, 46 Me. 377 (1859); Kelley v. Proctor, 41 N. H. 189 (1860); Prongle v. Pringle, 59 Pa. 281

(1868); William & Mary College v. Powell, 12 Gratt. (Va.) 372 (1855); 5 Chamb., Ev., § 3655, n. 2.

23. Rivers v. State, 118 Ga. 42, 44 S. E. 859 (1903); Gillespie v. People, 176 Ill. 238, 52 N. E. 250 (1898); Wilke v. People, 53 N. Y. 525 (1873); Thurman v. State, 2 O. C. D. 466 (1889); Com. v. Woodcroft, 17 Pa. Co. Ct. R. 554 (1896); Baker v. State, 120 Wis. 135, 97 N. W. 566 (1903); 5 Chamb., Ev., § 3656, n. 1.

24. Talbott v. U. S., *supra*. Though if the case against the husband of the proposed witness has been disposed of, as by a plea of guilty or by a verdict for or against him, the fact that he was accused in conjunction with others, will not exclude her testimony for or against the latter. R. v. Thompson, 3 F. & F. 824 (1863); 5 Chamb., Ev., § 3656, n. 3.

25. Groom v. Parables, 28 Ill. App. 152 (1888); Carpenter v. White, 46 Barb. (N. Y.) 291 (1866); Speck v. Gray, 14 Wash. 589, 45 Pac. 143 (1896); 5 Chamb., Ev., § 3656, n. 4. Compare Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006 (1897).

26. Palmer v. Palmer, 79 N. J. Eq. 496, 82 Atl. 358 (1912); Timmann v. Timmann, 142 N. Y. Supp. 208 (1913); Com. v. Shepherd, 6 Binn. (Pa.) 268, 6 Am. Dec. 449 (1814); Mink v. State, 60 Wis. 583, 19 N. W. 445 (1884); 5 Chamb., Ev., § 3656, n. 5.

law rule.²⁷ Similarly the incompetency of the wife extended to a suit against a partnership of which her husband was a member.²⁸ Husband and wife were not permitted to violate the rule even by agreement.²⁹

Unlawful Cohabitation.—The rule at common law only applied to those persons who lawfully occupied the relation towards each other of man and wife, and did not include those who were living together in violation of the law, such as a man and his mistress,³⁰ or as the result of a bigamous marriage.³¹ If they are not lawfully married or are living together in immoral relations it seems that the testimony of either may be received,³² the fact that they are living in such a relation being said to only affect the credit and not the competency of the witness.³³ In a prosecution for statutory rape, it may be shown that no lawful marriage ever took place between the prosecutrix and the defendant, for the purpose of enabling her to testify.³⁴ The policy of the law, for reasons of which the testimony of such persons was excluded, had in view only those who occupied the relation of man and wife, *de jure*. It was never intended thereby to give recognition to illicit intercourse and cohabitation and place those occupying such a relation on the same plane, by exclusion of their testimony, as was occupied by those bound together by the lawful and holy ties of matrimony.³⁵

Exceptions.—The testimony of a wife has been received, in an action brought for necessities furnished to her to show the facts of her expulsion from her husband's home and his failure to provide for her,³⁶ upon the theory of necessity, in that, in the great majority of cases, there would be no other proof of such facts, thus preventing the courts from enforcing the liability of the husband to provide for his wife.³⁷ So an exception is recognized where the

27. *George Tucker Commission Co. v. Bell*, 62 Ark. 26, 34 S. W. 80. (1896); *Jones v. Bassett*, 27 Ind. 58 (1866); *Wood v. Bradley*, 76 Mo. 23, 43 Am. Rep. 754 (1882); *Warne v. Dyett*, 2 Edw. Ch. (N. Y.) 497 (1835); 5 Chamb., Ev., § 3656, n. 6.

28. *McEwen v. Shannon & Co.*, 64 Vt. 583, 25 Atl. 661 (1892).

29. *Dwelly v. Dwelly*, 46 Me. 377 (1859); *Colbern's Case*, 1 Wheel. C. C. (N. Y.) 479 (1823).

30. *Wrye v. State*, 95 Ga. 466, 22 S. E. 273 (1894); *Dennis v. Crittenden*, 42 N. Y. 542 (1870); *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829 (1895); 5 Chamb., Ev., § 3657, n. 1.

31. *Jeims v. State*, 141 Ga. 493, 81 S. E. 202 (1914); *Hoch v. People*, 219 Ill. 265, 76 N. E. 356 (1905); *Kelly v. Drew*, 12 Allen (Mass.) 107, 90 Am. Dec. 138, (1866); 5 Chamb., Ev., § 3657, n. 2.

32. *Flanagin v. State*, 25 Ark. 92 (1867); *Hill v. State*, 41 Ga. 484 (1871); *State v.*

Johnson, 9 La. Ann. 308 (1854); 5 Chamb., Ev., § 3657, n. 3.

33. *Meuiner v. Conet*, 2 Mart. (La.) 56 (1811). Thus in the case of a man whom his first wife had divorced and obtained a decree forbidding him to marry again, a woman with whom he had subsequently cohabited, though referred to by him as his wife would not be excluded by the rule under consideration. *Dennis v. Crittenden*, *supra*. The same situation would exist if he had married again within the jurisdiction, as the marriage would not be one recognized as lawful.

34. *People v. Schoonmaker*, 119 Mich. 242, 77 N. W. 934 (1899).

35. *Rickerstricker v. State*, 31 Ark. 207 (1876); *State v. Samuel*, 2 Dev. & B. (N. C.) 177 (1836).

36. *Wilcoxson v. Read*, 95 Ill. App. 33 (1900); *Morgenroth v. Spencer*, 124 Wis. 564, 102 N. W. 1086 (1905).

37. *Bach. v. Parmely*, 35 Wis. 238 (1874).

husband commits an offense against the person of the wife,³⁸ or her testimony is needed to prove the fact of some injury sustained by her by the act of a third party.³⁹ Similarly a married woman may testify as to the question of unlawful intercourse with her where the proceeding is one to charge a man with the support of a bastard borne by her,⁴⁰ the exception in such a case being also regarded as founded upon necessity.⁴¹ In the case of agency also, where either the husband or wife acts as agent for the other, testimony has been allowed, in some cases under statute and in some cases independent thereof, of the parties in respect thereto.⁴²

Injuries to Husband or Wife.—The rule of the common law, rendering the husband or wife incompetent to testify for or against the other, was subject to an exception in the case of injuries inflicted by one upon the other,⁴³ particularly founded upon the theory of the necessity of the case, having in view the fact that such acts were so frequently done under such conditions and circumstances as to render proof of them, by the testimony of third persons, impossible. The rule seems to have had reference more particularly to violent injuries than to those affecting the feelings or pride merely of the other. Thus the exception was held not to apply to adultery by the husband or wife.⁴⁴ Nor was an indecent assault committed upon a minor daughter within the meaning of the exception.⁴⁵ A like rule prevailed in a prosecution for bigamy.⁴⁶ Similarly the offense of polygamy is not a crime against the wife, within the meaning of a code provision excepting a husband or wife from the operation of the rule in "a criminal action or proceeding for a crime committed by one against the other,"⁴⁷ a statute to this effect being considered, like the common law exception, as having reference to acts of personal violence.⁴⁸ In an

38. *Stein v. Bowman*, 13 Pet. (U. S.) 209, 10 L. ed. 129 (1839).

39. *King v. Luffe*, 8 East 193 (1807); *People v. Overseers of Poor*, 15 Barb. (N. Y.) 286 (1853); *Com. v. Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449 (1814); 5 Chamb., Ev., § 3658, n. 5.

40. *Com. v. Shepherd*, *supra*.

41. *Dannewitz v. Miller*, 179 Ill. App. 185 (1913); *Green v. McCracken*, 64 Kan. 330, 67 Pac. 857 (1902); *Packard v. Reynolds*, 100 Mass. 153 (1868); *Orchard v. Collier*, 171 Mo. 390, 71 S. W. 677 (1903); *Hathorn v. Louis*, 170 N. Y. 576, 62 N. E. 1096 (1902); *Lawman v. Blaine County Bank*, 40 Okl. 519, 139 Pac. 952 (1914); *Madison v. City of Antigo*, 153 Wis. 448, 141 N. W. 287 (1913); 5 Chamb., Ev., § 3658, n. 7.

42. *State v. Chambers*, 87 Iowa 1, 53 N. W. 1090 (1893); *Com. v. Murphy*, 4 Allen (Mass.) 491 (1862); *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106 (1894); *People*

v. Northrup, 50 Barb. (N. Y.) 147 (1867); *Whipp v. State*, 34 Ohio St. 87, 32 Am. Rep. 359 (1877); *Com. v. Reid*, 8 Phila. (Pa.) 385 (1871); 5 Chamb., Ev., § 3659, n. 1.

44. *Bishop v. Bishop*, 124 Ga. 293, 52 S. E. 743 (1905); *Com. v. Sparks*, 89 Mass. 534 (1863); *People v. Fowler*, 104 Mich. 449, 62 N. W. 672 (1895); *Com. v. Jailer*, 1 Grant Cas. (Pa.) 218 (1855); 5 Chamb., Ev., § 3659, n. 2.

45. *People v. Westbrook*, 94 Mich. 629, 54 N. W. 486 (1893).

46. *Hiller v. State*, 156 Ill. 511, 41 N. E. 181 (1895); *State v. Ulrich*, 110 Mo. 360, 19 S. W. 656 (1892); *People v. Houghton*, 24 Hun (N. Y.) 501 (1881).

47. *Bassett v. U. S.*, 137 U. S. 496, 34 L. ed. 762, 11 S. Ct. 165 (1890); 5 Chamb., Ev., § 3659, n. 5.

48. *Baxter v. State*, 34 Tex. Cr. 516, 81 S. W. 394 (1895); *State v. Woodrow*, 58 W. Va. 527, 52 S. E. 545 (1905).

action by both husband and wife for an injury to the wife; the rule of exclusion was also relaxed.⁴⁹

Tendency to Remove Restrictions.—The arbitrary exclusion of witnesses, possessed of the requisite mental capacity to testify, under the early restrictions of the common law, as applied, subject to such exceptions as we have referred to, has been the subject of some adverse comment by the courts as being hardly consistent with the objects of judicial tribunals, viz., the discovery of truth and the attainment of justice.⁵⁰

Statutes.—As an outgrowth of these ideas and views, many exceptions and qualifications of the common law rule regarding husband and wife have been made by legislative enactment.⁵¹ A statute, however, removing disqualification arising from interest has not generally been regarded as removing the incompetency of husband or wife⁵² upon the theory that the disqualification exists not by reason of interest but on grounds of public policy.

Does Death or Divorce Remove Incompetency?—The rule is frequently stated that divorce does not remove the disability of incompetency⁵³ and that death does.⁵⁴ In other decisions the rule is stated that death does not remove the incompetency as to confidential matters, knowledge of which was acquired as a result of the marriage relation and during its existence.⁵⁵ A similar conclusion has also been reached in the case of divorce.⁵⁶ In yet other cases testi-

49. *City of Rock Island v. Deis*, 38 Ill. App. 409 (1890); *Hooper v. Hooper*, 43 Barb. (N. Y.) 292 (1865); *Hoverson v. Noker*, 60 Wis. 511, 19 N. W. 382 (1884); 5 Chamb., Ev., § 3659, n. 8.

50. *Stapleton v. Crofts*, 18 Q. B. 367 (1852); 5 Chamb., Ev., § 3660, n. 1.

51. *Johnson v. McGregor*, 157 Ill. 350, 41 N. E. 558 (1895); *Anderson v. Edwards*, 123 Mass. 273 (1877); *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225 (1888); *Westerman v. Westerman*, 25 Ohio St. 500 (1874); *Sahms v. Brown*, 4 Pa. Co. Ct. 488 (1887); 5 Chamb., Ev., § 3661, n. 1.

52. *Kelly v. Drew*, 94 Mass. 107, 90 Am. Dec. 138 (1866); *Mitchinson v. Cross*, 58 Ill. 366 (1871); *Com. v. Brink*, 5 Lanc. L. Rev. 23 (1887); *Carpenter's Ex'r v. Moore*, 43 Vt. 392 (1871); 5 Chamb., Ev., § 3661, n. 2. But see *Moore v. Moore*, 51 Mo. 118 (1872); *Birdsall v. Patterson*, 51 N. Y. 43 (1872); *Yeager v. Weaver*, 64 Pa. 425 (1870).

53. *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283 (1901); *Barnes v. Camack*, 1 Barb. (N. Y.) 392 (1847); *Cook v. Grange*, 18 Ohio 26 (1849); *French v. Ware*, 65 Vt. 338, 26 Atl. 1096 (1892); 5 Chamb., Ev., § 3662, n. 1. Where a charge of perjury was

brought on the ground that the defendant had previously obtained a divorce by falsely testifying that he was a resident of the state the defendant objected to the testimony of the wife on the ground that a wife could not testify against the husband and the court after looking at the decree of divorce allowed the wife to testify. The defendant should not be allowed to take two such inconsistent positions. Preliminary questions of fact are for the court even when the preliminary question is also the main issue in the case. *Laird v. State* (Texas 1916), 184 S. W. 810.

54. *Robnett v. Robnett*, 43 Ill. App. 191 (1892); *Coffin v. Jones*, 13 Pick. (Mass.) 441 (1833); *Sells v. Tootle*, 160 Mo. 593, 61 S. W. 579 (1901); *Stober v. McCarter*, 4 Ohio St. 513 (1855); *Poundstone v. Jones*, 187 Pa. 289, 4 Atl. 21 (1898); 5 Chamb., Ev., § 3662, n. 2.

55. *Yokem v. Hicks*, 93 Ill. App. 667 (1901); *Lyons v. Lyons*, 101 Mo. App. 494, 74 S. W. 467 (1903); *Stowe v. Bishop*, 58 Vt. 498, 3 Atl. 494 (1886); 5 Chamb., Ev., § 3662, n. 3.

56. *Toohey v. Baxter*, 59 Mo. App. 470 (1894); *French v. Ware*, *supra*.

mony has been received as to matters occurring after divorce,⁵⁷ as to statements made to third persons during the existence of the relation,⁵⁸ and as to facts, knowledge of which was acquired independent of the relation.⁵⁹

§ 1156. **Infamous Crimes; Common Law Rule.**⁶⁰—Under the rule which prevailed at common law, a conviction of a person of an infamous crime, which included treason, felony and every species of *crimen falsi*,⁶¹ followed by a judgment of the court, rendered the convicted person incompetent as a witness,⁶² as a result, it is said, of the infamy of character and loss of moral principle which are manifested by the commission of the crime.⁶³ Under this rule upon proof of a conviction and sentence for an infamous crime a presumption of the person's incompetency arises which must be overcome before he will be permitted to testify.⁶⁴

Disqualification Ensues on the Judgment Upon the Conviction.—It is not the conviction alone which renders a person incompetent as a witness; it is the judgment pronounced by the court upon the conviction.⁶⁵ A verdict of guilty, not followed by a judgment by the court, will not render him incompetent as a witness.⁶⁶ Nor will the testimony of a witness, taken under a commission, that he has committed a crime,⁶⁷ nor a plea of guilty,⁶⁸ nor the finding of a true bill,⁶⁹ disqualify a witness. And pending an appeal it has been held that such a person may testify;⁷⁰ similarly in the case of a suspended sentence.⁷¹

Conviction in Foreign Jurisdiction.—Conviction of a person in one state is not generally regarded as operating to affect the competency of a witness beyond the jurisdiction of such state, in the absence of some statute to the con-

57. *Long v. State*, 86 Ala. 36, 5 So. 443 (1888).

58. *Mercer v. Patterson*, 41 Ind. 440 (1872).

59. *Elawick v. Com.*, 13 Bush (Ky.) 155 (1877); 5 Chamb., Ev., § 3662.

60. 5 Chamberlayne, Evidence, §§ 3663–3668.

61. *County of Schuylkill v. Copley*, 67 Pa. 386 (1871); *Maxey v. U. S.*, 207 Fed. 327, 125 C. C. A. 77 (1913).

Manslaughter.—The fact that a witness has been convicted of manslaughter does not render him incompetent as a witness. *State v. Laboon*, 107 S. C. 275, 92 S. E. 622, L. R. A. 1917 F 896 (1917).

62. *Myers v. People*, 26 Ill. 173 (1861); *State v. Clark*, 60 Kan. 450, 56 Pac. 767 (1899); *Le Baron v. Crombie*, 14 Mass. 234 (1817); *People v. Whipple*, 9 Cow. (N. Y.) 707 (1827); *Quillan v. Com.*, 105 Va. 874, 54 S. E. 333 (1906); 5 Chamb., Ev., § 3663, n. 2.

63. *Com. v. Green*, 17 Mass. 514 (1822).

64. *State v. Clark*, *supra*.

65. *Yates v. State*, 43 Fla. 177, 29 So. 965

(1901); *Thornton v. State*, 25 Ga. 301 (1858); *Dawley v. State*, 4 Ind. 128 (1853); *Blaufus v. People*, 69 N. Y. 107, 25 Am. Rep. 148 (1877); *Com. v. Miller*, 6 Pa. Super. Ct. 35 (1897); 5 Chamb., Ev., § 3664, n. 1.

66. *Faunce v. People*, 51 Ill. 311 (1869).

67. *Laborde v. Consol. Ass'n of Planters*, 4 Rob. (La.) 190, 39 Am. Dec. 517 (1843).

68. *U. S. v. Wilson*, 60 Fed. 890 (1894).

69. *Powell v. State*, 72 Ala. 194 (1882).

70. *Foster v. State*, 39 Tex. Cr. 399, 46 S. W. 231 (1898). *Compare Ritter v. Democratic Press Co.*, 68 Mo. 458 (1878); *State v. Harraas*, 22 Wash. 57, 60 Pac. 58 (1900).

71. *Espinoza v. State* (Tex. Cr. App. 1914), 165 S. W. 208. The fact, however, that a judgment might have been arrested or reversed on error will not operate to remove the incompetency, ensuing as a result of the action of the tribunal, where the defendant submitted to the judgment of the court. *Com. v. Keith*, 49 Mass. 531; 5 Chamb., Ev., § 3664, n. 8.

trary in the foreign jurisdiction in which it is desired to introduce the testimony of such witness.⁷² The clause in the second section of the fourth article of the United States Constitution, as to giving faith and credit to the judicial proceedings of another state, is not regarded as affecting judgments in criminal suits, so as to attach incompetency resulting from conviction beyond the jurisdiction of the state in which the judgment was rendered.⁷³

When Competency Restored.—Where disqualification ensues, as a result of the judgment, the generally accepted rule is that a pardon restores the competency of the convicted person.⁷⁴ Where, however, the disability is annexed by statute the prevailing opinion seems to be that it does not so operate,⁷⁵ although there is much authority in favor of the contrary view.⁷⁶ A limited pardon,⁷⁷ an executive act, which restores a convicted person to citizenship,⁷⁸ or a paper which only releases and discharges a prisoner from the penitentiary or other place of confinement,⁷⁹ does not remove the disability of incompetency which attached, as a result of the conviction. A pardon after serving the term will have the same effect as one granted during the term.⁸⁰ Service of the sentence has been held not to, of itself, operate to restore competency.⁸¹

Growth of Belief That Rule too Strict.—The rule at common law, which excluded a person as a witness under such circumstances, has been, to a great extent, modified both as a result of the tendency of the judicial mind⁸² and the action of legislative bodies,⁸³ upon the theory that the court should receive

72. *Com. v. Green*, 17 Mass. 515 (1822); *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632 (1879); *Logan v. U. S.*, 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 (1892); 5 Chamb., Ev., § 3665, n. 1. But see *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458 (1880); *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210 (1887).

73. *Com. v. Green*, *supra*; 5 Chamb., Ev., § 3665, n. 2.

74. *State v. Baptiste*, 26 La. Ann. 134 (1874); *Diehl v. Rodgers*, 169 Pa. 316, 32 Atl. 424, 47 Am. St. Rep. 908 (1895); *Wormley v. State* (Tex. Cr. App. 1912), 143 S. W. 615; *Thompson v. U. S.*, 202 Fed. 401, 120 C. C. A. 575 (1913); 5 Chamb., Ev., § 3666, n. 1. For an interesting article on the question of the effect of a pardon in removing the disqualification of a witness see 28 H. L. R. 647.

75. *Foreman v. Baldwin*, 24 Ill. 298 (1860). See *Klein v. Dinkgrave*, 4 La. Ann. 540 (1849); *Houghtaling v. Kelderhouse*, 1 Park. Cr. R. (N. Y.) 241 (1851).

76. *Singleton v. State*, 38 Fla. 297, 21 So. 21, 34 L. R. A. 251, 56 Am. St. Rep. 177 (1896); *Wood v. Fitzgerald*, 3 Or. 568 (1870); *Diehl v. Rodgers*, *supra*.

77. *State v. Timmons*, 2 Harr. (Del.) 529 (1833).

78. *People v. Bowen*, 43 Cal. 439 (1872).

79. *State v. Kirschner*, 23 Mo. App. 349 (1886).

80. *People v. Bowen*, *supra*; *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458 (1880); *State v. Blaisdell*, 33 N. H. 388 (1856).

81. *State v. Benoit*, 16 La. Ann. 273 (1861); 5 Chamb., Ev., § 3666, n. 8. Effect of statute, see *United States v. Hall*, 53 Fed. 352 (1892).

82. *Vance v. State*, 70 Ark. 272, 68 S. W. 37 (1902); *Bickel's Ex'r's v. Fasig's Adm'r*, 33 Pa. 463 (1859); *Benson v. U. S.*, 146 U. S. 325, 36 L. ed. 991, 13 S. Ct. 60 (1892).

83. *People v. Willard*, 92 Cal. 482, 28 Pac. 585 (1891); *Stone v. State*, 118 Ga. 705, 45 S. E. 630 (1903); *Dotterer v. State*, 172 Ind. 357, 88 N. E. 689 (1900); *Newhall v. Jenkins*, 2 Gray (Mass.) 562 (1854); *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91 (1886); *People v. McGloin*, 91 N. Y. 241, 12 Abb. N. C. 172 (1882); *Hopt v. People*, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262 (1883); 5 Chamb., Ev., § 3667, n. 2.

the testimony of any person, who is mentally competent, weight being given to it according to the circumstances of each particular case; the fact of a conviction going to the credibility of the witness and not to the question of competency.

Legislative Provisions.—A frequent legislative provision is that though a person may have been convicted of a criminal offense he may, nevertheless, be a competent witness, but that such conviction may be proved and considered as bearing upon his credibility.⁸⁴ Such an enactment is not to be regarded as violative of a constitutional provision which secures to a party in a civil action a jury trial, or of one vesting in certain courts the judicial power of the state.⁸⁵ Nor is such a statute *ex post facto* in its operation as to offenses committed prior to its passage.⁸⁶

§ 1157. *Interest, Etc.*⁸⁷—Under the practice at common law it was deemed that persons who were interested in or were parties to the proceedings, were, by reason of such fact, so under the temptation to testify falsely that they should be rejected.⁸⁸ The belief gradually grew that such rejection was contrary to experience and that so broad a rule of exclusion should be swept aside and the testimony of such persons received as better tending to an ascertainment of truth and the administration of justice by the courts, until finally, by reason of legislative enactments, the exclusion of such persons as incompetent, because of interest, has become of importance only from a historical standpoint.

Survivors.—In removing the disqualification on account of interest legislative bodies have, as a general rule, deemed it advisable to make an exception in the case of the survivor of a transaction,⁸⁹ upon the theory that, as the mouth of one of the parties had been closed by death or incapacity, it would tend to jeopardize the estates of such persons to permit the survivor to give his version of an affair in which both had been interested. The wisdom of permitting such acts to remain in force may well be questioned; in fact much the same objection exists why they should be relegated to the past as existed in the case of incompetency by reason of interest.⁹⁰

84. See cases cited in last preceding section.

85. *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 944 (1882).

86. *Hopt v. People*, *supra*.

87. 5 Chamberlayne, Evidence. §§ 3669, 3670.

88. *Soule v. Dawes*, 6 Cal. 473 (1856); *Rome v. Dickerson*, 13 Ga. 302 (1853); *Lucas v. Spencer*, 27 Ill. 15 (1861); *Binney v. Merchant*, 6 Mass. 190 (1810); *Todd v. Boone County*, 8 Mo. 431 (1841); *City Bank of Brooklyn v. McChesney*, 20 N. Y. 240 (1859); *Hale v. Wetmore*, 4 Ohio St. 600 (1855); *Camp v. Stark*, 81 Pa. 235 (1875); 5 Chamb., Ev., § 3669, n. 1.

89. See the various statutes of the different States.

90. *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930 (1895); 5 Chamb., Ev., § 3670. Under a statute prohibiting a party from testifying as to a transaction with a deceased person one cannot testify that he saw a certain note in possession of a joint defendant where this tended to show that the note formerly held by the deceased had been paid as this is doing indirectly what cannot be done directly. *Wall v. Wall*, 139 Ga. 270, 77 S. E. 19, 45 L. R. A. (N. S.) 583 (1913). Under a statute rendering a witness incompetent to testify as to transactions with a deceased per-

§ 1158. **Judges and Jurors.**⁹¹—An instance where a person offered as a witness has been excluded, on the ground of public policy, occurs in the case of a judge whose testimony is desired in the court of which he is sole judge.⁹² Much the same situation has been considered as existing where the judge, whose testimony is desired, is a member of a court which is composed of more than one judge. In such a case it seems that, if his action is not required, he may be permitted to testify, though, in such a case, the proper course for him to pursue would be to decline to return to the bench.⁹³ If, however, his services are needed as a member of the court many of the American decisions seem to regard it as decidedly improper for him to testify, and he is accordingly declared to be, on grounds of public policy, incompetent as a witness.⁹⁴ This, however, does not seem to be in accord with the early English practice⁹⁵ and the objections to such testimony seem rather chimerical than sound.⁹⁶

A very similar objection to the testimony of a juror has been made.⁹⁷ If the evidence is material, any mischief can be prevented by challenging the juror, as has been repeatedly held or provided by statute.⁹⁸ Grand jurors are frequently allowed to testify in regard to what took place before them as members of the grand jury,⁹⁹ having reference more particularly to a contradiction

son one cannot testify if an interested witness to a transaction or conversation between a deceased person and a party to the suit although he did not participate in the conversation or transaction. So one who claims property as the successor of his wife who is dead cannot testify as to a gift made to her by another deceased person in which transaction he took no part. *Griawold v. Hart*, 205 N. Y. 384, 98 N. E. 918, 42 L. R. A. (N. S.) 320 (1912). But a wife may testify in an action by her husband for services to a person since deceased. *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241, L. R. A. 1917 A 1. On an issue of undue influence one charged with the undue influence may be asked whether he had asked the grantor to make a deed to him. This is not calling for a transaction with a deceased person but is the opposite as trying to show that there had been no transaction. *Coblentz v. Putifer*, 87 Kan. 719, 125 Pac. 30, 42 L. R. A. (N. S.) 298 (1912). A creditor of a party is not interested in the litigation in the sense that he is barred by interest from testifying to services rendered to the deceased in a suit by his assignee of the claim where he has taken a note of the assignee in payment for the assignment of the claim. He has here only an indirect interest as a creditor and has not that direct property interest which is necessary to disqualify him. *Clen-dennin v. Clancy*, 82 N. J. L. 418, 81 Atl. 750,

42 L. R. A. (N. S.) 315 (1911). Conversations with deceased persons — exceptions, see note, *Bender* ed., 26 N. Y. 281. When declarations are admissible and when not admissible as *res gestae*, see note, *Bender*, ed., 95 N. Y. 298. Conversations with deceased persons — bona fide purchasers, see note, *Bender*, ed., 124 N. Y. 511. Declarations by one since deceased, see note, *Bender*, ed., 128 N. Y. 421. Transactions with one since deceased, see note, *Bender*, ed., 101 N. Y. 434, 118 N. Y. 56, 141 N. Y. 87, 153 N. Y. 358, 187 N. Y. 495. 91. 5 *Chamberlayne*, Evidence. §§ 3671, 3672.

92. *Rogers v. State*, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154 (1894); *Baker v. Thompson*, 89 Ga. 486, 15 S. E. 644 (1892); *Morss v. Morss*, 11 Barb. (N. Y.) 510 (1851); 5 *Chamb.*, Ev., § 3671, n. 1.

93. *People v. Dohring*, 59 N. Y. 374 (1874).

94. *Id.*; *Morss v. Morss*, *supra*; *People v. Miller*, 2 Park Cr. (N. Y.) 197 (1854).

95. *Supra*, § 319; 1 *Chamb.*, Ev., § 575.

96. 5 *Chamberlayne*, Evidence, § 3671.

97. *Supra*, § 320; 1 *Chamb.*, Ev., § 582.

98. *Supra*, § 320; 1 *Chamb.*, Ev., §§ 581, 582.

99. *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533 (1906); *Com. v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894 (1888); 5 *Chamb.*, Ev., § 3672, n. 3.

of the testimony of a witness on the trial.¹ Such a person has also been permitted to testify where he possesses knowledge in respect to the offense charged.²

1. *Com. v. Mead*, 12 Gray (Mass.) 167, 71 Am. Dec. 741 (1858); *State v. Thomas*, 99 Mo. 235, 12 S. W. 643 (1889); *State v. Brown*, 28 Or. 147, 41 Pac. 1042 (1895);
- Gordon v. Com.*, 92 Pa. 216, 37 Am. Rep. 672 (1879); 5 Chamb., Ev., § 3672, n. 4.
2. *State v. McDonald*, 73 N. C. 346 (1875).

CHAPTER LXIV.

INCOMPETENCY OF WITNESSES; RACE.

Incompetency of witnesses; race, 1159.

§ 1159. [Incompetency of Witnesses]; Race.¹— There were formerly in some states due to local prejudice laws excluding the testimony of certain races as Chinese,² Indians³ and negroes⁴ before slavery was abolished but happily such distinctions are now abolished everywhere.

1. 5 Chamberlayne, Evidence, §§ 3673— See Pumphrey v. State, 84 Neb. 636. 122 N. 3676. W. 19 (1909). Japanese are not "Indians."

2. People v. Jones, 31 Cal. 565, 573 (1867).

4. Grady v. State, 11 Ga. 253 (1852).

3. People v. Howard, 17 Cal. 63 (1860).

CHAPTER LXV.

PRIVILEGED COMMUNICATIONS.

Privileged communications, 1160.

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§ 1160. **Privileged Communications.**¹—The law has deemed it advisable, on grounds of public policy, that a certain class of evidence, known generally as privileged or confidential communications would be more detrimental to the interests of society than would the rejection of the evidence. While the purpose of judicial tribunals is the discovery of truth, in all cases, yet, in respect to communications of such a character, having particular reference to those between husband and wife and attorney and client, it has been considered that such a desire should be subordinated to the maintenance and preservation of social relations and confidences, the disturbance and destruction of which would cause greater mischief than the possible exclusion of the truth in some cases.

§ 1161. **Attorney and Client; General Rule.**²—One of the two great classes involved in the application of this rule is that of attorney and client. In all cases where this relation exists, all communications between a client and his legal adviser, made for the purpose and in the course of the employment are regarded as privileged and the rule of exclusion is strictly enforced.³ The theory upon which this rule is founded seems to be concerned more with the interests and administration of justice and the security and protection of the individual than with the furtherance of the interests of the legal profession.⁴ No man would be secure in respect to disclosures which must necessarily be

1. 5 Chamberlayne, Evidence, § 3676a.

3. Phillips v. Chase, 201 Mass. 444, 87 N. E.

2. 5 Chamberlayne, Evidence, §§ 3677, 755 (1909).

4. Greenough v. Gaskell, 1 My. & K. 100 (1833).

made under such circumstances; fear, distrust and suspicion would exist on the part of the client,⁵ and in many cases, on this account, concealment respecting the true situation might result. The attorney laboring under such a disadvantage and handicap would frequently be unable to correctly advise his client as to the proper course to pursue. The consequence would be that much unnecessary litigation, litigation which an attorney correctly advised as to the facts would discourage, would be thrust upon the courts.⁶ The discovery of truth would not be aided, but the contrary result would ensue, thus hindering and impeding the administration of justice.

§ 1162. [Attorney and Client]; General Rule; When Applied.⁷—The rule may apply to letters⁸ and protects both the attorney and client against disclosure.⁹ It applies only to attorneys regularly entitled to practice¹⁰ and it must further appear that the relation of attorney and client existed¹¹ although the payment of a retainer is not essential¹² or present or expected litigation.¹³ The communication must have been made while the relationship existed¹⁴ and may extend to the attorney's clerk or assistant¹⁵ but the fact that the relationship has terminated since the communication was made is immaterial.¹⁶ The rule extends to writings entrusted to the attorney by the client.¹⁷

5. *Wade v. Ridley*, 87 Me. 368, 373, 32 Atl. 975 (1895).

6. *McLaughlin v. Gilmore*, 1 Ill. App. 563, 564 (1878), per Pillsbury, J. Attorney's privilege, see note, Bender, ed., 80 N. Y. 402. Attorney's privilege. see note, Bender, ed., 111 N. Y. 251. Communications to counsel privileged, see note, Bender, ed., 18 N. Y. 546. Privileged communications between attorney and client, see note, Bender, ed., 128 N. Y. 420. When attorneys may testify. see note, Bender ed., 131 N. Y. 196. Testimony of admissions concerning one learned in professional capacity, see note, Bender, ed., 150 N. Y. 176. Privilege of attorney not to testify, see note, Bender, ed., 30 N. Y. 330, 343. What conversations with attorney are not privileged, see note, Bender, ed., 84 N. Y. 78.

7. 5 Chamberlayne, Evidence, §§ 3679-3687.

8. *State v. Laponio*, 85 N. J. L. 357, 88 Atl. 1045, 49 L. R. A. (N. S.) 1017 (1913).

9. The true view seems to be, that communications which the lawyer is precluded from disclosing, the client cannot be compelled to disclose. *State v. White*, 19 Kan. 445 (1877), per Horton, C. J.

10. That one held himself out as an attorney is not enough to make communications to him privileged. *McLaughlin v. Gilmore*, 1 Ill. App. 563 (1878); *Sample v. Frost*, 10 Iowa

266 (1850); *State v. Burkhardt*, 7 Ohio Dec. 537 (1878); *Schubkagel v. Dierstein*, 131 Pa. St. 46, 18 Atl. 1059 (1880); *Holman v. Kimball*, 22 Vt. 555 (1850).

11. *Hoar v. Tilden*, 178 Mass. 157, 50 N. E. 641 (1901).

Letter seeking to Employ Attorney.—The client's privilege extends to written communications made by him to his attorney and to a letter seeking to employ an attorney, even though the letter never reaches the attorney and he never is employed. An illiterate person may even employ a scrivener for this purpose and the scrivener is barred from testifying as a man has the right to use all proper methods of communication. *State v. Laponio*, 85 N. J. L. 357, 88 Atl. 1045, 49 L. R. A. (N. S.) 1017 (1913).

12. *Pfeffer v. Kling*, 171 N. Y. 668, 64 N. E. 1125 (1902), affirming 58 App. Div. 179, 68 N. Y. Suppl. 641 (1901).

13. *Illinois*.—*Rogers v. Daniels*, 116 Ill. App. 515 (1904).

14. *Leitch v. Diamond Nat. Bank*, 234 Pa. 557, 83 Atl. 416 (1912).

15. *State v. Laponio*, 85 N. J. L. 357, 88 Atl. 1045, 49 L. R. A. (N. S.) 1017 (1913).

16. *Harless v. Harless*, 144 Ind. 196, 41 N. E. 592 (1895).

17. *Selden v. State*, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144 (1889).

§ 1163. [Attorney and Client]; General Rule; Exceptions.¹⁸— The privilege does not extend to information which an attorney did not learn as a result of his professional employment¹⁹ or to statements made in the presence of a third person²⁰ or overheard by a third person²¹ or to statements made by the attorney with the intention that they be repeated to a third person.²² Neither does the privilege cover communications made in connection with the accomplishment of a criminal purpose²³ or where the attorney is employed by both parties to the transaction.²⁴ The attorney may be forced to testify to certain matters which are not regarded as confidential as the fact of his employment,²⁵ the nature and reasonable value of his services,²⁶ the payment of money connected with his client's business,²⁷ the signature of his client²⁸ and other collateral facts²⁹ like charges made by the client against the attorney.³⁰

§ 1164. [Attorney and Client]; Waiver by Client of Privilege.³¹— The privilege is regarded as that of the clients.³² He alone is the one for whose protection the rule is enforced, and as the client is the sole one for whose benefit the rule is invoked so he is the only one who may remove the restriction. He may, if he desires, waive the benefit of the rule,³³ in which case testimony, otherwise excluded, may be received.

Papers Accessible to Others.— The privilege of an attorney does not apply to papers delivered to him where the knowledge of their existence or contents is accessible to others or the public as in case of a recorded mortgage. *Pearson v. Yoder*, 39 Okla. 105, 134 Pac. 421, 48 L. R. A. (N. S.) 334 (1913).

18. 5 Chamberlayne, Evidence, §§ 3688–3694.

19. *Skellie v. James*, 81 Ga. 419, 8 S. E. 607 (1889).

20. *People v. Farmer*, 194 N. Y. 251, 87 N. E. 457 (1909).

21. *State v. Loponio*, 85 N. J. L. 357, 360, 88 Atl. 1045, 49 L. R. A. (N. S.) 1017 (1913).

22. *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. 563 (1887).

23. *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116 (1903).

24. *Thompson v. Cashman*, 181 Mass. 36, 62 N. E. 976 (1902).

25. *Security Loan & T. Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257 (1901). Although an attorney can ordinarily be required to divulge the name of his client still where the information is asked only for the purpose of incriminating him the attorney may not be forced to answer. So where the attorney acted for certain persons accused of election frauds, he may not be forced to tell who employed him to defend them where the only purpose of the

inquiry is to obtain evidence to convict those who employed him. *Ex parte McDonough*, 170 Cal. 230, 149 Pac. 566. L. R. A. 1916 C 503 (1915).

26. *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 508 (1890).

27. *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552 (1903).

28. "If he knew nothing but what his client had communicated to him, he could not be compelled to disclose that; but if he became acquainted with his client's signature, in any other manner, though it was subsequent to his retainer, he was bound to answer, for an attorney and counsel may be questioned, as to a collateral fact within his knowledge, or as to a fact which he may know, without being entrusted with it as an attorney in the cause." *Johnson v. Daverne*, 19 Johns. (N. Y.) 1374, 136, 10 Am. Dec. 108 (1821), per Spencer, C. J.

29. *Funk v. Mohr*, 185 Ill. 395, 57 N. E. 2 (1900).

30. *Laffin v. Herrington*, 1 Black (U. S.) 326, 17 L. ed. 45 (1861); *Smith v. Guerre* (Tex. Civ. App. 1913), 159 S. W. 417.

31. 5 Chamberlayne, Evidence, § 3695.

32. *Passmore v. Passmore*, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62 (1883).

33. *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (1909).

*In case two or more persons are concerned in the communications made to an attorney it seems that one alone cannot waive so far as their mutual interests are involved.*³⁴

§ 1165. Clergymen.³⁵—At the common law although there was much endeavor to force a recognition of confessions to priests or spiritual advisers as being privileged and therefore, like communications between attorney and client and husband and wife, not subject to disclosure, the courts did not give recognition to this view.³⁶ In many jurisdictions, however, this situation has been changed by statute, an ordinary provision being that no clergyman or priest shall reveal any "confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs." Under such a statute it is not enough to render the communication privileged that it is made to a clergyman or priest. If it is not made to such a person in his professional character and because enjoined by the rules of discipline or practice of such religious denomination the privilege does not attach.³⁷

§ 1166. Husband and Wife; General Rule.³⁸—Communications between husband and wife were early recognized as privileged and neither could be compelled to disclose what took place between them.³⁹ The theory upon which the rule was founded was that the confidence, peace and harmony which should exist between spouses would be seriously disturbed if testimony as to such matters should be received and that the exclusion of such evidence would tend

34. *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922 (1902). Waiver of privilege, see note, *Bender*, ed., 148 N. Y. 97.

35. 5 *Chamberlayne*, Evidence, § 3696.

36. "The cases of privilege are confined to solicitors and their clients; and stewards, parents, medical attendants, clergymen and persons in the most closely confidential relation are bound to disclose communications made to them." *Greenlaw v. King*, 1 Beav. 137, 145 (1838), per Langdale, M. R.

37. *Alford v. Johnson*, 103 Ark. 236, 238, 146 S. W. 516 (1912), per Frauenthal, J.

Statements to Church Session.—A statute excluding confidential communications to a Minister of the Gospel covers a statement made by a member of a Presbyterian Church before the Church session consisting of the pastor and the ruling elders. As the communication is privileged it is not available for impeachment of the party who made it. *Reutkemeier v. Nolte*, 179 Iowa 342, 161 N. W. 290, L. R. A. 1917 D 273 (1917).

38. 5 *Chamberlayne*, Evidence, §§ 3697-3700.

39. *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085 (1911).

To Show Unsound Mind.—In a will contest a wife cannot testify to words and acts of the husband in her presence when they were alone to show that he was not of sound mind as these are privileged communications. *Whitehead v. Kirk*, 104 Miss. 776, 61 So. 737, 62 So. 432, 51 L. R. A. (N. S.) 187 (1913).

Effect of Statute allowing Testimony against each other.—Even a statute making a husband or wife competent to testify against each other in a criminal case does not render confidential communications between them competent. So a letter written by a husband to his wife disclosing his criminal relations with her sister is not admissible against him in a bastardy process. *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95, L. R. A. 1916 F. 382 (1916) and note.

Waiver.—Where a husband or wife is a defendant in a criminal case the privilege as to confidential communications between them is and may be waived by calling the other spouse as a witness. *Hampton v. State*, 7 Okla. Crim. Rep. 201, 123 Pac. 571, 40 L. R. A. (N. S.) 43 (1912).

to better preserve and protect these most necessary essentials to the permanency of the family circle, and therefore to the betterment of society.⁴⁰ It was the belief that greater mischief would result from the admission of such evidence than would ensue from its exclusion.⁴¹ In other words the rule of exclusion was one of public policy.⁴²

Where the information is not a result of marital confidence but is obtained from some outside source, it is held that the rule does not apply.⁴³

Communications made after the termination of the relationship may be used⁴⁴ although the termination of the marital relation through death⁴⁵ or divorce⁴⁶ after the communication is made does not affect the application of the rule. If the communication was made in the presence of a third person,⁴⁷ even a child of age to understand⁴⁸ or an eavesdropper,⁴⁹ it is not regarded as a private communication and hence is not privileged. The rule covers letters between husband and wife⁵⁰ as well as oral communications. This privilege is commonly covered by statutes.⁵¹

§ 1167. **Physician and Patient; Privilege is of Statutory Origin.**⁵²—At common law communications between physician and patient, were not regarded in the same light as those between attorney and client,⁵³ although the advisability

40. *State v. Brittain*, 117 N. C. 783, 23 S. E. 433 (1895).

41. *Sexton v. Sexton*, 129 Iowa 487, 489, 105 N. W. 314, 2 L. R. A. (N. S.) 708 (1905).

42. *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057 (1909).

43. *Gray v. Cole*, 5 Har. (Del.) 448, 419 (1853), per the Court.

44. The privilege does not apply where the husband and wife have separated as where the husband writes the wife a threatening letter. *McNamara v. McNamara*, 99 Neb. 9, 154 N. W. 858, L. R. A. 1916 B 1272 (1915). Communications between husband and wife after they are divorced are not privileged, although the divorce is afterwards set aside as being fraudulent. *Spearman v. State* (Tex. Crim. Rep 1912), 152 S. W. 915, 44 L. R. A. (N. S.) 243. Communications by a husband to his wife testamentary in nature are admissible in evidence when found by the wife only after his suicide as then they are not communications by one to the other during marriage as they were received after the death of one of the parties. *Whitford v. North State Life Ins. Co.*, 163 N. C. 223, 79 S. E. 501.

45. *Stephens v. Collison*, 256 Ill. 238, 99 N. E. 914 (1913).

46. *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005 (1900).

47. *People v. Lewis*, 62 Hun 622, 16 N. Y. Suppl. 881 (1891), *affirmed* 136 N. Y. 633, 32 N. E. 1014 (1892).

48. *Lyon v. Prouty*, 154 Mass. 488, 28 N. E. 908 (1891).

49. *Com. v. Griffin*, 110 Mass. 181 (1872); *State v. Center*, 35 Vt. 378 (1862).

50. *Wilkerson v. State*, 91 Ga. 729, 737, 17 S. E. 990 (1893), though husband's letter was delivered by wife to another.

51. *Com. v. Cronin*, 185 Mass. 96, 69 N. E. 1065 (1904).

Practical Suggestions.—This harsh rule can sometimes be avoided by clever counsel by the use of the negative form of questions. For example the editor has in mind a case where the husband claimed that title to certain property was taken in his name as a gift to him and the wife claimed he had taken it in his name fraudulently using her money to buy it and the counsel for the wife put in her story by asking her whether she had ever told her husband that she was making this gift to him, etc. Here the wife could not of course be asked what she had said to her husband about the matter no other person being present but the effect of the conversation was still put in the record in this way.

52. 5 Chamberlayne, Evidence, §§ 3701-3705a.

53. *Banigan v. Banigan*, 26 R. I. 454, 59

of extending the privilege to this class of cases seems not to have been entirely in disfavor.⁵⁴ In fact the view, that such communications should be excluded, began to spread among the judiciary and members of the legal profession, resulting finally in enactments by legislative bodies, making communications between a physician and his patient privileged.⁵⁵

The privilege created under such statutes covers any information received by the physician as a result of the relation which he has acquired either from oral statements of the patient or as a result of examinations or observations made by him.⁵⁶ The privilege is confined to one who has the right to act as a physician⁵⁷ though he be in the employ of another⁵⁸ and covers statements made to a physician by a patient for the purpose of enabling him to prescribe⁵⁹ and the privilege also attaches to statements made by a physician to a patient as to the nature of his disease⁶⁰ and its treatment,⁶¹ and includes the mental condition of the patient.⁶² Statements made when the relation did not exist are not privileged.⁶³ A physician may be forced to testify to the fact of his employment⁶⁴ and his attendance,⁶⁵ to affidavits of the cause of death filed with the proper authorities,⁶⁶ to examinations pursuant to the order of the court⁶⁷ or at the request of both parties.⁶⁸ The statute cannot be invoked to

Atl. 313 (1904). A physician who discloses on the stand when ordered by the court confidential communications of his patient is not liable to civil suit by his patient. *Smith v. Driscoll*, 94 Wash. 441, 162 Pac. 572, L. R. A. 1917 C 1128 (1917). Physician's privilege, see note, *Bender*, ed., 103 N. Y. 587. Admissibility of evidence of examining physician, see note, *Bender*, ed., 137 N. Y. 582.

54. *Wilson v. Rastall*, 4 T. R. 753, 760 (1792).

55. *Ansdenmoore v. Holzback*, 88 Ohio St. 625, 106 N. E. 41 (1914).

56. *Rose v. Supreme Court*, 126 Mich. 577, 85 N. W. 1073 (1901).

Autopsy by Attending Physician.—Under a statute making communications to a physician privileged an attending physician who performs an autopsy immediately after death may not tell of the results of the autopsy and his conclusions therefrom as this would take away from the privilege as the conclusions must have been based in part on what he had learned as the attending physician. *Thomas v. Byron*, 168 Mich. 593, 134 N. W. 1021, 38 L. R. A. (N. S.) 1186 (1912).

57. *Wiel v. Cowles*, 45 Hun (N. Y.) 307 (1887); *Head Camp v. Loehrer*, 17 Colo. App. 247, 68 Pac. 136 (1902).

58. *Battis v. Chicago R. I. & P. Ry. Co.*, 124 Iowa 623, 100 N. W. 543 (1904).

59. *Briggs v. Briggs*, 20 Mich. 34 (1874).

60. *Hammerstein v. Hammerstein*, 74 Misc. R. 567, 134 N. Y. Suppl. 473 (1912).

61. *Hammerstein v. Hammerstein*, 74 Misc. R. 567, 134 N. Y. Suppl. 473 (1912).

62. *Shuman v. Supreme Lodge*, 110 Iowa 480, 81 N. W. 717 (1900).

63. *Herries v. Waterloo*, 114 Iowa 374, 86 N. W. 306 (1901).

64. *Haughton v. Aetna Life Ins. Co.*, 165 Ind. 32, 73 N. E. 592 (1905).

65. *Cooley v. Foltz*, 85 Mich. 47, 48 N. W. 176 (1896).

66. *Robinson v. Supreme Commandery*, 77 App. Div. 215, 70 N. Y. Suppl. 13 (1902), affirmed 177 N. Y. 564, 69 N. E. 1130 (1904).

67. *People v. Glover*, 71 Mich. 303, 38 N. W. 874 (1888) (examination to determine physical condition of one charged with rape); *People v. Sliney*, 137 N. Y. 570, 33 N. E. 150 (1893) (examination of prisoner as to sanity). Where the plaintiff is ordered by the court to submit to a physical examination any statements he makes in answer to the defendant's physician are deemed privileged according to the weight of authority. It is argued that this is an abuse of authority to force the plaintiff to submit to examination and thus elicitate from him statements which may be filtered as admissions through an irresponsible witness instead of using the

protect crime⁶⁹ as in abortion cases⁷⁰ and the privilege may be waived by the patient,⁷¹ as where he testifies in regard to the matter⁷² or calls on the physician to do so.⁷³

§ 1168. **Public Justice; Grand Jurors.**⁷⁴—In the interest of public justice there are certain things which are considered as necessary to protect from disclosure. Thus in the case of proceedings before the grand jury it is deemed that the administration of public justice may be better secured by preventing

ample legal process available to secure the testimony in open court. In a recent case the court does not decide this question but holds that a statement made voluntarily by the witness to the doctor may be put in evidence. *McGuire v. Chicago & A. R. Co.* (Mo. 1915), 178 S. W. 79, L. R. A. 1915 F 888 and note

68. *Clark v. State*, 8 Kan. App. 782, 61 Pac. 814 (1899).

69. *People v. West*, 106 Cal. 89, 39 Pac. 207 (1895).

70. *Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340 (1903); *State v. Smith*, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219 (1896); *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. 497 (1905)

71. *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S. W. 699 (1913). Waiver of physician's privilege, see note, *Bender*, ed., 118 N. Y. 94, 188 N. Y. 407, 193 N. Y. 11.

Provision in Insurance Policy.—Where an insurance policy provides that the attending physician may testify this is a waiver of the privilege which binds the beneficiary. *National Unity Ass'n. v. McCall*, 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N. S.) 418 (1912).

Waiver at former Trial.—The mere fact that testimony has been given without objection at a former trial does not necessarily constitute a waiver of the claim that it is privileged at a later trial of the same case especially where the party has not been misled by it. *Maryland Casualty Co. v. Maloney*, 119 Ark. 434, 178 S. W. 387, L. R. A. 1916 A 519 (1915).

72. *City of Tulsa v. Wicker*, 42 Okla. 539, 141 Pac. 963 (1914); *Fulson-Morris Coal & M. Co. v. Mitchell*, 37 Okla. 575, 132 Pac. 1103 (1913). Under a statute declaring that a physician cannot be examined as to communications made to him by his patient the latter does not waive the privilege by testifying to his own condition at the time. *Arizona & New Mexico R. Co. v. Clark*, 235 U. S. 669, 35 Sup. Ct. Rep. 210, L. R. A. 1915 C 834 (1915).

Where Physician is Claimed to have Defrauded Plaintiff.—Where the insured claims that she was induced to settle a claim on an insurance policy by false and fraudulent statements of the attending physician she has put in issue the cause of death and has waived her statutory privilege of objecting to the testimony of the physician. *National Unity Assn. v. McCall*, 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N. S.) 418 (1912).

73. *Speck v. International Ry. Co.*, 133 App. Div. 802, 118 N. Y. Suppl. 71 (1909).

Testimony by another Doctor.—According to the decided weight of authority the waiving of the privilege by the plaintiff calling one of his physicians does not waive his right to object to the testimony of any other physicians. *Jones v. Caldwell*, 20 Idaho 5, 116 Pac. 110, 48 L. R. A. (N. S.) 119 (1911). The fact that the plaintiff puts on a physician who testifies as to an examination he made just after the injury does not waive the privilege as to examination by another physician before the injury. The court lays down the rule that waiver only takes place as to another doctor who examined in company with the doctor who testifies. *Mays v. New Amsterdam Casualty Co.*, 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108 (1913). A patient waives his privilege by going on the stand and telling his ailments and putting one physician on the stand also and he cannot then object to other doctors who attended him telling what they know, although the privilege arises under a statute as the waiver may be engrafted on the statute. The point is that the privilege if secrecy applies to his physical condition and when he voluntarily tells this he should then not object to the whole truth being known. *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N. S.) 394 (1913).

74. 5 Chamberlayne, Evidence, § 3706.

any inquiry in regard thereto,⁷⁵ except that it may be shown by statute in some states that a witness testified differently before the grand jury than at the later trial.⁷⁶

§ 1169. [Public Justice]; *Petty or Traverse Jurors*.⁷⁷— Much the same situation exists, where it is desired to introduce testimony of petty or traverse jurors, as to some mistake, irregularity or misbehavior on the part of the jury, for the purpose of impeaching their verdict, it being generally decided that such testimony will be excluded.⁷⁸

§ 1170. *Secrets of State*.⁷⁹— In the case of matters relating to affairs of state, it is clearly apparent that there are many communications which it is essential should be protected from disclosure. While the discovery of truth, as an aid in the administration of justice, is particularly to be desired and sought for, yet the proper administration of public affairs, both state and national, particularly the latter, require that often times the executive and heads of departments should not be hampered by any interference from the courts.⁸⁰ It is, therefore, deemed advisable that, whenever, the executive departments consider that certain matters or communications should not be divulged, their opinion or decision shall be regarded as binding upon the courts and testimony concerning them will not be compelled.⁸¹

75. *State v. Wood*, 53 N. H. 484 (1873).

76. *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267 (1895); *Pritchett v. Frisby*, 112 Ky. 629, 23 Ky. L. Rep. 2035, 66 S. W. 503 (1902); *State v. Thomas*, 99 Mo. 235, 12 S. W. 643 (1889).

77. 5 *Chamberlayne*, Evidence, § 3707.

78. *Smith v. Smith*, 50 N. H. 212 (1870).

Affidavits of jurymen as to facts as that a verdict was reached by lot [*Wright v. Illinois & Miss. Teleg. Co.*, 20 Iowa 195, 210 (1866)], or as to what was considered by the jury in reaching a verdict have been received. "Whenever it does not contradict the record,

parol evidence may be given to show that a former recovery was had, not upon the merits, but upon some technical objection to the form of action or otherwise." *Follansbee v. Walker*, 74 Pa. St. 306, 310 (1873), per *Sharswood, J.* See *Heffron v. Gallupe*, 55 Me. 563 (1867).

79. 5 *Chamberlayne*, Evidence, § 3708.

80. *Totten v. United States*, 92 U. S. 105, 107, 23 L. ed. 605 (1875).

81. *Hartman's Appeal*, 85 Pa. St. 433 (1877); *Gray v. Pentland*, 2 S. & P. 23 (1815).

CHAPTER LXVI.

EXAMINATION OF WITNESSES.

Examination of witnesses, 1171.

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privilege as to self-incrimination, 1179.

§ 1171. **Examination of Witnesses.**¹—In the use of witnesses, as a media of proof, the administrative power of the presiding judge, stands out most clearly. It is here that his ability to work out by the use of reason the results of substantial justice, in connection with the rules of law substantive or procedural, is greatly increased. Having in view the object of judicial administration, the discovery of truth as an aid to the attainment of justice, much rests in the exercise of sound reason by the presiding judge or as it is frequently termed the exercise of sound discretion by him. So many and varied are the circumstances developed in the case of different witnesses, having regard to their characters, intelligence, and memory, the effect of bias upon their minds and other similar factors that the court is continually confronted with different situations in administering the rules of evidence. In each and every instance the judicial mind must be imbued with the thoughts of discovering the truth and of thus securing substantial justice to the parties and for this purpose the presiding judge must in all cases endeavor, by the exercise of sound reason in the proper administration of the rules of evidence, to attain these objects.

§ 1172. **Direct Examination; Leading Questions.**²—An elementary rule of evidence, in the examination of witnesses, is that leading questions will not be allowed.³ As to what is a leading question is often a matter of much nicety. It may be stated, generally, however, that any question which contains in it a suggestion to the witness of the answer desired falls within the prohibition.⁴

1. 5 Chamberlayne, Evidence, §§ 3709, 3710.

2. 5 Chamberlayne, Evidence, §§ 3711–3720.

3. Kankakee v. Illinois Cent. R. Co., 258 Ill. 368, 101 N. E. 592 (1913).

4. "A question is leading which instructs

the witness how to answer on material points, or puts into his mouth words to be echoed back as was done here, or plainly suggests the answer which the party wishes to get from him." Page v. Parker, 40 N. H. 47, 63 (1860), per Fowler, J.

The presiding judge will, in all cases, take care to prevent any question being asked of a witness which is so framed or put to him as to indicate the particular answer which is wanted.

The fact that a question may be answered by "yes" or "no" does not stamp it as necessarily leading,⁵ while a question put in the alternative form as "whether or not" is usually not regarded as leading.⁶ Whether a question is leading is peculiarly a question for the presiding judge.⁷ A question which assumes the existence of facts which have not been established is ordinarily regarded as leading⁸ but not where such facts are admitted to exist.⁹ Leading questions may be put when they are preliminary to the matters in controversy to expedite the trial.¹⁰

The court may allow the use of leading questions where a person's memory is exhausted concerning a matter¹¹ or where the witness is clearly hostile to the party producing him¹² or in the case of children,¹³ or feeble-minded persons,¹⁴ illiterates¹⁵ or foreigners with a limited knowledge of the English language.¹⁶

§ 1173. **Use of Memoranda to Refresh Memory.**¹⁷—The mind of a witness will frequently not contain a present recollection of some past event or transaction. Where such a situation arises the presiding judge may permit the use of memoranda by a witness for the purpose of refreshing his mind and reviving his recollection.

§ 1174. **Cross Examination; Right of.**¹⁸—The right to cross examine a witness, after he has been examined in chief, is one which is undisputed,¹⁹ and if,

5. *Southern Cotton Oil Co. v. Campbell*, 106 Ark. 379, 153 S. W. 256 (1913); *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170 (1897).

6. *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347 (1854).

7. *Com. v. Dorr*, 216 Mass. 314, 103 N. E. 902 (1914).

8. *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 73 N. E. 906 (1905).

9. *Erie & P. Despatch v. Cecil*, 112 Ill. 180 (1884); *Willey v. Portsmouth*, 35 N. H. 303 (1857); *Hays v. State* (Tex. Cr. App. 1892), 20 S. W. 361.

10. "If the questions relate to introductory matter and be designed to lead the witness with the more expedition to what is material to the issue, it is captious to object to it, even if it be leading." *People v. Mather*, 4 Wend. (N. Y.) 229, 247, 21 Am. Dec. 122 (1830), per Marcy, Sen.

11. *Warren v. Warren*, 33 R. I. 71, 80 Atl. 593 (1911).

12. *Wiener v. Mayer*, 162 App. Div. 142, 147 N. Y. Suppl. 289 (1914).

13. *State v. Drake*, 128 Iowa 539, 105 N. W. 54 (1906).

14. *Strnad v. William Messer Co.*, 142 N. Y. Suppl. 314 (1913); *Armstead v. State*, 22 Tex. App. 51, 2 S. W. 627 (1886).

15. *People v. Bernor*, 115 Mich. 692, 74 N. W. 184 (1898).

16. *Christensen v. Thompson*, 123 Iowa 717, 99 N. W. 591 (1904).

Practical Suggestion.—Witnesses should be cautioned to tell not what they thought or inferred but what they saw or heard, and for this reason it is usually best to ask them shortly, "Tell the court what talk you heard, telling the conversation as near as you can, stating just what each party said," or, "Tell the court what you actually saw with your own eyes."

17. 5 Chamberlayne, Evidence, § 3720. See *supra*, § 1098. 5 Chamb., Ev., § 3506.

18. 5 Chamberlayne, Evidence, § 3721.

19. *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286 (1890).

after he has testified on direct examination, no opportunity therefor is afforded as in case of his death²⁰ or illness,²¹ or where a party to the proceeding refuses to answer,²² or from some other cause²³ his testimony will be rejected. The mere appearance and swearing of a witness, however, when no testimony is given by him, is frequently not regarded as conferring any such right,²⁴ and this result of course follows in those jurisdictions where the cross-examination of a witness is limited by the direct examination.

§ 1175. [Cross Examination]; Scope of.²⁵—The question whether the cross-examination of a witness must be limited to those matters concerning which he has been examined in chief or may extend to any facts in the case which are relevant and may be a part of the opponent's case is one upon which the decisions are not uniform. The great weight of authority, however, although there are several decisions to the contrary,²⁶ supports the doctrine that it is so limited and that if a party desires to examine a witness as to any other matter he can only do so by calling him as his own witness at the proper time.²⁷ This rule is not generally construed as meaning that a witness can be cross-examined as to a particular subject only to the extent that it has been gone into on the direct examination, for if a matter is touched upon there, as for instance part of a conversation or transaction, a legitimate subject for cross-examination is thus presented in so far as the matter may constitute a unity.²⁸ It is often difficult to determine just how far the cross-examination of a witness may proceed before the limit has been reached or passed. In each case the question must be determined by the presiding judge in the exercise of sound discretion.²⁹

The use of leading questions is always allowed in cross-examination³⁰ unless it appears that the witness is friendly to the cross-examining counsel.³¹ The cross-examination may always bring out matters not fully disclosed by the

20. *Sperry v. Moore's Estate*, 42 Mich. 353, 4 N. W. 13 (1880); *People v. Cole*, 43 N. Y. 508 (1871).

21. *Cole v. People*, 2 Lans. (N. Y.) 370 (1869).

Effect of Redirect Examination.—The testimony of a witness may be received although after thorough cross-examination she is further examined redirectly and then is too ill for further cross-examination as the party has already fully availed himself of his right of cross-examination. *State v. Duvall*, 135 La. 710, 65 S. W. 904, L. R. A. 1916 E 1264 (1914).

22. *Howard v. Chamberlain*, 64 Ga. 684 (1880); *Heath v. Waters*, 40 Mich. 457 (1879).

23. *People v. Cole*, 43 N. Y. 508 (1871).

Compare.—*Scott v. McCann*, 76 Md. 47, 24 Atl. 536 (1892).

24. *Harris v. Quincy, O. & K. C. R. Co.*, 115 Mo. App. 527, 91 S. W. 1010 (1906).

25. 5 *Chamberlayne, Evidence*, §§ 3722-3727.

26. *People v. Pindar*, 210 N. Y. 191, 104 N. E. 133 (1914).

27. *People v. Darr*, 262 Ill. 202, 104 N. E. 389 (1914).

28. *De Haven v. De Haven*, 77 Ind. 236, 239 (1881).

29. *Thornton v. Hook*, 36 Cal. 223, 227 (1868).

30. *People v. Considine*, 105 Mich. 149, 63 N. W. 196 (1895).

31. *Moody v. Rowell*, 17 Pick. (Mass.) 490 (1835).

direct examination³² but the extent of cross-examination as to collateral or irrelevant facts is for the determination of the presiding judge.³³ Questions which assume the existence of facts which have not been proved will be excluded.³⁴

§ 1176. **Redirect Examination.**³⁵—After the cross-examination of a witness has been completed the right of the party by whom he was called to re-examine him within proper limits is recognized. It is stated generally that no right exists to introduce new matter at this stage,³⁶ as it is considered that the party has had full opportunity, on the direct examination, to bring out all facts which are material and relevant to his contention. The real purpose of the redirect examination is to obtain an explanation³⁷ of statements made on the cross-examination which tend to create doubts and to contradict matters drawn forth on the direct examination. Thus it is permissible to show the motive, provocation, or reason which influenced the witness in respect to certain statements made by him,³⁸ or to further interrogate him as to new matter thus disclosed,³⁹ as in case of a conversation or transaction to bring it out in full.⁴⁰

Leading questions will ordinarily be excluded on redirect examination.⁴¹ This, however, is left largely to the presiding judge to determine as a matter of sound administration.⁴²

§ 1177. **Examinations Subsequent to Re-direct.**⁴³—After the re-direct examination of a witness, a recross-examination is, in some cases, permitted,⁴⁴ as where new matter has been gone into on the former.⁴⁵ Whether such a priv-

32. *Com. v. St. Pierre*, 175 Mass. 48, 55 N. E. 482 (1899).

33. *Drexler v. Borough of Braddock*, 238 Pa. 376, 86 Atl. 272 (1913).

34. *Balswic v. Balswic*, 179 Ill. App. 118 (1913).

Practical Suggestions.—It is commonly remarked by those familiar with the courts that most cross-examinations hurt the side that does the cross-examining and strengthen the witness. One reason is that most lawyers never learn the danger of haphazard questions. Mr. Wellman's wonderful book on the art of Cross-examination might be compressed in the single injunction, "Never attack a witness unless you know the facts which will injure him and when you have brought out these facts then stop." Attorneys must remember that witnesses are often intelligent and that by the time the attorney has gone very far with his cross-examination the witness has a bias against him and will take any opportunity to bring in something to injure the side of the cross-examiner. The wise lawyer never gives the witness this opportunity.

35. 5 Chamberlayne, Evidence, § 3728.

36. *Finley v. West Chicago St. R. Co.*, 90 Ill. App. 368 (1900); *Struth v. Decker*, 100 Md. 368, 59 Atl. 727 (1905).

37. *Musselman Grocer Co. v. Casler*, 138 Mich. 24, 100 N. W. 997 (1904).

38. *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805 (1905).

39. *People v. Robinson*, 135 Mich. 511, 98 N. W. 12 (1904).

40. *Chicago City Ry. Co. v. Lowitz*, 119 Ill. App. 300, *affd.* 218 Ill. 24, 75 N. E. 755 (1905).

41. *Sager v. Samson Min. Co.* (Mo. App. 1914), 162 S. W. 702; *Anderson v. Berrum*, 36 Nev. 463, 136 Pac. 973 (1914); *Harvey v. State*, 35 Tex. Cr. 545, 34 S. W. 623 (1906).

42. *Mann v. State*, 134 Ala. 1, 32 So. 704 (1902); *Hess v. Com.* (Ky. 1887), 5 S. W. 751. See *Gilbert v. Sage*, 57 N. Y. 630 (1874).

43. 5 Chamberlayne, Evidence, § 3729.

44. *State v. Haab*, 105 La. 230, 29 So. 725 (1901).

45. *Wood v. McGuire*, 17 Ga. 303 (1855);

ilege will be accorded and, if so, the extent to which the examination may go is in each case a question for the presiding judge to determine. If he is of opinion that no useful result will ensue he may refuse to permit a recross-examination, or, after it has been entered upon, to allow its continuance.⁴⁶

An examination in *surrebuttal* may likewise be allowed by the presiding judge where he may deem it necessary in the interests of justice.⁴⁷

§ 1178. *Recalling of Witnesses.*⁴⁸—Whether a witness, who has been examined, may be recalled is a matter which rests largely with the presiding judge. If he deems it advisable, as an aid in eliciting the truth and, therefore, as tending to the furtherance of justice, he will permit such a course to be pursued.⁴⁹

§ 1179. *Privilege as to Self-Incrimination.*⁵⁰—The doctrine which protects a witness from self-incrimination permits him in any proceeding, civil or criminal, to decline to answer any question which would expose him, or tend to expose him, to a criminal prosecution.⁵¹ It is not essential, in order for a witness to avail himself of the privilege, that the answer might of itself be sufficient to have this result. If it should happen that the fact concerning which the question relates may be only a link in a chain of circumstances, or one of a series of acts which as a whole, would produce this result he may refuse to answer.⁵²

He may also claim the privilege where the answer might subject him to a penalty or forfeiture⁵³ or, in some states might degrade him⁵⁴ but not simply where the answer may result in pecuniary loss⁵⁵ or civil liability.⁵⁶ The privilege extends to writings.⁵⁷

The court may,⁵⁸ but need not,⁵⁹ inform the witness of his privilege. The privilege is personal to the witness and can be invoked only by him⁶⁰ and may be terminated by waiver,⁶¹ as where the witness testifies,⁶² or by operation of

People v. Detroit Post & T. Co., 54 Mich. 457, 20 N. W. 528 (1884); State v. Pyscher, 179 Mo. 140, 77 S. W. 836 (1903).

46. Com. v. Nelson, 180 Mass. 83, 61 N. E. 802 (1901).

47. Goodyear Rubber Co. v. Scott Co., 96 Ala. 439, 11 So. 370 (1892).

48. 5 Chamberlayne, Evidence, §§ 3730, 3731.

49. Wagner v. State, 119 Md. 559, 87 Atl. 407 (1913).

50. 5 Chamberlayne, Evidence, §§ 3732-3740.

51. Com. v. Phoenix Hotel Co., 157 Ky. 180, 162 S. W. 823 (1914).

52. Ford v. State, 29 Ind. 541, 95 Am. Dec. 658 (1868).

53. Godsen v. Woodward, 108 N. Y. 242, 8 N. E. 653 (1886).

54. Lohman v. People, 1 N. Y. 379, 49 Am.

Dec. 340 (1848). *Contra*: Waters v. West Chicago St. R. Co., 101 Ill. App. 265 (1902).

55. La Bourgogne, 104 Fed. 823 (1900).

56. Neally v. Ambrose, 21 Pick. 185 (1838).

57. Ballman v. Fagin, 200 U. S. 186, 50 L. ed. 433, 26 S. Ct. 212 (1906).

58. People v. Priori, 164 N. Y. 459, 58 N. E. 668 (1900).

59. Bolen v. People, 184 Ill. 338, 56 N. E. 406 (1900).

60. Moser, *In re*, 138 Mich. 302, 101 N. W. 588, 11 Detroit Leg. 593 (1904).

61. Evans v. O'Connor, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 816 (1899).

62. People v. Rosenaeimer, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977 (1913).

When the defendant takes the stand the state may cross-examine him and also comment on his failure to deny or explain damaging evidence against him. State v. Larkin, 250 Mo.

law as where prosecution for the crime is barred by limitations⁶³ or by statutes granting immunity to witnesses from criminal prosecution for any matter to which their testimony may relate.⁶⁴ The repeal of such an immunity statute does not deprive him of the immunity it afforded.⁶⁵

218, 257 S. W. 600, 46 L. R. A. (N. S.) 13
(1913).

63. *Manchester & L. R. R. v. Concord R. R.*,
66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep.
582, 9 L. R. A. 689 (1889).

64. *People v. Court of General Sessions*,
179 N. Y. 594, 72 N. E. 1148 (1904).

65. *Cameron v. U. S.*, 231 U. S. 710, 34 S.
Ct. 244, 58 L. ed. 448 (1914).

CHAPTER LXVII.

IMPEACHMENT OF WITNESSES.

Impeachment of witnesses; application of maxim "falsus in uno falsus in omnibus," 1180.

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§ 1180. **Application of Maxim "Falsus in Uno, Falsus in Omnibus."**¹—The maxim "*falsus in uno, falsus in omnibus*" is frequently called to the attention of juries, as bearing upon the weight which is to be given to the testimony of a witness who has testified falsely in one or more particulars.² In some cases it is said that where such a situation exists the testimony should be rejected as a whole and instructions to this effect have been sustained.³ Such a doctrine, however, is not favored,⁴ it being considered that the maxim is to be applied by the jury,⁵ or by the judge when acting without a jury⁶ according to the circumstances of the case. The generally accepted view is that the mere fact of a witness having sworn falsely in one respect is not of itself a reason for the rejection of his entire testimony. The jury may reject that which is shown to be false and accept the remainder, or they may reject it all.

§ 1181. **Right to Impeach.**⁷—After the examination of a witness the adversary of the party calling him is entitled to impeach his credit for the purpose of affecting the weight of his testimony with the jury. This may be done either by the testimony of other witnesses or by the cross-examination of the witness himself, the object being to show that his testimony is, either in part or in whole, discredited.

§ 1182. **One's Own Witness.**⁸—It is stated as a general rule that a party will not be permitted to impeach his own witness.⁹ The courts in their decisions

1. 5 Chamberlayne, Evidence, § 3741.

5. Galloway v. Com., 5 Ky. L. Rep. 213

2. Weigel v. Weigel, 60 N. J. Eq. 322, 47 Atl. 183 (1900).

(1883).

3. Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324 (1861).

6. Axiom Min. Co. v. White, 10 S. D. 198, 72 N. W. 462 (1897).

7. 5 Chamberlayne, Evidence, § 3742.

4. Coggins v. Chicago & A. R. Co., 18 Ill. App. 620 (1886); McCrary v. Crandall, 1 Iowa 117 (1855); Higbee v. McMullan, 18 Kan. 133.

8. 5 Chamberlayne, Evidence, §§ 3743-3745.

9. Barker v. Citizens' Mut. Fire Ins. Co., 136 Mich. 626, 99 N. W. 866 (1904). A

to this effect, with a slight difference in their manner of stating the reason, all base their conclusion upon the idea that the one who presents a witness to the court in support of his case represents him as worthy of belief and will not subsequently be permitted to impeach him by evidence to the contrary.¹⁰

Thus a party may not put in evidence for the purpose of impeachment that a witness has made contradictory statements¹¹ or is influenced by bias¹² except to refresh his recollection¹³ or in some jurisdictions in case of surprise¹⁴ or in case of a witness whom the party is obliged to call.¹⁵ The party may produce other witnesses whose testimony on material facts is contradictory to that of his witness.¹⁶

§ 1183. **Opponent's Witness; Character.**¹⁷—It is the general rule that a witness may be impeached only by evidence of bad character for veracity¹⁸ and not of general bad character¹⁹ and evidence of particular facts is not admissible²⁰ except in cross-examination.²¹ Evidence will be received of a prior conviction for a crime²² although the witness has been pardoned²³ or a new trial ordered.²⁴ The character evidence should be of a time near the trial²⁵

prosecuting attorney may not impeach his own witness by stating in the presence of the jury that he told a different story on the stand from what he had told previously. Mere failure to testify does not give the right to impeach anyway and he cannot be impeached in this way. *Andrews v. State*, 64 Tex. Crim. Rep. 2, 141 S. W. 220, 42 L. R. A. (N. S.) 747 (1911).

10. *People v. Skeehan*, 49 Barb. (N. Y.) 217, 219 (1867), per Leonard, P. J.

11. *Appeal of Carpenter*, 74 Conn. 431, 51 Atl. 126 (1902).

12. *Fairly v. Fairly*, 38 Miss. 280 (1859); *In re Mellen's Estate*, 56 Hun (N. Y.) 555, 9 N. Y. Suppl. 929 (1890).

13. *People v. Sherman*, 133 N. Y. 349, 31 N. E. 107 (1892).

14. *People v. Brooks*, 131 N. Y. 321, 325, 30 N. E. 189 (1892).

15. *Illinois — Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046, 45 L. R. A. 632 (1898).

16. *Ingersoll v. English*, 66 N. J. L. 463, 49 Atl. 737 (1901).

17. 5 Chamberlayne, Evidence, §§ 3746-3751. As to character evidence, see *ante*, §§ 1025 *et seq.*

18. *F. W. Stock & Sons v. Dellapenna*, 217 Mass. 503 (1914). It seems that in New York evidence of either general bad character or bad character for veracity is admissible. But see *Wright v. Rage*, 3 Keyes 581. *Carlson v. Winterman*, 10 Misc. 388. *Adams v. Greenwich, Jus. Co.* 70 N. Y. 388.

19. *State v. King*, 88 Minn. 175, 92 N. W. 965 (1903). *Contra*, *State v. Haupt*, 126 Iowa 152, 101 N. W. 739 (1904). What may

be asked on cross-examination—character of witness, see note, *Bender*, ed., 32 N. Y. 131, 140.

Gambling.—A witness may be impeached by showing that he lived in a gambling place and asking what his habits are, as if the witness had been engaged in any occupation which would tend to impair his credibility the jury is entitled to that information. *State v. Fong Loon*, 29 Idaho 248, 158 Pac. 233, L. R. A. 1916 F 1198 (1916).

20. *Stock & Sons v. Dellapenna*, 217 Mass. 503, 105 N. E. 378 (1914).

21. *State v. Chingin*, 105 Iowa 169, 74 N. W. 946 (1898).

22. *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287 (1906). A witness may be impeached by being asked whether he has not been convicted of larceny and later paroled. *United Railways v. Phillips*, 129 Md. 328, 99 Atl. 355, L. R. A. 1917 C 384 (1916).

23. *Curtis v. Cochran*, 50 N. H. 242 (1870). The disqualification of a witness as he had been convicted of perjury may be removed by the production of a pardon properly connected with the crime, but the conviction may be put in evidence just the same. *Rittenberg v. Smith*, 214 Mass. 343, 101 N. E. 989, 47 L. R. A. (N. S.) 215 (1913).

24. *State v. Duplechain*, 52 La. Ann. 448, 26 So. 1000 (1899).

25. *Miller v. Assured's Nat. M. F. I. Co.*,

and of the place where his reputation fairly existed and need not be confined to his present residence.²⁸

§ 1184. [Opponent's Witness]; Bias or Interest.²⁷—The bias,²⁸ or interest²⁹ of a witness is always recognized as proper, to be considered by the jury as bearing upon the credit to be accorded to his testimony. When the credit of the witness has been thus attacked his attitude may be explained³⁰ and his position in the case as being interested in its outcome³¹ pecuniarily or through relationship³² or friendship with a party may always be shown. The fact that he has been or is to be paid for his testimony³³ as in case of detectives³⁴ or that he is the complaining witness³⁵ or an accomplice³⁶ may always be shown.

§ 1185. [Opponent's Witness]; Contradictory Statements.³⁷—A frequent mode of impeaching the credit of a witness is by evidence showing, that at some other time or times, he has made statements inconsistent with, or contradictory to, his present testimony.³⁸ This may be done in cross-examination³⁹ when the statement is as to a material point in the case.⁴⁰ A proper foundation for this contradiction should be laid by calling the attention of the witness to the alleged contradictory statements and asking him whether he has made them⁴¹ and he should then be given a right to explain them.⁴² If the statement was not as to a material fact his statement is conclusive and cannot be contradicted.⁴³ That the witness denies that he remembers making the statement

184 Ill. App. 271, *affirmed* 264 Ill. 380, 106 N. E. 203 (1914).

26. *Lake Lighting Co. v. Lewis*, 29 Ind. App. 164, 64 N. E. 35 (1902).

27. 5 Chamberlayne, Evidence, §§ 3752-3754.

28. *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952 (1914).

29. *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550 (1902).

30. *People v. Zigouras*, 163 N. Y. 250, 57 N. E. 465 (1900). An imputation of bias against a witness may always be rebutted so where a witness is asked whether he has a suit pending against the city and he replies that he did have he may be further asked whether he has not settled his claim to show that he has no present interest in the matter. *Louisville v. Hechman*, 161 Ky. 523, 171 S. W. 165, L. R. A. 1915 C 747 (1914).

31. *Purdie v. State*, 118 Ga. 798, 45 S. E. 606 (1903).

32. *State v. Lortz*, 136 Mo. 122, 86 N. W. 906 (1905).

33. *Southern Ry. Co. v. Crowder*, 130 Ala. 256, 30 So. 522 (1901).

34. *State v. Shew*, 8 Kan. App. 679, 57 Pac. 137 (1899).

35. *People v. Bennett*, 107 Mich. 430, 65 N. W. 280 (1895).

36. *People v. Becker*, 210 N. Y. 274, 104 N. E. 396 (1914) (holding that may compel production of immunity agreement when in writing). A perjurer is not an accomplice of one accused of subornation of perjury within the rule that the evidence of an accomplice should be received with caution. The crime of perjury committed was a separate and distinct offense from that of subornation of perjury. *State v. Richardson*, 248 Mo. 563, 154 S. W. 735, 44 L. R. A. (N. S.) 307 (1913).

37. 5 Chamberlayne, Evidence, § 3755.

38. *Cotton v. Boston Elevated Ry.*, 191 Mass. 103, 77 N. E. 698 (1906).

39. *Hoye v. Chicago M. & St. P. Ry. Co.*, 46 Minn. 269, 48 N. W. 1117 (1891).

40. *Commonwealth v. Nelson*, 180 Mass. 83, 61 N. E. 802 (1901).

41. *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823 (1896).

42. *State v. Reed*, 62 Me. 129, 146 (1874).

has the same effect as though he denied making it.⁴⁴ Proof that a prior contradictory statement has been made does not render the statement evidence of the facts asserted.⁴⁵ Where the contradictory statement has been shown it seems the better view that other prior statements may be proved consistent with his present testimony.⁴⁶

43. *Alger v. Castle*, 61 Vt. 53, 17 Atl. 727 (1888).

44. *Gregg Township v. Jamison*, 55 Pa. 468 (1867).

45. *Jensen v. Michigan Cent. R. Co.*, 102 Mich. 176, 60 N. W. 57 (1894). Contradictory statements made by the witness before trial can have no legal tendency to establish the truth of their subject-matter. *Southern R. Co. v. Gray*, 241 U. S. 333, 36 S. Ct. Rep. 558 (1916). Evidence in a prosecution

for perjury is insufficient that the defendant made contradictory statements although evidence of such statements is admissible and can be explained by showing that they were made under duress. *People v. McClintic*, 193 Mich. 589, 160 N. W. 461, L. R. A. 1917 C 52 (1916).

46. *Burnett v. Wilmington N. & N. Ry. Co.*, 120 N. C. 517, 26 S. E. 819 (1897). See *Rogers v. State*, 88 Ark. 451, 115 S. W. 156, 41 L. R. A. (N. S.) 857 (1908).

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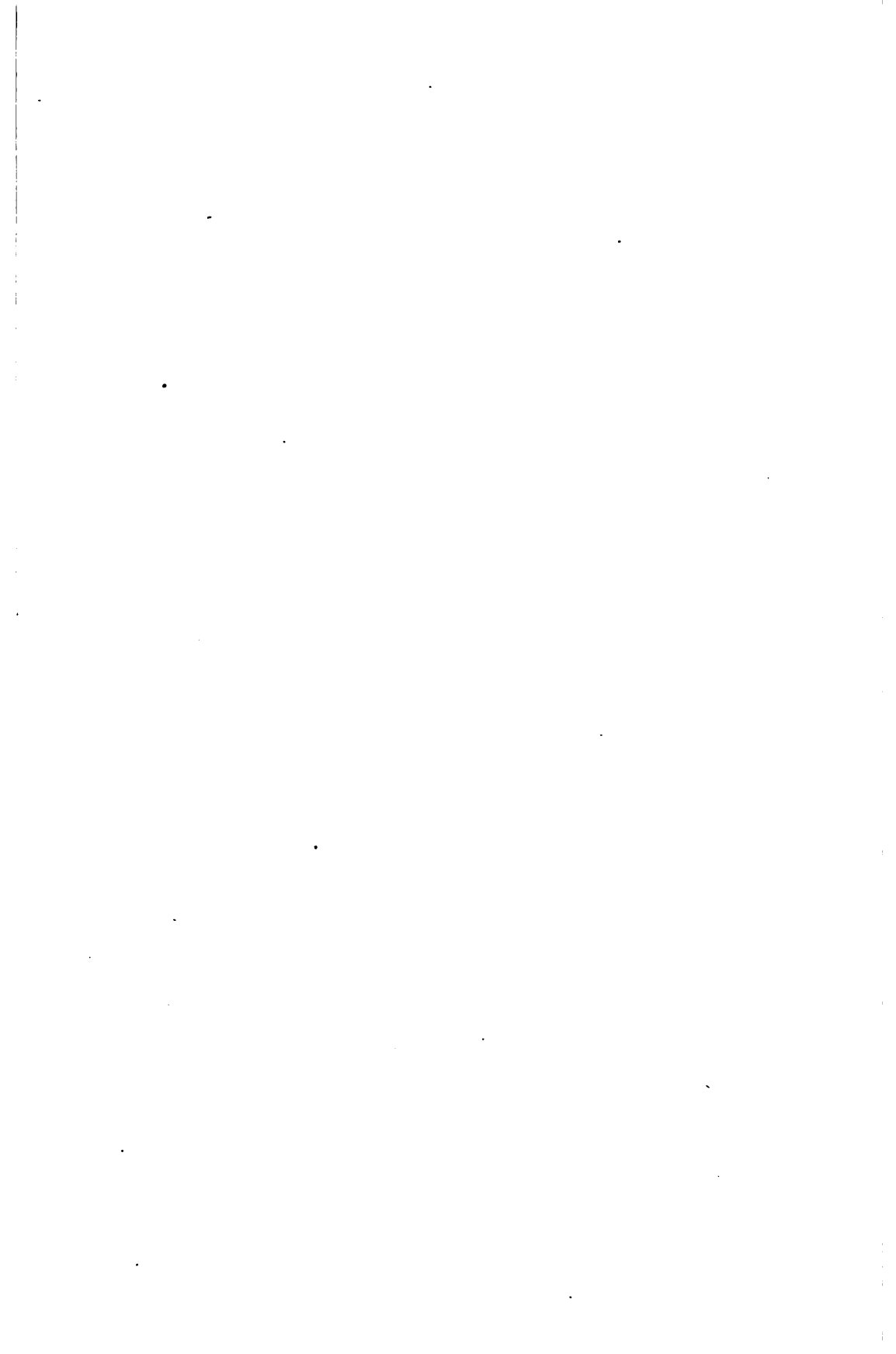
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